

STRIKING THE BALANCE: EXPERT REVIEW OF ONTARIO'S CONSTRUCTION LIEN ACT

Report Prepared for the Ministry of the Attorney General and the
Ministry of Economic Development, Employment and Infrastructure

Delivered April 30, 2016

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Jurisdiction	Legislation Title	Short Form
Canadian Legislation		
British Columbia	Builders Lien Act ¹	<i>B.C. Act</i>
Alberta	Builders' Lien Act ²	<i>Alberta Act</i>
Ontario	Construction Lien Act ³	<i>Ontario Act or the Act</i>
Saskatchewan	Builders' Lien Act ⁴	<i>Saskatchewan Act</i>
Manitoba	Builders' Liens Act ⁵	<i>Manitoba Act</i>
New Brunswick	Mechanics' Lien Act ⁶	<i>New Brunswick Act</i>
Nova Scotia	Builders' Lien Act ⁷	<i>Nova Scotia Act</i>
Prince Edward Island	Mechanics' Lien Act ⁸	<i>P.E.I. Act</i>
Newfoundland and Labrador	Mechanics' Lien Act ⁹	<i>Newfoundland Act</i>
Yukon	Builders Lien Act ¹⁰	<i>Yukon Act</i>
Northwest Territories	Mechanics Lien Act ¹¹	<i>Northwest Territories Act</i>
Nunavut		<i>Nunavut Act</i>
International Legislation		
United Kingdom	Housing Grants, Construction and Regeneration Act 1996 ¹²	<i>U.K. Construction Act</i>
New Zealand	Construction Contracts Act 2002 ¹³	<i>New Zealand Act</i>

¹ SBC 1997, c 45.

² RSA 2000, c B-7.

³ RSO 1990, c C.30.

⁴ SS 1984-85-86, c B-7.1.

⁵ CCSM c B91.

⁶ RSNB 1973, c M-6.

⁷ RSNS 1989, c 277.

⁸ RSPEI 1988, c M-4.

⁹ RSNL 1990, c M-3.

¹⁰ RSY 2002, c 18.

¹¹ RSNWT 1988, c M-7.

¹² 1996, c 53.

¹³ 2002 No 46.

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Jurisdiction	Legislation Title	Short Form
Ireland	Construction Contracts Act 2013 ¹⁴	<i>Ireland Act</i>
Singapore	Building and Construction Industry Security of Payment Act 2004 ¹⁵	<i>Singapore Act</i>
Malaysia	Construction Industry Payment and Adjudication Act 2012 ¹⁶	<i>Malaysia Act</i>
New South Wales	Building and Construction Industry Security of Payment Act 1999 ¹⁷	<i>New South Wales Act</i>
Victoria	Building and Construction Industry Security of Payment Act 2002 ¹⁸	<i>Victoria Act</i>
Queensland	Building and Construction Industry Payments Act 2004	<i>Queensland Act</i>
South Australia	Building and Construction Industry Security of Payment Act 2009	<i>South Australia Act</i>
Tasmania	<i>Building and Construction Industry Security of Payment Act 2009</i>	<i>Tasmania Act</i>
Australian Capital Territory	<i>Building and Construction Industry (Security of Payment) Act 2009</i>	<i>Australian Capital Territory Act</i>
Western Australia	<i>Construction Contracts Act 2004</i>	<i>Western Australia Act</i>
Northern Territory	<i>Construction Contracts (Security of Payments) Act 2004</i>	<i>Northern Territory Act</i>

¹⁴ No 34, 2013.

¹⁵ Cap 30B, 2006 Rev Ed.

¹⁶ Act 746.

¹⁷ Act 46, 1999.

¹⁸ Act No 15/2002.

The document that follows this Introduction is the final Report (the “Report”) of the Expert Review of Ontario’s *Construction Lien Act*. The Report sets out certain of our research on the issues considered, and refers at many points to the submissions of the stakeholders that have been consulted through the approximately 14-month process that has culminated in the Report. While the conduct of the Review is dealt with in detail in Chapter 2 – Conduct of the Review, it is worth mentioning as an introductory point that the Report is not merely the result of legal research but is the product, as well, of extensive stakeholder submissions and consultations in 2015, and an Advisory Group process that took place in early 2016. In other words, when we sometimes refer to “the Review”, in a sense we include ourselves, our team here at Borden Ladner Gervais LLP, which has included the Honourable Dennis O’Connor, QC, Soizic Reynal de St. Michel, James Little (Secretary of the Review), Chuck Andary, and Imogen Bailey, as well as all of the stakeholders and subject matter experts that have participated in the process.

As we explained in each of the approximately 30 stakeholder consultation meetings, our retainer in respect of the Review is a solicitor-client relationship. Our clients are The Ministry of the Attorney General (“MAG”) and the Ministry of Economic Development, Employment and Infrastructure. Accordingly, the Review was not conducted as an independent public inquiry, like the Walkerton Inquiry, for example; rather, our instructions were to research and deliver an expert legal opinion – with a twist. The very significant twist was that our instructions also included the mandate to conduct a broad based consultation within the Ontario construction industry. Equally importantly, our clients committed to us from the outset that we would be allowed intellectual independence in our work.

In conducting the Review we have communicated with over 60 stakeholders, and have identified approximately 90 issues and sub-issues. In part, the number of stakeholders and issues resulted from our mandate to proceed in a manner that was inclusive, transparent and collaborative. In order for us to produce the Report, it was necessary to analyze the issues list with reference to our core mandate, which was described in MAG’s February 2015 Announcement. As discussed in the stakeholder consultation meetings, the core issues in respect of our mandate were, and are, the modernization of the *Act*; promptness of payment; and the effectiveness of dispute resolution. Our mandate did not include, for example, opining on procurement issues, which are not a subject encompassed by the *Act*, and did not extend to proposing the introduction of or major amendments to other provincial legislation. On this basis, we determined that a small number of issues, such as financial disclosure during the procurement of projects, bidder exclusion provisions, and the potential passage of false claims legislation, were beyond our remit. Having said this, however, the vast majority of the issues identified during the course of the Review to date have been researched and considered and are addressed in the Report that follows.

It is also important to note the breadth of the issues we have considered in respect of the *Act*. While certain areas were outside of our remit as noted above, everything within the context of

the *Act* was open to consideration. In fact, we considered potential fundamental changes up to and including repealing the *Act* itself. However, it was apparent from the stakeholder consultation meetings, the written submissions received from the stakeholders, and the discussions of the Advisory Group, that there was virtually unanimous support for the continuation of the lien/holdback regime as a means for protecting the construction industry. Accordingly, the recommendations that flow from our report are aimed at allowing the *Act* to better achieve its policy objectives and at bolstering certain elements of the *Act*, such as expediting payment and improving the efficiency of dispute resolution, that have not evolved optimally over the years since 1983. In addition, we recommend some relatively new concepts which we believe will strengthen the *Act* while at the same time supporting the intent of the 1983 legislation.

A few words regarding the form of the Report. In July 2015 we issued the Information Package and launched the Review's website, in order to make the Information Package easily accessible to the stakeholders and the public. The Information Package, which was broken down into fourteen categories of issues, was intended to provide the background context for the issues that had been identified up to that point in time. Of course, since the issuance of the Information Package we have conducted the stakeholder consultation meetings and the Advisory Group Meetings, and have received multiple written stakeholder submissions (all of which have been posted on the Review website), and this process has allowed us to draw a distinction between the core issues, a grouping of substantive issues, and a grouping of technical issues. Also, some issues that initially appeared to be distinct from one another have, as our research and analysis has developed, proven to be significantly related. As well, we have decided to recommend that no changes be made to the priorities provisions of the *Act*, and to recommend that alternative dispute resolution remain voluntary and outside the *Act*, such that our analysis in regards to these issues does not form part of the Report, but will be posted to the Review website as background papers. Thus, the breakdown of categories contained in the Information Package has changed, and the reader will readily see that the final Report follows its own organizational structure.

While over the course of five meetings the Advisory Group was not unanimous in respect of every issue discussed, a broad consensus was generally reached with relation to three core issues: maintaining and modernizing the lien/holdback remedy; introducing a made-in-Ontario promptness of payment regime; and introducing targeted adjudication to enhance the efficiency of dispute resolution throughout the Ontario construction industry.

Above all, we have in our recommendations attempted to achieve an appropriate balance between competing interests and tensions, hence the title of this Report, *Striking The Balance*. Among the linked principles we encountered perhaps the most fundamental was that of regulation versus freedom of contract, however the competing values of cash flow versus collateralization also featured prominently, as did efficiency versus thoroughness in regards to dispute resolution. Generally, there was a need to address a complex set of interacting

mechanisms in as practical a manner as possible in the circumstances. In each case, we have attempted to develop a recommendation that is practical and efficient. Having said this, it must also be recognized, and the reader will appreciate, that we have reached the fundamental conclusion that promptness of payment, supported by the remarkable efficiency of adjudication, represents a policy objective that justifies the need to strike a balance that allows for blending these recommended features into the legislation.

As part of this introduction we would like to make one fundamental recommendation. That is, given the breadth and scope of the changes we recommend, a new *Act* will be created, an *Act* that will encompass rights and remedies that extend considerably beyond construction liens and trusts, and we suggest this new act be named the *Construction Act: An Act respecting Security of Payment and Efficient Dispute Resolution in the Construction Industry*. It is our view that such a change correlates with the changes we recommend, the changes in the industry that have taken place since 1983, and the collective desire to move forward with a modernized piece of legislation.

In conclusion, we consider ourselves fortunate to have been selected to conduct the Review, and, with the assistance of the persons mentioned above, we have made every effort to fulfill our mandate.

Bruce Reynolds, Counsel

Sharon Vogel, Co-Counsel

30 April 2016

On February 11 2015, we were appointed to conduct an expert review of the *Act* (the “Review”). The appointment was announced to the public by the Ministry of the Attorney General. As noted above, our retainer is to advise MAG and the Ministry of Economic Development, Employment & Infrastructure (collectively, the “Ministries”).¹⁹

Over the course of the Review, our primary contact has been through MAG, and in particular Mr. Irwin Glasberg, Assistant Deputy Attorney General, Policy and Innovation Division.

Originally, a deadline of December 31, 2015 was established for the delivery of this expert report (the “Report”). The original deadline was ultimately extended to April 30, 2016.

Following the Announcement, we set out to design a process that would not only fit the needs of the industry but also would be flexible enough to ensure that the consultation would produce valuable submissions and meaningful dialogue. The goal was to create an open and transparent process. Ultimately, the process was organized in three distinct phases, as follows:

Phase 1:

- finalization of a complete stakeholder list;
- research and preparation of a substantive issues list; and
- preparation of an information package that was designed to provide the background necessary for the stakeholders to participate meaningfully in the consultations in Phase 2.

Phase 2:

- distribution of the Information Package;
- launch of the Review website;
- scheduling of a series of consultation meetings (the “Consultation Process”);
- receipt of written submissions from stakeholders;
- circulation of a Review Questionnaire;
- conducting stakeholder meetings;
- distribution of a supplemental issues list for consideration by the stakeholders;
- receipt of supplemental written submissions from stakeholders; and
- formation of a small subject matter expert Advisory Group that would meet during Phase 3 to discuss issues of relevance and identify opportunities for consensus building.

Phase 3:

- conducting the Advisory Group meetings; and
- writing and submitting to the Ministries of this Report.

¹⁹ Please see the announcement on our website at www.constructionlienactreview.com.

1. Phase 1

Phase 1 commenced shortly after the Announcement, in February of 2015. Initially, MAG provided a list containing the contact information of various stakeholders that had been involved in the process surrounding Bill 69.²⁰ Once we had followed up with the representatives identified on the initial list, it was immediately apparent that there would be many other associations and groups that would want to participate.

We heard from many stakeholders in short order after the Announcement. Ultimately hundreds of people were heard from, representing over 60 stakeholders.²¹

Following the stakeholder identification process, the process of issue identification began. There were more issues than originally anticipated. We considered a significant amount of research material to assist in developing an information package of background material on the various issues which was distributed to the stakeholder community on July 15, 2015 (the “Information Package”).

2. Phase 2

The Information Package, when issued, contained over 60 issues and sub-issues to be considered by the stakeholder community. Its distribution marked the commencement of Phase 2 of the Review process.

Once the Information Package had been distributed to the stakeholder community, the Review’s website www.constructionlienactreview.com was launched in order to add a further level of transparency and an efficient mechanism through which to disseminate information.

At this time, the process of preparing a survey which was to be administered by a third party consultant also began. EKOS Research Associates Inc. (“EKOS”) was selected through a competitive process and EKOS began data collection (the “EKOS Survey”). The EKOS data collection process was ongoing throughout the entire Consultation Process and ultimately resulted in the EKOS Survey which is available online on the Review website. The results of this survey were used to confirm general submissions made by stakeholders and to analyze the views of the industry generally.

Concurrently with the EKOS process, we began the task of coordinating what would become approximately 30 stakeholder meetings that took place between September and December of 2015. The initial timeframes for the performance of these consultation meetings required significant adjustment as the Review did not have the power of subpoena and was required to accommodate the busy schedules of industry representatives in order to complete as many meetings as possible. As a result of the extended timeframe, a request was made to the Ministries

²⁰ See Chapter 8 – Promptness of Payment for a brief summary of the history of Bill 69.

²¹ For a full list of the participating stakeholders please see **Appendix A** to this Report.

to extend the deadline for the report (which request was subsequently granted such that an initial extension was given to March 31, 2016, followed by a further extension to April 30, 2016 as described below).

The stakeholders were grouped, where appropriate, in order to achieve a more efficient process. These meetings were held at our offices in order to present an accommodating neutral environment for stakeholders to share their views and discuss potential opportunities for modernizing the *Act*. A representative of MAG attended each of the meetings in order to prepare summaries of the discussion. Copies of the summaries of the Consultation Process are provided on the Review website.

Nearly every consultation meeting generated a new idea or new issue for the Review. As part of the Consultation Process, we invited each of the stakeholders (as well as members of the industry generally) to provide written submissions in relation to the issues identified in the Information Package. Over the course of the consultation process, upwards of 70 formal submissions were received from over 40 of the identified stakeholders in addition to many e-mail submissions from individual participants in Ontario's construction industry. These submissions were extremely helpful and were reviewed as part of the ongoing process leading up to Phase 3. In January 2016, we posted the written submissions on the Review website.

Following the receipt of the written submissions and the conclusion of the Consultation Process, a supplemental issues list containing 27 new (or modified) issues was prepared. Shortly after, we wrote to stakeholders informing them that the new issues list was available and inviting stakeholders to provide discrete supplementary submissions on these issues.

A further tranche of written submissions was then received in relation to these new issues that were also considered in the writing of this Report. All submissions are on the Review website.

The final step of Phase 2 was the formation of the Advisory Group. We invited a group of eminently qualified subject matter experts to participate in 3 meetings to be held between January and March of 2016. The Advisory Group was comprised of the following individuals:

- Glenn Ackerley, WeirFoulds LLP
- Geza Banfai, McMillan LLP
- Ray Basset, Travelers Insurance Company of Canada
- Glenn Clarke, Simcoe Muskoka Catholic District School Board
- Marni Dicker, Infrastructure Ontario
- Derek Freeman, Freeman Law - Barristers
- Duncan Glaholt, Glaholt LLP
- Howard Krupat, DLA Piper
- Tanya Litzenberger, City of Toronto
- Jeffrey Long, Koskie Minsky LLP
- Bernie McGarva, Aird & Berlis LLP
- Jerry Paglia, York Region
- Howard Wise, Goodmans LLP

Importantly, while we selected the members of the Advisory Group in part due to their alignment with key stakeholder groups, the members of the Advisory Group were not representatives of their aligned interests and were not in a position to make binding commitments. Rather, they brought to the table an ability to provide the context of multiple stakeholder perspectives.

3. Phase 3

In Phase 3, the Advisory Group meetings were held for the purpose of obtaining input in respect of the issues, and determining whether it was possible to achieve consensus on certain issues, as well as to refine recommendations that were being developed following the Consultation Process. In order to promote discussion, the Advisory Group meetings were conducted on a confidential basis.

In March of 2016, certain members of the Advisory Group asked if it would be possible to add further Advisory Group meetings in order to continue the progress that had been made at the previous three meetings. In view of the potential opportunity to achieve further consensus, we gave careful consideration to the possibility of further meetings and ultimately requested a further extension from the Ministry to provide our Report. Shortly after, the Ministries granted the request for an extension so that this Report could be submitted by April 30, 2016. We then proceeded to conduct two further Advisory Group meetings in late March/early April of 2016.

As noted in Chapter 1 – Introduction, while over the course of five meetings the Advisory Group was not unanimous in respect of every issue discussed, a broad consensus was generally reached with relation to three core issues: maintaining and modernizing the lien/holdback remedy; introducing a made-in-Ontario promptness of payment regime; and introducing targeted adjudication to enhance the efficiency of dispute resolution throughout the Ontario construction industry.

During the entirety of Phase 3, our team has been extensively engaged in researching certain of the issues under consideration in numerous jurisdictions in addition to our own. That said we could not have produced this Report without the important and significant contributions of the stakeholder community and the Advisory Group. We extend our thanks to each and every contributor for their hard work and collaborative spirit.

1. Overview

While in theory the *Act* contains all of the necessary procedures to pursue a claim for lien, some stakeholders report having experienced difficulties in applying certain definitions contained in the *Act*, including the definitions of: “improvement”, “owner”, “price”, and “supply of services”. Stakeholders have also expressed concerns with respect to the lienability of publicly owned lands and/or lands on which a public interest project is being constructed. It has been suggested that, because these lands are not likely to be subjected to a court-ordered sale, liens in respect of such lands be “given” and constitute a charge on the holdback, rather than being registered.

As a result, we have considered the following issues:

- The definitions of “improvement”, “owner”, “price”, and “supply of services”
- Liening municipal lands and “broader public sector” lands

2. Improvement

2.1 Context

Stakeholders raised two concerns regarding the definition of “improvement”:

- (1) Clarity of the definition and
- (2) Applicability of the definition to Information Technology (“IT”) projects.

2.1.1 Clarity of the Definition

The definition of “improvement” is purposely broad to protect those who supply services and materials. In the Report of the Attorney General’s Advisory Committee on the Draft Construction Lien Act in 1982, it was made clear that the lien created by the *Act* would apply “in the case of the construction and building repair industries”.²² The broad definition replaced the old definition under the *Mechanics’ Lien Act*, which attempted to circumscribe the types of projects that would constitute an improvement.²³

In 2010, the *Act* was amended to further broaden the applicability of the definition of “improvement”. The definition immediately prior to the amendment read:

- (a) any alteration, addition or repair to, or
- (b) any construction, erection or installation on,

²² Report of the Attorney General’s Advisory Committee on the Draft Construction Lien Act, 1982, Appendix A to Duncan Glaholt & David Keeshan, *The 2016 Annotated Construction Lien Act* (Toronto: Carswell, 2015) at 670 [AG Report].

²³ RSO 1980, c 261, s 6(1) as repealed by the *Construction Lien Act*, SO 1983, c 6, s 92.

any land, and includes the demolition or removal of any building, structure or works or part thereof, and “improved” has a corresponding meaning;

The 2010 amendment expanded the definition to include “the installation of industrial, mechanical, electrical or other equipment” that is “essential to the normal or intended use of the land, building, structure or works”. The definition now reads:

“improvement” means, in respect of any land,

(a) any alteration, addition or repair to the land,

(b) any construction, erection or installation on the land, including the installation of industrial, mechanical, electrical or other equipment on the land or on any building, structure or works on the land that is essential to the normal or intended use of the land, building, structure or works, or

(c) the complete or partial demolition or removal of any building, structure or works on the land;

This amendment primarily affected electrical and mechanical contractors and suppliers of machinery in manufacturing facilities.²⁴ Commentators have noted that the 2010 amendment was preceded by the Ontario Court of Appeal Decision in *Kennedy Electric Ltd. v Dana Canada Corporation*.²⁵ In that case, the Court of Appeal upheld a decision of Killeen J. which had found that the work performed by two subcontractors, Kennedy Electric and its subcontractor Cassidy, who supplied services and materials to a project involving the addition to a manufacturing plant of an assembly line for the manufacture of Ford F150 trucks, was not lienable. Justice Killeen found that the supply and the installation of the assembly line “represented the installation of manufacturing equipment in a building but did **not** constitute an improvement or part of an improvement within the Act” [emphasis added].²⁶ The Divisional Court dismissed the appeals, finding that the trial judge had applied the correct law to his findings of fact. The Court of Appeal also dismissed the appeals, holding that each case would be decided on its facts, noting as follows:

In most cases, the installation or repair of machinery used in a business operated in a building, **particularly where the machinery is portable**, will not give rise to lien rights under the CLA. On the other hand, where machinery is installed in a building for the use of a business and is completely and permanently integrated into the building, a lien claim will arise.²⁷ [Emphasis added]

²⁴ Tammy Evans & Lea Nebel, “Construction Lien Act Amendments – Benefit or Burden?” *Blaneys on Building* (June 2011), online: <http://www.blaney.com/sites/default/files/Construction-Lien-Act-Amendments_TAE.pdf>.

²⁵ *Kennedy Electric Ltd. v Dana Canada Corporation*, 2007 ONCA 664 [Kennedy ONCA].

²⁶ *Kennedy Electric Ltd. v Rumble Automation Inc.* (2004), 73 OR (3d) 530 at para 116, aff’d at 2007 ONCA 664; see also Andrew Heal, “Common Errors in Construction Litigation – Best Practices to Avoid Them and What to do When They Occur” (2011) at 4-9, online: <http://www.blaney.com/sites/default/files/Common-Mistakes_AJH.pdf> [Heal].

²⁷ *Kennedy ONCA*, *supra* at para 50.

The legislature responded with the 2010 amendment which provided that the installation of industrial, mechanical, electrical, or other equipment that is “essential to the normal or intended use of the lands or building” constitutes an improvement. The issue of portability is now said to be largely irrelevant, at least by some commentators.²⁸

The broad Ontario wording is atypical in Canada. British Columbia and Alberta both use definitions for “improvement” that are more restrictive. For example, British Columbia defines “improvement” as “anything made, constructed, erected, built, altered, repaired, or added to, in, on or under land, and attached to it or intended to become a part of it, and also includes any clearing, excavating, digging, drilling, tunnelling, filling, grading, or ditching”.²⁹ Alberta defines “improvement” as “anything constructed, erected, built, placed, dug or drilled, or intended to be constructed, erected, built, placed, dug or drilled, on or in land except a thing that is neither affixed to the land nor intended to be or become part of the land”.³⁰ Recognizing that the overarching purpose of the *Act* is to protect construction suppliers,³¹ the Ontario legislature purposely adopted a broad definition of “improvement”.

A third definitional approach involves the use of non-exhaustive lists and exclusions to clear up ambiguities. An example of this appears in the *Manitoba Act*, where “contract” is defined as a contract for construction, for improving land, for doing any work or the providing any services in construction or in improving land, or for supplying any materials to be used in construction or in improving land.³² Anyone that does work or provides services or materials in the performance of a contract or sub-contract has a lien for the value of the work.³³ “Construction” and “improving land” are both defined terms in the *Manitoba Act*. The definition of “improving land” incorporates a non-exhaustive list and exclusions:

...the doing of any work which improves the character of the land and without limiting the generality of the foregoing includes

- (a) clearing the land of timber or scrub,
- (b) landscaping the land,
- (c) fencing the land, and
- (d) demolishing structures on the land,

²⁸ Heal, *supra* at 6.

²⁹ *B.C. Act*, s 1(1).

³⁰ *Alberta Act*, s 1(d).

³¹ AG Report, *supra* at 647.

³² *Manitoba Act*, s 1(1).

³³ *Manitoba Act*, s 13.

but does not include tilling, seeding, cultivating or mowing the land for agricultural or forest production or the harvesting of a crop from the land or the cutting of timber from the land for sale.³⁴

Some stakeholders advocated for such lists to be incorporated into the *Act*; however, Ruth Sullivan, in her text on statutory interpretation and legislative drafting, cautions that non-exhaustive lists can lead to confusion, and should be used to deal with borderline applications of general terms to illustrate the range of application through the use of examples, to prevent the reading-down of legislation to exclude something that is meant to be included. The use of “does not include” is intended to carve out exceptions from the general application of a provision.³⁵

Stakeholders particularly expressed concern with the distinction between “repairs” and “maintenance” under the current *Act*. Repairs to the land are specifically included within the definition of “improvement” under the *Act* while maintenance is not included. In *310 Waste Ltd. v Casboro Industries Ltd.*, the Divisional Court confirmed that maintenance is not included within the definition of “improvement”.³⁶ A concern was raised by a number of stakeholders, as outlined below, that the *Act* does not adequately distinguish between “repair” and “maintenance”. Infrastructure Ontario has noted this to be an issue of particular concern in regards to long-term agreements where repairs are part of regular maintenance over a long period of time, for example on an Alternative Financing and Procurement (“AFP”) project that includes an operations and maintenance phase of thirty years.³⁷

The test employed by the courts to delineate between repair and maintenance examines whether or not the work improved the value of the land or constitutes part of a construction project (for example, snow removal that is part of regular maintenance would not give rise to lien rights, but snow removal directed by a contractor to clear the way for construction of an improvement to continue would) as opposed to typical periodic maintenance.³⁸ In some cases, the line between “repairs” and “maintenance” can be blurry. There is also commentary to suggest that some degree of permanence may be required;³⁹ a repair of some permanence could result in an increase in the value of the land, while work such as snow removal that is part of regular maintenance does not increase the value of the land, and should thus be excluded. This analysis is in line with a fundamental precept of the *Act*, that “[t]he lien is a right to hold the owner’s interest in the premises as security for the payment of all persons who have supplied services or materials to the making of the improvement”.⁴⁰ Thus, the lien should only attach where the work has contributed to an upgrade of some permanence to the land. In this regard, using the snow

³⁴ *Manitoba Act*, s 1(1).

³⁵ Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham: LexisNexis Canada, 2014) at §§4.38-4.39, 4.43.

³⁶ *310 Waste Ltd. v Casboro Industries Ltd.* (2005), 79 OR (3d) 75 at paras 7-8 (Div Ct) [*310 Waste*].

³⁷ IO Supp. (Attachment) to the CLA Review at 2.

³⁸ *G. Newman Aluminum Sales Ltd. v Snowking Enterprises Inc.*, 1980 CarswellOnt 551 at para 8 (H Ct J).

³⁹ CED Construction Liens II.3 (Ontario) at §33.

⁴⁰ AG Report, *supra* at 647.

removal example, it would have to be determined whether the snow removal is part of an “improvement” (clearing the way for construction of the improvement) or is merely periodic maintenance associated with the normal use of the premises.

In our view, the *Income Tax Act* provides guidance on drawing the distinction between “repairs” and “maintenance” by analogizing to the distinction between “capital expenses” and “current expenses”. Landlords may deduct “current expenses” from rental income, which are “recurring expenses that provide a short-term benefit” that “keep a...property in the same condition”, but landlords cannot deduct “capital expenses”, which are “expenses that extend the useful life of ... property or improve it beyond its original condition”.⁴¹ The example of snow removal not associated with an improvement would be a “current expense” or “maintenance”, while snow removal directed by a contractor to clear the way for construction of an improvement to continue would be a “capital expense” or “repair”. Again, the element of permanence is important in this distinction. Several considerations are relevant to determining whether work is of a “capital” or a “current” nature. The following chart outlines some of the considerations in relation to the work, but the applicability and weight of each will depend on the circumstances:

Capital (Repair)	Current (Maintenance)
Increase to the value of the land, building, structure or works	No change or nominal increase to the value of the land, building, structure or works
Higher degree of permanence	Temporary, low degree of permanence
Upgrade to the land, building, structure or works	Replacement of similar quality or correction of a defect

In distinguishing between lienable repairs and non-lienable maintenance, the principal considerations therefore are the permanence of the work, the effect the supply has on the land, building, structure or works, and whether or not it is part of an improvement.

2.1.2 Applicability to Information Technology (“IT”) Projects

The definition of “improvement” under the *Act* relates solely to land. A concern raised by some stakeholders was that the definition of “improvement”, does not make clear whether or not the IT elements of a project fall within the scope of the *Act*.

IT projects may involve some construction work and may therefore be classified as an “improvement” under the *Act*. For some of these contracts, the physical installation of industrial, mechanical, or electrical equipment may be a relatively small element of the work to be performed under a contract, but the project generally may fall within the definition of improvement because of this work.

⁴¹ Canada Revenue Agency, “Rental Income 2015” T4036(E) Rev 15, online: <http://www.cra-arc.gc.ca/E/pub/tg/t4036/t4036-e.html#P300_26515>.

No other Canadian jurisdiction specifically mentions IT projects within the definition of “improvement”. However, New Zealand, which uses an exhaustive list of what is included in “construction work”, has addressed this issue. At section 6(1)(c) and (d) of the New Zealand *Construction Contracts Act 2002*, the installation and maintenance of communications systems is included. In the other jurisdictions reviewed, the inclusion or exclusion of IT projects is not clear.

2.2 Summary of Stakeholder Views

a) Clarity of the Definition

With respect to the definition of “improvement”, as noted, the two main stakeholder concerns related to the clarity of the definition and the application of the definition to IT projects.

With regards to the clarity of the definition, concerns were also raised regarding whether or not repairs should be included in the definition, and whether or not there needs to be a distinction drawn between “repairs” and “maintenance”:

- a) The Ontario Association of School Business Officials, the Ontario Public School Board Association,⁴² and the Council of Ontario Universities⁴³ suggested that repairs be included in the definition of improvement such that the definition under paragraph (b) would read “any construction, erection, repair, or installation on the land...”.
- b) The Provincial Building and Construction Trades Council of Ontario and the International Union of Operating Engineers, Local 793 were in favour of making all of the definitions as inclusive as possible to protect workers, suppliers, and contractors.⁴⁴
- c) The City of Toronto and the Association of Municipalities of Ontario submitted that there should be a clearer distinction between “repairs” and “maintenance”, with the City of Toronto suggesting a non-exhaustive list be adopted of what is considered an “improvement”.⁴⁵
- d) As noted above, Infrastructure Ontario also commented on the distinction between “repairs” and “maintenance”, and suggested that “repairs that are part of regular maintenance over a long-term contract” be excluded “unless it is the intent such repairs be captured”.⁴⁶

b) IT Projects

The treatment of IT projects under the *Act* was also commented on generally by municipal stakeholders during the stakeholder consultation meetings.

⁴² OASBO and OPSBA Submissions to the CLA Review at 1.

⁴³ COU Submissions to the CLA Review at 1.

⁴⁴ Local 793 and PBCTCO Submissions to the CLA Review at 1-2.

⁴⁵ City Toronto Submissions to the CLA Review at 1.

⁴⁶ IO Supp. (Attachment) to the CLA Review at 2.

- a) Some municipalities indicated that, for IT contracts, payments are made on the basis of various testing phases rather than substantial performance. The municipalities indicated that, in this context, there are discrepancies in how the *Act* is applied; some municipalities apply the *Act* to IT projects while others do not. Further, many IT projects include long-term maintenance payments. The ongoing nature of these projects makes it unclear as to how the *Act* should apply.
- b) The City of Toronto commented that “it would be useful to have clarification for IT and service agreements particularly when a large part of the scope of work of a contract is a software solution or technical support”.⁴⁷
- c) The City of Toronto also indicated that it “is open to considering carve-outs for certain work, such as the IT service/software components of a contract”; however, “the City does not support the waiver of lien rights that could result in a supplier not having access to holdback”.⁴⁸ The City also suggested that “there are issues that need to be addressed for specific forms of contract, such as [AFPs] and some other contract arrangements (for instance Waterfront Toronto doing a project for the City)” which “could possibly be addressed through definitions or new clauses for specific agreements rather than exempting certain projects from the *Act*”.⁴⁹ Specifically, the City noted that the definitions under the *Act* must be rewritten with AFP projects in mind, or new definitions be created that specifically address the parties, such as Project Co, involved in AFP projects.

2.3 Analysis and Recommendations

While the definition of “improvement” is, arguably, sufficiently broad to satisfy the objectives of the *Act*, stakeholders advocated for a clearer definition that would reduce litigation on the issue.⁵⁰ Accordingly, the suggestion by the City of Toronto of a non-exhaustive list of what should be considered to be an improvement is worth considering in order, for example, to distinguish between “repairs” and “maintenance”, and it is not without legislative precedent considering the Manitoba legislation cited above. In several U.S. states, specific lists of what is included as an “improvement” are provided, but these lists can become cumbersome and limiting; non-exhaustive general lists can be incorporated to satisfy the concerns that have been raised if needed. Importantly, though, such lists can create confusion as they generally cannot address every area of ambiguity, and should only be used where there is not a more practical alternative.

An alternative is to utilize the approach of the *Income Tax Act*. “Repairs” of a “capital” nature should be included as “improvements” under the *Act*, while “maintenance” that is more “current” in nature should not be included as “improvements”. As noted above, in determining whether work is “capital” or “current”, there are several considerations, such as the value that the work brings to the land, building, structure or works, the degree of permanence intended by the work,

⁴⁷ City of Toronto Supplemental (New Issues) Submissions to the CLA Review at 2.

⁴⁸ City of Toronto Supplemental (New Issues) Submissions to the CLA Review at 3.

⁴⁹ City of Toronto Supplemental (New Issues) Submissions to the CLA Review at 3-4.

⁵⁰ See, for example, *310 Waste*, *supra*.

and whether or not the work is an upgrade to the original condition of the land or structure. Capital repairs are intended to improve upon the land, building, structure or works and therefore should be captured by the *Act* while maintenance is intended to maintain the original condition of the land, building, structure or works, and are not part of an “improvement”, and therefore should not be captured by the *Act*.

With respect to IT projects, few stakeholders offered submissions. While a specific definition could be included in the *Act*, as is the case in New Zealand, this would move away from the broad scope of the provision unless incorporated as part of a non-exhaustive list. The broad wording used in the 2010 amendment to the definition of “improvement” will be interpreted to include IT projects, if they involve “the installation of industrial, mechanical, electrical or other equipment on the land or on any building, structure or works on the land that is essential to the normal or intended use of the land, building, structure or works”. Those IT projects that are essential to the intended use of the building, structure or works would thus fall within the existing definition. That said, it would not be advisable to expand the application of the *Act* to include software solution contracts that are not part of a construction project. Accordingly, the definition should not be revised to include such contracts and the dividing line between what is and is not lienable should be left to the courts.

Recommendations

- Part (a) of the definition of “improvement” should be amended to refer to “any alteration or addition to the land and any **capital** repair to the land”.
- “Capital repair” should be added as a definition and defined to include all repairs intended to extend the normal economic life or to improve the value and productivity of the land, or building, structure or works on the land, but not including maintenance work performed in order to prevent the normal deterioration of the land or building, structure or works on the land and to maintain them in a normal functional state.
- The definition of “improvement” should not be amended to specifically include IT services, materials, equipment and software.

3. Owner

3.1 Context

The issue of who is an “owner” for the purposes of the *Act* has been the subject of considerable attention in case law and in academic commentary. In particular, the concept of ownership has become more complex due to an increase in the types of contractual arrangements in use, for example, in public-private partnership (AFP) projects multiple parties may be considered to be “owners”. To further complicate matters, construction is sometimes carried out under “licenses”

that purport to grant access to land but not an interest in the land, with the “licensee” then contracting for the supply of services, materials and equipment.

In addition to the increased complexity of contractual arrangements, the complexity of projects themselves can further compound the issue of determining who the “owner” is for the purposes of the *Act*. Some stakeholders have noted that this issue compels subcontractors to, in effect, “lien everyone” to attempt to ensure compliance with the *Act*.⁵¹ While this may be an effective way for a lien claimant to minimize its risk of failing to properly preserve its lien, it is inefficient and it can create an administrative burden that places strain and additional costs on the dispute resolution system. As a result, it has been suggested that the definition of “owner” should be clarified. The definition of “owner” currently reads:

“owner” means any person, including the Crown, having an interest in a premises at whose request and,

- (a) upon whose credit, or
- (b) on whose behalf, or
- (c) with whose privity or consent, or
- (d) for whose direct benefit,

an improvement is made to the premises but does not include a home buyer;

The definition of “owner” has not been amended since the *Act* came into force in 1983,⁵² despite the increasing complexity of construction projects and the increased use of AFPs. AFP projects in Canada trace back to the mid-1980s,⁵³ after the *Act* came into force.

In AFP projects, the identity of the “owner” for the purposes of the *Act* can be difficult to ascertain. “Project Co”⁵⁴ acts as the manager of the project, entering into a contract with a public-sector counterparty and passing down the design, building, and commissioning of an asset to a contractor, but Project Co’s interest in the land is typically limited to its license to use the land to build, operate, and maintain the project.⁵⁵ Crown agencies, such as Infrastructure Ontario, manage the procurement process and are involved throughout the construction phase of the project, but also may not have an interest in the land.

The “owner” of the land will typically be listed in the AFP project agreement, but for subcontractors lower in the contractual pyramid, these documents may not be readily accessible.

⁵¹ Metrolinx Submissions to the CLA Review at 2.

⁵² *Ontario Act*, s 1(1).

⁵³ Mark Bain, “Public-Private Partnerships in Canada” presented at the National Public Private Partnerships Summit (June 17, 2010), online:

<http://www.torys.com/Publications/Lawyers%20PDF%20Documents/P3inCanada_Aus2010.pdf>.

⁵⁴ Project Co is a private sector consortium that is formed to manage the project for a contracted period.

⁵⁵ Dominion Bond Rating Service, *Methodology: Rating Public-Private Partnerships* (2015), online: <<http://www.dbrs.com/research/277613/rating-public-private-partnerships.pdf>>.

This leads to the problem of “liening everyone”, cited by stakeholders. The owner(s) will vary depending on the project. For example, in the case of a highway, the owner may be the Crown (under the jurisdiction and control of the Ministry of Transportation),⁵⁶ along with any municipalities that the highway runs through. Or, in the case of a hospital, the Crown will only be involved to fund the project. The confusion in ascertaining the owner(s) in AFP projects stems in part from the presence of “Project Co” in the contractual pyramid, leading many claimants to believe that Infrastructure Ontario is an “owner”. According to some stakeholders, the resulting confusion has led to increased costs as a result of liens being improperly registered.

Significantly, Infrastructure Ontario has suggested that there be only one owner with respect to an improvement, and that the owner should be the entity that requests the improvement from the contractor. This could include, in respect of AFP projects, a “special purpose vehicle” that has taken responsibility for the improvement, typically known as “Project Co”.⁵⁷

Other stakeholders have suggested the exclusion of AFP projects from the lien regime of the *Act*, with mandatory surety bonding of AFP projects.⁵⁸

3.2 Summary of Stakeholder Views

With respect to the definition of “owner”, stakeholder submissions were varied.

- a) Infrastructure Ontario noted that the definitions of “owner” and “contract” under the *Act* are misaligned with the AFP model,⁵⁹ and suggested several possible solutions with respect to the definition of “owner”. These include:
 - Consider amending the definition of “owner” to allow the parties to deem an “owner” and ensure that there is one “owner” per improvement.
 - Consider allowing parties to designate the agent that is directly contracting with the contractor to be the “owner”.
 - “Consider limiting the definition of “Owner” to only one “Owner” that directly requests the improvement from the Contractor”.
 - Consider clarifying that “owner” in “AFP projects means the special purpose vehicle that has taken responsibility for the improvement”.

⁵⁶ *Public Transportation and Highway Improvement Act*, RSO 1990, c P.50, s 2(1).

⁵⁷ IO Supp. (Attachment) to the CLA Review at 17.

⁵⁸ There is mandatory surety bonding in place in the U.S. by virtue of the *Miller Act*, on federal public works projects, and by virtue of “Little Miller Acts” on state public works projects. For example, under the *Miller Act*, the contractor must provide a surety bond in respect of every contract of a value of more than \$100,000 (40 US Code § 3131.) Surety bonds provide security for subcontractors and suppliers⁵⁸ and may avoid the issues associated with identifying owners and “liening everyone” when there is a dispute.

⁵⁹ IO Submissions to the CLA Review at 4.

- Consider allowing liens on the Authority property while allowing the Authority “to delegate “Owner” responsibilities to Project Co”.
 - Alternatively, consider “prohibiting liens against Authority property but ensure that funds withheld by [the] Authority for Project Co constitute trust funds with the beneficiary being contractors”.
 - Consider whether Project Co should be an “owner” under the *Act* as Project Co “is granted an interest in the premises by way of its license to the site”.⁶⁰
- b) Prompt Payment Ontario submitted that a separate AFP scheme should be included in the *Act* with a definition of “owner” specific to AFP projects, and submitted that the definition of “owner” “should not be amended to accommodate the specific issues arising from” AFP projects.⁶¹
- c) Metrolinx submitted that the definition of “owner” requires clarification to address the issue of subcontractors “lien[ing] everyone”.⁶²
- d) The Ontario Association of Landscape Architects suggested that “owner” should be redefined as “proponent”, such that in an AFP project “someone near the top” of the project “be held accountable as the proponent”.⁶³ Other stakeholders also noted issues with the definition as it applies to multiple “owners”.⁶⁴
- e) The Toronto Transit Commission submitted that “owner”, as it is currently defined, can include a person “who does not actually pay any money in respect of a project,” but will not include a party that, for all intents and purposes, is the “owner” but does not have a legal interest in the land.⁶⁵

3.3 Analysis and Recommendations

As noted above, stakeholders varied in their submissions on the definition of “owner”. Generally, it was agreed that the current definition does not suit the AFP model. Stakeholders recommended either amendments to the definition of “owner” to address AFP projects, or an entirely separate regime for AFP projects.

The *Act* was drafted prior to the introduction of AFPs in Ontario. As AFP projects have developed, gaining significant prominence in size and scope, problems have been encountered with applying the provisions of the *Act*. The definition of “owner” with respect to AFP projects should be amended to provide that Project Co is an “owner” and is the entity responsible for maintaining holdbacks.

⁶⁰ IO Supp. (Attachment) to the CLA Review at 16-17.

⁶¹ PPO Submissions to the CLA Review at 13.

⁶² Metrolinx Submissions to the CLA Review at 2.

⁶³ OALA Submissions to the CLA Review at 1.

⁶⁴ Antonio Conte Submissions to the CLA Review at 1.

⁶⁵ TTC Submissions to the CLA Review at 6.

Recommendation

- The definition of “owner” should be amended to provide for multiple owners on AFP projects such that Project Co is included as an owner (along with the Crown) and it is Project Co that should be responsible to maintain holdbacks.

4. Price**4.1 Context**

A lien claimant can lien for “the price of those services or materials” supplied. The issue of what constitutes the “price” has been the subject of dispute, particularly in relation to the consequences of delay. The definition of “price” currently reads:

“price” means the contract or subcontract price,

(a) agreed upon between the parties, or

(b) where no specific price has been agreed upon between them, the actual value of the services or materials that have been supplied to the improvement under the contract or subcontract.

Generally speaking, time is money, and delayed projects give rise to extra costs for all parties. The parties typically look to their respective contractual rights for relief. Some commentators question whether or not there should be lien rights in relation to costs or damages arising from delays.⁶⁶

To be the proper subject of a lien a claim must be reflective of the “price” of work done on the improvement. As well, it must come within the definition of “services or materials supplied to the improvement” and is limited to the “amount owing to the lien claimant in relation to the improvement”.⁶⁷ Some jurisdictions allow a lien claimant to include costs or damages for extended duration if such costs or damages represent part of the price of work done or provided or material supplied, or if damages for delay are closely connected to the work so as to be reasonable and proper within the claim for lien.⁶⁸

Case law in Ontario is divided as to whether additional costs or damages incurred as a result of delay are lienable. Recent cases have suggested that additional costs incurred because a project takes longer than anticipated (such as labour costs, equipment rental and similar costs of

⁶⁶ Duncan W. Glaholt, *An Overview of Construction Liens (In Five Easy Pieces)* at 19, online: <<http://www.glaholt.com/files/028.pdf>> [Overview of Construction Liens].

⁶⁷ *Ontario Act*, ss 14, 17; See also Ontario Superior Court of Justice decision *Structform v Ashcroft*, 2013 ONSC 4544.

⁶⁸ John S. Logan & Robert W. DuMerton, “What You Can Lien and What You Can Lien For”, Pacific Business & Law Institute (April 18, 2012), online: <<http://www.jml.ca/wp-content/uploads/What-You-Can-Lien-And-What-You-Can-Lien-For-FINAL.pdf>>.

remaining on the job) can be found to be the basis for a valid lien.⁶⁹ Conversely, one author notes that older cases state that such additional costs are not recoverable because they were not contemplated in the contract price, and are in the nature of damages.⁷⁰

As well, some Ontario courts have found that damages at large, such as lost opportunity costs, loss of profits, or aggravated damages are not lienable. Additional costs incurred offsite such as administrative overhead or lost profit, and even onsite office overhead costs, have also been found not to be lienable on this basis. Some stakeholders have suggested that it would be useful to clarify what can be properly included within a lien claim.

Stakeholders have also expressed concern with the definition of “price” as it relates to the scope of what exactly can be included within a claim for lien. A strict reading of the *Act* suggests that “price” should be limited to the contracted price or the “actual value of the services or materials that have been supplied.” There is case law in Ontario that supports the principle that “price” includes “reasonable value of the additional work caused by the [delaying] owner’s conduct” so long as those costs are incurred by a person supplying services or materials to an improvement.⁷¹ It includes, for example, labour costs, equipment rental and similar costs of remaining on the job that will readily be found to be the basis of a valid lien”.⁷² However, it does not include damages at large, such as lost opportunity cost, loss of profits or aggravated damages.⁷³

In British Columbia, “price”, although not separately defined, is restricted to the value of work or material and does not include damages for delay. However, courts in British Columbia have, in some circumstances, included damages for delay that are “so closely connected [to the work performed or material supplied] that it is reasonable and proper to include them in a claim of lien”.⁷⁴

4.2 Summary of Stakeholder Views

The majority of responding stakeholders expressed the view that “price” ought not include damages for delay other than direct out of pocket expenses.

- a) The Association of Municipalities of Ontario, the Council of Ontario Construction Associations,⁷⁵ the Toronto Transit Commission,⁷⁶ the City of Toronto,⁷⁷ and Metrolinx⁷⁸ all opposed the inclusion of a definition of price which would include damages for delay.

⁶⁹ *Structform v Ashcroft*, 2013 ONSC 4544 [*Structform*].

⁷⁰ Overview of Construction Liens, *supra* at 19.

⁷¹ *Proform Construction Ltd. v Noblestar Properties (Central) Inc.*, [2001] OJ No 4973 at para 5.

⁷² *Structform*, *supra* at para 14.

⁷³ *Ibid.*

⁷⁴ *Q West Van Homes Inc. v Fran-Car Aluminum Inc.*, 2007 BCSC 823 at para 9.

⁷⁵ COCA Submissions to the CLA Review at 7.

⁷⁶ TTC Submissions to the CLA Review at 7.

⁷⁷ City of Toronto Submissions to the CLA Review at 2.

⁷⁸ Metrolinx Submissions to the CLA Review at 2.

- b) The Council of Ontario Construction Associations submitted that allowing these types of claims “would upset the balance achieved under the Act” and “would likely increase the potential for lien rights to be abused”.⁷⁹ The Ontario Association of Landscape Architects proposed that a contractor that is incurring costs beyond the construction schedule ought to have out of pocket expenses included in the lien amount.⁸⁰ They further suggested that “damages for delay” should be a defined term, listing costs that are associated with delays are lienable.
- c) The Ontario Public Works Association suggested that the *Act* should differentiate between “price” and “damages”.⁸¹

4.3 Analysis and Recommendations

The concern expressed by the stakeholders in respect of the lack of clarity as to what is included in “price”, combined with varying judicial decisions on what types of costs (or damages) are included, prompts the need for a clarified definition of what is included in the term “price.” The case law suggests that direct out of pocket costs incurred ought to be part of the lien but not other damages such as head office overhead. In order to bring clarity to the definition, consideration may be given to the Ontario Public Works Association’s suggestion to delineate between “price” and “damages” in the *Act*. The definition should be framed in such a way that makes it clear that the fair market value of direct out-of-pocket costs incurred due to extended duration are included in the definition of “price”.

Recommendation

- The definition of “price” should be amended to include direct out-of-pocket costs of extended duration and exclude damages for delay.

5. Supply of Services

5.1 Context

Some stakeholders raised a concern that the definition for “supply of services” is unclear with respect to consulting services. The current definition reads:

“supply of services” means any work done or service performed upon or in respect of an improvement, and includes,

(a) the rental of equipment with an operator, and

(b) where the making of the planned improvement is not commenced, the supply of a design, plan, drawing or specification that in itself enhances the value of the owner’s interest in the land,

⁷⁹ COCA Submissions to the CLA Review at 7.

⁸⁰ OALA Submissions to the CLA Review at 2.

⁸¹ OPWA Submissions to the CLA Review at 1.

and a corresponding expression has a corresponding meaning;

The current definition is broad enough to include consulting services as it applies to “any ... service performed ... in respect of an improvement”. Further, courts have consistently held that consultants are entitled to make lien claims where the value of the land is enhanced as a result of their services.⁸²

5.2 Summary of Stakeholder Views

Few submissions were made in regard to the definition of “supply of services”.

- a) The City of Toronto suggested a non-exhaustive list of what should be included as a “supply of service” to bring a greater degree of certainty to the definition.
- b) Metrolinx submitted that “supply of services” requires clarification, particularly in the application of consulting services that are required over an extended time to support projects.⁸³
- c) The Ontario Association of Landscape Architects also suggested clarification with regards to whether consultants can lien.⁸⁴

5.3 Analysis and Recommendations

The definition of “supply of services” appears sufficiently broad so as to address the concerns raised by stakeholders, particularly given that courts have held that consultants can make lien claims where the value of the land is enhanced as a result of their services.

Recommendation

- The current definition of “supply of services” is sufficiently broad and need not be amended.

6. Municipal and Broader Public Sector Lands

6.1 Context

Stakeholders identified difficulties in registering liens in certain circumstances, including, *inter alia*, the following:

- Municipal/Provincial linear transportation projects (e.g. highways, subways, light rail transit);

⁸²See: David Bristow, “Who is Entitled to Make a Lien Claim” *The Canadian Institute Construction Superconference* (2002); *Markborough Properties Inc. v 841202 Ontario Inc.*, 1996 CarswellOnt 1326; *Alcorn & Associates Ltd. v 634713 Ontario Ltd.*, 1987 WL731422.

⁸³ Metrolinx Submissions to the CLA Review at 2.

⁸⁴ OALA Submissions to the CLA Review at 2.

- Railway projects; and
- Colleges/Universities/Education projects.

The difficulties associated with certain of these types of projects tend to derive from the nature of the projects themselves. For example, a light rail transit project may cause logistical problems as the project extends over and under a large number of properties, thereby affecting multiple “owners” for the purposes of the *Act*, both public and private. For many of these types of projects, liens do not attach to the premises in any event, as they fall into one of the categories listed in section 16 of the *Act* as follows:

Interest of Crown

16. (1) A lien does not attach to the interest of the Crown in a premises.

Interest of person other than Crown

- 2) Where an improvement is made to a premises in which the Crown has an interest, but the Crown is not an owner within the meaning of this Act, the lien may attach to the interest of any other person in that premises.

Where lien does not attach to premises

- (3) Where the Crown is the owner of a premises within the meaning of this Act, or where the premises is,
- (a) a public street or highway owned by a municipality; or
 - (b) a railway right-of-way,

the lien does not attach to the premises but constitutes a charge as provided in section 21, and the provisions of this Act shall have effect without requiring the registration of a claim for lien against the premises.

Section 16(1) of the *Act* was enacted because “the Crown is the source of property rights” and because it is unnecessary to have liens registered against Crown lands since the Crown is required to pay all final judgments against it.⁸⁵ Thus, the security that the lien provides when it attaches to land, that is, the power to order a sale of the land, is unnecessary because there is no risk of non-payment at the conclusion of proceedings. As well, liens cannot attach to federal Crown lands due to the doctrine of interjurisdictional immunity; the *Act*, being provincial legislation, cannot intrude on a federal undertaking.⁸⁶

In applying section 16 of the *Act*, difficulties can arise for subcontractors liening facilities in terms of ascertaining the ownership and nature of the property in order to properly make a claim for lien. In addition, some types of projects involve interaction with different pieces of legislation

⁸⁵ AG Report, *supra* at 747-748.

⁸⁶ See: *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.

specific to the project type. As well, projects may involve the construction of multiple structures on a single property or more than one property. The aggregate effect of all these factors can serve to ‘muddy’ the issue of lienability.

Pursuant to section 34(3) of the *Act*, where land is owned by the provincial Crown, a copy of the lien is “given” to the office prescribed by regulation. If an office has not been prescribed, the lien is given to the ministry or Crown agency for whom the improvement is made. The lien is not registered, but constitutes a charge against the holdback. In addition, liens also do not attach to public streets or highways owned by a municipality or a railway right-of-way pursuant to section 16(3) set out above. The attachment of liens to municipal roads or railways was cited as “impractical” in the 1982 Report of the Attorney General.⁸⁷ Again, the lien will constitute a charge against the holdback.⁸⁸

Municipalities

Conversely, municipal lands outside of those prescribed under section 16(3) of the *Act* can be subjected to a claim for lien by registration against title. That said, there is case law from outside of Ontario (discussed below) to suggest that lien claimants who hold liens against municipalities cannot force a sale that is contrary to public interest, depending on the “uses and purposes for which [the municipal] property is held”.⁸⁹

Some provinces treat municipal lands similar to Crown lands. For example, in British Columbia, although liens can be registered against municipal lands, lien claimants are prevented by the legislation from forcing a sale of the municipal property that is subject to the lien; instead, the court may give judgment for an amount equal to the maximum liability under the legislation.⁹⁰ In Manitoba, liens do not attach to the interests of municipalities; rather, the amount becomes a charge on the amounts retained in the holdback.⁹¹

Several stakeholders have commented that it is unnecessary to register liens against municipal lands. In this regard, municipalities are not authorized to become bankrupt under the *Bankruptcy and Insolvency Act*,⁹² although they can and do take on debt. Under section 17 of the *Municipal Act*, municipalities are not authorized to incur debt unless it is for the purpose of long-term financing or capital projects. Debt levels for long-term financing and capital projects are closely monitored by the province as municipalities are “creatures of the province” and municipalities

⁸⁷ AG Report, *supra* at 747.

⁸⁸ *Ontario Act*, ss 16(3), 21.

⁸⁹ *L.E. Shaw Ltd. v Berube-Madawaska Contractors Ltd.* (1982), 40 NBR (2d) 374 at para 11 [*L.E. Shaw*]; *Prairie Roadbuilders Ltd. v Stettler (County No. 23)*, 1983 CarswellAlta 147 at para 39 [*Prairie Roadbuilders*].

⁹⁰ *B.C. Act*, s 31(6).

⁹¹ *Manitoba Act*, s 16.

⁹² *Municipal Act, 2001*, SO 2001, c 32, Sched A, s 17. As well, it has been proposed that section 17 should be amended to include a similar prohibition in respect of the *Companies’ Creditors Arrangement Act*.

are ultimately accountable to the province due to the controls imposed under the *Municipal Act*⁹³ and the *Municipal Affairs Act*. The *Municipal Affairs Act*, for example, authorizes the Ontario Municipal Board to take several measures with respect to the finances of a municipality that is at risk of defaulting on debts, including the consolidation of the debenture debt and debentures of the municipality and the “custody, management, investment, and application of sinking funds, reserves, and surpluses”.⁹⁴ The *Municipal Affairs Act* also authorizes the Ministry of Municipal Affairs and Housing to take “full charge and control over all money belonging to the municipality”.⁹⁵ Given the prospect of provincial control in exigent circumstances, and the fiscal restrictions placed on municipalities, the current financial outlook of municipalities is considered generally positive, with net financial debt generally decreasing yearly.⁹⁶ In view of the foregoing, it is at a minimum extremely unlikely that an Ontario municipality would become insolvent or otherwise be in a position where it is unable to meet its financial obligations.

The Broader Public Sector

During the Consultation Process, some stakeholders expressed support for public entities other than municipalities to be included as part of the “broader public sector”, which is generally understood to include colleges, universities, school boards, and hospitals.

Colleges that are enumerated under the *Colleges of Applied Arts and Technology Act, 2002* are agents of the Crown, thus liens do not attach to their lands under the current legislation.⁹⁷ Master Sandler noted in *Dirm Inc. v Dalton Engineering & Construction Ltd.* that, in addition to colleges, other institutions falling under this regime could include the “AGO, ROM, O.C.A.D. (Ontario College of Art and Design), the casinos in Windsor, Orillia, and Niagara Falls, other local museums and art galleries, Ontario universities, and other educational, cultural, health, or tourist institutions”.⁹⁸

Universities, on the other hand, are largely autonomous, having “considerable flexibility in the management of their financial affairs and program offerings”.⁹⁹ However, universities rely on public grants for almost half of their total revenue, with the rest coming from tuition and other private sources,¹⁰⁰ which is comparable to the percentage of total revenue that is comprised of

⁹³ Ron Levi and Mariana Valverde, “Freedom of the City: Canadian Cities and the Quest for Governmental Status” (2006) 44:3 Osgoode Hall LJ at 458-459

⁹⁴ *Municipal Affairs Act*, RSO 1990, c M.46, ss 20, 28.

⁹⁵ *Municipal Affairs Act*, RSO 1990, c M.46, s 35(1).

⁹⁶ David Amborski, *The Context of Municipal Borrowing in Canada*, School of Urban & Regional Planning, Ryerson University, online:

<http://munkschool.utoronto.ca/imfg/uploads/226/context_of_municipal_borrowing_in_canada_col.pdf>.

⁹⁷ *Dirm Inc. v Dalton Engineering & Construction Ltd.*, 2004 CarswellOnt 3479.

⁹⁸ *Ibid* at para 12.

⁹⁹ Canadian Council of Ministers of Education, Canada, *Education in Canada: An Overview*, (Ottawa: Council of Ministers of Education, 2013), online:

<<http://www.cmec.ca/299/Education-in-Canada-An-Overview/index.html#04>>.

¹⁰⁰ Council of Universities, *Financial Report of Ontario Universities 2013-14 Highlights*, April 2015 at 2, online: <<http://cou.on.ca/wp-content/uploads/2015/04/Financial-Report-Highlights-2013-14.pdf>>.

public funding in Ontario's colleges.¹⁰¹ Most Canadian universities are "private, non-for-profit corporations",¹⁰² and there is no prohibition in the *Bankruptcy and Insolvency Act* upon their becoming bankrupt. Universities are often described as "public" institutions, but this is because they receive public funding.¹⁰³ There are exceptions, for example, the Royal Military College of Canada is a federal institution established by an Act of Parliament in 1874.¹⁰⁴ *The Royal Military College of Canada Degrees Act, 1959*, granted the Royal Military College of Canada degree-granting authority. In order to have the ability to grant degrees, an institution must either be authorized to do so under the *Post-Secondary Education Choice and Excellence Act*.¹⁰⁵

With regards to school boards, section 58.5(1) of the *Education Act* provides that every district school board is a corporation. Public school boards in Ontario are registered as not-for-profit corporations, and there is no prohibition in the *Bankruptcy and Insolvency Act* against their becoming bankrupt. School board trustees are elected during municipal elections under section 58 of the *Education Act*.¹⁰⁶ Similar to the case of municipalities, the *Education Act* imposes strict control over finances. Schools are largely publically financed,¹⁰⁷ and the *Education Act* prohibits school boards from having in-year deficits without the approval of the Minister of Education and Training and schools must comply with accounting standards set by the legislature.¹⁰⁸ School boards also require permission under section 242(2) to exceed the prescribed maximum amount of debt that a school board may incur under the *Education Act*. The *Education Act* also allows the Minister of Education and Training to take financial control of a school board where the school board has "failed to pay any of its...debts or liabilities when due".¹⁰⁹

Public hospitals are non-share capital corporations run by their own boards of directors;¹¹⁰ hospitals are not agents of the Crown.¹¹¹ Under section 4 of the *Public Hospitals Act*, no application to incorporate a hospital can proceed until it has the approval of the Minister of Health and Long-Term Care. Despite their legal status, however, public hospitals are almost

¹⁰¹ Colleges Ontario, *College Resources 2014* at 3, online: <http://www.collegesontario.org/research/2014_environmental_scan/CO_EnvScan_2014_RESOURCES_WEB.pdf>.

¹⁰² Sharon Li & Glen Jones, "The "Invisible" Sector: Private Higher Education in Canada" in K.M. Joshi & S. Paivandi eds. *Private Higher Education: A Global Perspective* (Delhi, India: B.R. Publishing, 2015) at 3 [Invisible Sector].

¹⁰³ *Ibid.*

¹⁰⁴ 1874, c. 36.

¹⁰⁵ *Post-Secondary Education Choice and Excellence Act*, 2000, SO 2000, c 36.

¹⁰⁶ *Education Act*, RSO 1990, c E.2, s 58.

¹⁰⁷ Ministry of Education, "2015-16 Education Funding: A Guide to the Grants for Students Need" (Queen's Printer for Ontario, 2015).

¹⁰⁸ *Education Act*, RSO 1990, c E.2, ss 230.21, 231.

¹⁰⁹ *Education Act*, RSO 1990, c E.2, ss 257.30(1), 257.34.

¹¹⁰ Ontario Hospital Association, "Hospital Governance", online:

<<http://www.oha.com/CurrentIssues/keyinitiatives/PhysicianandProfessionalIssues/QPSGT/Documents/Module%20%20-%20%201.pdf>>.

¹¹¹ Ontario Hospital Association, "Health Care in Ontario", online:

<[https://www.oha.com/CurrentIssues/keyinitiatives/PhysicianandProfessionalIssues/QPSGT/Documents/Module%20%20-%201.2%20\(Mar%2025%202013\).pdf](https://www.oha.com/CurrentIssues/keyinitiatives/PhysicianandProfessionalIssues/QPSGT/Documents/Module%20%20-%201.2%20(Mar%2025%202013).pdf)>.

entirely publically funded, although may raise their own (nominal) funds through fundraising initiatives, food sales, and parking income.¹¹² Hospitals are not agents of the Crown and the *Bankruptcy and Insolvency Act* does not prohibit a hospital from declaring bankruptcy, although the *Public Hospitals Act* allows the Minister to provide financial assistance to a hospital if it is considered “in the public interest to do so”.¹¹³ Further, the *Public Hospitals Act* allows the Lieutenant Governor to appoint an investigator to investigate and report on the management and administration of a hospital, and appoint, on the recommendation of the Minister, a hospital supervisor where it is in the public interest to do so.¹¹⁴ Public interest is defined in the *Public Hospitals Act*, and includes “the availability of financial resources for the management of the health care system and for the delivery of health care services”.¹¹⁵ For public policy reasons, it seems unlikely that a court would ever direct the sale of a hospital that is subject to a lien. In *Westeel-Rosco Ltd. v Board of Governors of South Saskatchewan Hospital Centre*, Justice Ritchie wrote in *obiter* that “any sale of the hospital property in the present case ‘would be clearly contrary to the public interest and should not be permitted’”.¹¹⁶

Several pieces of legislation define the “broader public sector” for other purposes. The *Broader Public Sector Executive Compensation Act, 2014*, for example, applies to hospitals, school boards, colleges, and other broader public sector entities for the purposes of managing executive compensation.¹¹⁷ The *Broader Public Sector Accountability Act, 2010*, also defines “designated broader public sector organization” as follows:

“designated broader public sector organization” means,

- (a) every hospital,
- (b) every school board,
- (c) every university in Ontario and every college of applied arts and technology and post-secondary institution in Ontario whether or not affiliated with a university, the enrolments of which are counted for purposes of calculating annual operating grants and entitlements,
- (e) every community care access corporation,
- (f) every corporation controlled by one or more designated broader public sector organizations that exists solely or primarily for the purpose of purchasing goods or services for the designated broader public sector organization or organizations,

¹¹² Ontario Hospital Association, “Funding Basics”, online: <[https://www.oha.com/CurrentIssues/keyinitiatives/PhysicianandProfessionalIssues/QPSGT/Documents/Module%201%20-%201.3%20\(Mar%2025%202013\).pdf](https://www.oha.com/CurrentIssues/keyinitiatives/PhysicianandProfessionalIssues/QPSGT/Documents/Module%201%20-%201.3%20(Mar%2025%202013).pdf)>.

¹¹³ *Public Hospitals Act*, RSO 1990, c P.40, s 5(1).

¹¹⁴ *Ibid*, ss 8-9.

¹¹⁵ *Ibid*, s 9.1(1)(c).

¹¹⁶ *Westeel-Rosco Ltd. v Board of Governors of South Saskatchewan Hospital Centre*, [1977] 2 SCR 238 at 246.

¹¹⁷ *Broader Public Sector Executive Compensation Act, 2014*, SO 2014, c 13, Sched 1, ss 2, 3(1).

- (g) every publicly funded organization that received public funds of 10 million dollars or more in the previous fiscal year of the Government of Ontario, and
- (h) every organization that is prescribed for the purposes of this definition;

As discussed below, there was some support among stakeholders for adopting a “broader public sector” definition and for precluding liens from attaching to the lands of “broader public sector” entities; however, this definition of “broader public sector” is quite significant in respect of the issue of lienability. Specifically, although subheadings (a) and (b) represent institutions that can be easily identified, and which clearly constitute public interest entities, subheadings (c) through (h) include entities that are not easily identifiable, some of which are not core public interest entities. Generally, the definition raises serious concerns regarding how one would identify such entities with certainty and, in some instances, justify their inclusion within a group of entities the lands of which should not be put at risk of a judicial sale.

Further, identifying which lands are hospital, university, or school board lands can be complex as these institutions typically own multiple buildings for research and services outside of their core mandates.

6.2 Summary of Stakeholder Views

The submissions from the municipal stakeholders were nearly unanimous in supporting not only the continued exemption of transportation and rail projects from the registration of liens, but also in supporting an extension of the exemption to municipal lands generally.

- a) The Toronto Transit Commission and other municipal stakeholders stated that there was a sound public policy basis against allowing a lien claimant to initiate a process that would allow for the sale of publicly held property, and that “giving” a lien in such circumstances would still provide security to lien claimants but reduce the overall costs associated with registration.¹¹⁸
- b) The City of Mississauga noted the importance of preserving public properties such as City Hall and parks with clear title.¹¹⁹
- c) The Council of Ontario Construction Associations submitted that, similar to the regime in British Columbia, liens should not attach to municipal lands, but municipalities should remain bound by the *Act* and that a lien should “be a charge on the holdbacks required to be maintained by the municipalities”.¹²⁰

¹¹⁸ TTC Submissions to the CLA Review at 1-2.

¹¹⁹ City of Mississauga Submissions to the CLA Review at 14C.

¹²⁰ COCA Supplemental (New Issues) Submissions at 1.

- d) The OBA CLA Reform Committee did not note any problems with respect to municipal lands; in the view of the OBA CLA Reform Committee, potential issues have been “well addressed in the case law”, thus, there is no need to reform the *Act* in this respect.¹²¹
- e) Prompt Payment Ontario opposed the proposition that municipalities be treated the same as Crown lands. They argued that allowing liens to be registered serves a municipality in that, without registration, the municipality would have to establish procedures to receive notices of lien, which would cause an administrative burden on municipal clerks. Currently, “the municipality can easily search title to ascertain if a lien has been registered”.¹²² This may result in a situation where a municipality “inadvertently advance[s] funds when a notice of lien has been given, but this has not been brought to the attention of the payment issuing authority”.¹²³ The risk of this happening is heightened when there is no registration of the lien on title. Prompt Payment Ontario expressed the view that it was unaware of a municipality ever being ordered to sell lands due to a construction lien. Where municipalities maintain their holdback obligations, the risk is nominal at best.¹²⁴ The City of Toronto shared these concerns, citing the burden that the process of receiving and locating liens could cause on the city clerks.¹²⁵
- f) During the Consultation Process, the municipalities further asserted that, since municipalities are creatures of the Crown governed by the *Municipal Act*, they cannot become bankrupt. Thus, there is minimal risk to people who provide materials or services towards the improvement of land with respect to municipalities such that the ability to sell land is not necessary. As noted above, it was also suggested that liens should not attach to lands in the broader public sector, including municipalities, colleges, school boards, and hospitals.
- d) Outside of municipal lands, Colleges Ontario submitted that colleges, as Crown agencies, are not subject to liens attaching to their lands and opposed any change in this regard.¹²⁶
- e) The Ontario Association of School Business Officials suggested that schools also be treated similar to Crown lands as it would result in cost savings to manage disputes without a lien on title. The Ontario Association of School Business Officials further stated that, in any case, liens are typically vacated from title shortly after registration.¹²⁷

6.3 Analysis and Recommendations

As noted above, most of the responding municipalities, with the exception of the City of Toronto, advocated for municipal lands to be afforded the same treatment as Crown lands in that a lien should not be registerable with respect to municipal lands. Municipalities in Ontario cannot become bankrupt, therefore it is unnecessary to have liens attach to municipal lands, with

¹²¹ OBA CLA Reform Committee Submissions to the CLA Review at 31.

¹²² PPO Supplemental (New Issues) Submissions to the CLA Review at 1.

¹²³ PPO Supplemental (New Issues) Submissions to the CLA Review at 1.

¹²⁴ PPO Supplemental (New Issues) Submissions to the CLA Review at 1.

¹²⁵ City of Toronto Supplemental (New Issues) Submissions to the CLA Review at 1-2.

¹²⁶ Colleges Ontario Submissions to the CLA Review at 1.

¹²⁷ OASBO Supplemental (New Issues) Submissions to the CLA Review at 1.

the ultimate remedy of a court-ordered sale. The Council of Ontario Construction Associates advocated for changes that closely resemble the regime used in Manitoba and British Columbia. In Manitoba, liens do not attach to the interests of municipalities in municipal lands but constitute a charge against the holdback.¹²⁸ In British Columbia, liens attach to municipal lands, but these lands cannot be sold to satisfy lien claims. Rather, the court may “give judgment for an amount equal to the maximum liability under [the] Act...and any money realized on the judgment must be dealt with as if it were the proceeds of a sale of the interest in land”.¹²⁹

Other stakeholders, particularly Prompt Payment Ontario, suggested that this is not a practical issue as Ontario municipalities have not had to sell lands in the past to satisfy lien claims. The ability to register lien claims against municipalities benefits the municipalities in that administrative procedures need not be put into place to deal with liens that are given.

Given that municipalities cannot become bankrupt, and that a situation where the courts have ordered public lands to be sold to satisfy a lien has not arisen, the additional security provided by registering a lien is unnecessary. The *Act* can be amended to either allow liens to be “given” to municipalities in the same way that they are given to the provincial Crown, or to adopt a regime similar to that in British Columbia where the court cannot order a sale of public lands to satisfy a lien claim. Both of these solutions satisfy the concerns raised by stakeholders and maintain the security that the lien provides to claimants.

With respect to other “public” institutions, the question becomes much more difficult. The former *Mechanics’ Lien Act* stipulated that liens did not attach to the premises of “public work” projects, and these were treated in the same manner as Crown lands. This was removed from the *Act* as the term “public work” was found to be too ambiguous.¹³⁰ Considering the problems that this posed,¹³¹ and the potential for introducing a potentially significant ambiguity in the AFP context, we do not recommend attempting to identify which specific public interest entities, or projects, should be excluded from being subject to having liens attach to their lands.

The purpose of the lien is to provide security for those who provide services, materials, or equipment. The ultimate remedy that the lien provides is to force a sale of the owner’s interest in the land for the benefit of the lien holder. For municipal lands, this remedy is unnecessary. In some other jurisdictions, liens either do not attach to municipal lands, or, when they do attach, the land cannot be sold in a judicial sale. Municipal owners cannot become bankrupt under the *Bankruptcy and Insolvency Act*, and are extremely unlikely to become insolvent, or to be allowed by the province to remain so. As well, the courts are highly unlikely to order the sale of such lands. As a result, the current procedure to register liens on municipal properties is largely unnecessary and unduly burdensome.

¹²⁸ *Manitoba Act*, s 16.

¹²⁹ *B.C. Act*, s 31(6).

¹³⁰ AG Report, *supra* at 747.

¹³¹ See *Ken Gordon Excavating Ltd. v Edstan Construction Ltd.*, [1984] 2 SCR 280.

Recommendations

- Municipal lands should not be subject to a court-ordered sale, such that lien claims against municipalities should be “given” and not registered, provided that there should be clarity in respect of to whom the lien must be given.
- Liens should continue to attach to hospital, university, and school board lands due to the fact that they are private entities. As well, attempting to identify certain “broader public sector” owners would likely cause more confusion than clarity, such that the lands of these entities should continue to be lienied by registration.

1. Overview

The legal concepts of “preservation”, “perfection” and “expiration” of liens are straightforward enough, although in practice they are prone to complexity and misunderstanding. The basic principles applicable to preservation, perfection, and expiry are as follows:

- *First*, lien rights arise upon the supply of lienable services, materials or equipment to an improvement. Once they have “arisen”, liens are said to “subsist” until they “expire”.
- *Second*, liens must be “preserved” by registration or “giving” within 45 days from an objectively verifiable date (publication of a certificate of substantial performance, completion or abandonment in the case of a “contractor”; publication of a certificate of substantial performance, certification of completion of a subcontract, or the date of last supply to the improvement in the case of subcontractors and suppliers). A lien that is not preserved expires.
- *Third*, all preserved liens must then be “perfected” by commencing an action to enforce the lien and registering a certificate of that action in the prescribed form on the title of the premises if the land is lienable, or by “sheltering” under the perfected lien of another lien claimant, failing which the preserved lien expires.
- *Fourth*, “perfected” liens expire unless an order is made for the trial of the action or the action that perfected the lien is set down for trial within two years of the date of commencement of the action.

The stakeholders raised issues in relation to each of the above principles. As a result, we have considered the following issues:

- Preservation, including:
 - Time Period
 - Certificate of Completion of Subcontract
 - Termination
- Perfection
- Expiry
- The Abuse of Lien Rights
- Liens Against Specific Types of Property, including:
 - Condominiums
 - Residential Subdivisions
 - Leaseholds

2. Preservation

With certain fairly limited exceptions, lien claimants must strictly comply with the preservation and perfection requirements of the *Act*. This is important because it provides public notice to the owner of the improved land or premises, potential purchasers, lenders and any other interested parties that a lien claimant intends to enforce its lien against the premises.¹³² In other words, “fair warning” is provided.

The *Act* prescribes the form and content of the documents that must be completed and either registered on title or, in respect of certain types of premises, “given”, in order to preserve subsisting lien rights.¹³³ Errors and omissions in these documents can be fatal to the lien.¹³⁴ Section 34 of the *Act* provides as follows:

34. (1)A lien may be preserved during the supplying of services or materials or at any time before it expires,
- (a) where the lien attaches to the premises, by the registration in the proper land registry office of a claim for lien on the title of the premises in accordance with this Part; and
 - (b) where the lien does not attach to the premises, by giving to the owner a copy of the claim for lien.

As discussed in Chapter 3 - Lienability, subject to the exceptions set out in subsections 34(2) (Crown land), (3) (public highways) and (4) (railway right of ways), a lien that attaches to the premises is preserved by registration in the proper land registry office of a claim for lien against the title of the relevant premises. Where a lien fits within the express exceptions and does not attach to the premises, it is preserved merely by “giving” a copy of the claim for lien to the prescribed representative of the owner.¹³⁵

Under section 31 of the *Act* contractors have 45 days within which to preserve their liens, counting from the earlier of:

- the date of publication of the certificate or declaration of substantial performance, or
- the date the contract is completed or abandoned.

¹³² Mark Adrian de Jong, “*Ontario’s Construction Lien Act: Examining Preservation and Perfection Deadlines in Geographical, Inter-Jurisdictional, and Commercial Contexts – The Case for Extended Deadlines*”, *Journal of the Canadian College of Construction Lawyers*, 2013 J. Can. C. Construction Law 133 [Examining Deadlines].

¹³³ David Bristow et al, *Construction Builders’ and Mechanics’ Liens in Canada*, 7th ed, looseleaf (Toronto: Carswell, 2005) at 6-1.

¹³⁴ *Ibid.*

¹³⁵ *Ontario Act*, s 34(1).

Where there is no certification of substantial performance, or for services or materials supplied after the date of substantial performance, the preservation period for contractors is 45 days from the earlier of:

- the date the contract is completed, or
- the date the contract is abandoned.

For subcontractors and suppliers, the preservation period is 45 days from the earlier of:

- the date of publication of the certificate or declaration of substantial performance,
- the date of last supply of services or materials, or
- the date the subcontract is certified as complete under section 33 of the *Act*.

Where there is no certification of substantial performance, or for services or materials supplied after the date of substantial performance, the preservation period for subcontractors and suppliers is 45 days from the earlier of:

- the date of last supply of services or materials, or
- the date the subcontract is certified as complete under section 33 of the *Act*.

Stakeholders questioned certain of these time periods, suggested the inclusion of “termination” as an additional triggering circumstance for the commencement of the lien preservation period, questioned the fairness of the “date of last supply” concept in some circumstances, and questioned the permissive language of the *Act* with regards to certificates of completion of subcontracts.

2.1 Lien Preservation Time Periods

2.1.1 Context

Ontario’s lien preservation time period runs 45 days, which is consistent with other Canadian jurisdictions (the mean preservation period in Canada is 44 days) but is relatively short when compared to the United States where the mean preservation period is 120 days.¹³⁶

The mean time for preservation across all states is 120 days.¹³⁷ Only Hawaii and Louisiana have preservation periods within the ranges prescribed in Canada, at 45 days and 60 days, respectively, and almost half of U.S. states prescribe 90 day time periods for preservation. Rhode

¹³⁶ Examining Deadlines, *supra* at 1.

¹³⁷ *Ibid* at 9.

FOUR PRESERVATION, PERFECTION AND EXPIRY OF LIENS

Island has the longest amount of time at 200 days,¹³⁸ which was increased in 2006 from 120 days.¹³⁹

The following is a summary of time periods for preservation in Canada:

Province/territory	Preservation period
Newfoundland and Labrador Quebec Yukon Territory	30 days ¹⁴⁰
Manitoba Saskatchewan	40 days ¹⁴¹
Alberta British Columbia Northwest Territories Nunavut Ontario	45 days ¹⁴² (In Alberta, 90 days for oil and gas projects).
New Brunswick Nova Scotia Prince Edward Island	60 days ¹⁴³ (New Brunswick applies varying time periods, depending on the claim. Generally, the time period is 60 days from completion or abandonment. With respect to materials, the time period is 60 days from the furnishing of the last material. For wages and services, the time period is 30 days).

In 2004, Nova Scotia amended its *Mechanics' Lien Act* to increase the time for preservation of a lien from 45 days to 60 days.¹⁴⁴ The reasoning was explained during debate in the Legislative Assembly by the Honourable Michael Baker:

Again, I know I've dealt with clients who - routinely in the building trades, most people are on 30 days' credit, and that seems to be fairly standard these days in many organizations, whether it's the building trades or, in fact, the furnishing of materials for the building trades, people are on 30 days. Well, routinely what would happen is that people would get very close to or slightly over the 45 days before it became obvious that somebody was not going to pay their bill. By that time, it was too late, because after you're over the 45 days, your ability to file a lien disappears.¹⁴⁵

¹³⁸ *Ibid* at 4-5.

¹³⁹ Thomas Heald, *New Rhode Island Mechanics' Lien Statute Took Effect on October 1, 2006: Contractors Must Give Notice to Owner Within Ten Days of Starting Work to Protect Lien*, Construction Law Bulletin (Providence: Heald & Leboeuf, Ltd., 2006).

¹⁴⁰ *Newfoundland and Labrador Act*, s 22; *Civil Code of Quebec*, SQ 1991, c 64, art 2727; *Yukon Act*, ss 19-20.

¹⁴¹ *Manitoba Act*, s 43; *Saskatchewan Act*, s 49.

¹⁴² *Alberta Act*, s 41; *B.C. Act*, s 20; *Northwest Territories Act*, ss 21-22; *Nunavut Act*, ss 21-22.

¹⁴³ *New Brunswick Act*, s 24; *Nova Scotia Act*, s 24; *P.E.I. Act*, s 24.

¹⁴⁴ *An Act to Amend Chapter 277 of the Revised Statutes, 1989, the Mechanics' Lien Act*, SNS 2004, c 14, s 9.

¹⁴⁵ Nova Scotia, Legislative Assembly, *Hansard*, 59th General Assembly, 1st Sess, (27 April 2004) at 2721.

The result in Nova Scotia was an amendment to 60 days, but there were calls to extend the time period even further.¹⁴⁶ The 60-day recommendation came from a report of the Law Reform Commission of Nova Scotia, which stated that “the 45-day time period was likely the product of an era when a 30-day payment period was the norm.”¹⁴⁷ The report, drafted in 2003, ultimately recommended a 60-day preservation period to “reflect more closely commercial practice.”¹⁴⁸

2.1.2 Summary of Stakeholder Views

Many stakeholders expressed the view that the Ontario lien preservation period is too short.

The EKOS survey revealed stakeholder concern about the time period to preserve liens, but the results were mixed. Most of those who expressed concern with the 45-day time period suggested only a slightly longer lien preservation period.

There was a clear split between stakeholders in their submissions regarding the question of the adequacy of the 45-day time period to preserve liens. Those who expressed support for maintaining the status quo include the Canadian Bankers Association,¹⁴⁹ the City of Toronto,¹⁵⁰ the Consulting Engineers of Ontario,¹⁵¹ Metrolinx,¹⁵² and the Ontario Society of Professional Engineers.¹⁵³ Prompt Payment Ontario¹⁵⁴ and the Council of Ontario Construction Associates¹⁵⁵ both suggested that the 45-day time period be maintained provided that prompt payment provisions are enacted. Both expressed the concern that extending the time to preserve would extend the time to receive holdback monies.

Several stakeholders suggested modest increases to the 45-day time period, with most suggesting 60 days to align with modern billing practices:

Stakeholder	Suggested time period
Council of Ontario Universities	60 days (to allow subcontractors sufficient time to preserve the lien). ¹⁵⁶
Greater Toronto Sewer & Watermain Contractors Association	60 days (payments now take longer to process). ¹⁵⁷

¹⁴⁶ Nova Scotia, Legislative Assembly, *Hansard*, 59th General Assembly, 1st Sess, (27 April 2004) at 2729 (Keith Colwell); Nova Scotia, Legislative Assembly, *Hansard*, 59th General Assembly, 1st Sess, (27 April 2004) at 2730 (Hon Michael Baker).

¹⁴⁷ Law Reform Commission of Nova Scotia, *Builders’ Liens in Nova Scotia: Reform of the Mechanics’ Lien Act* (Halifax: Law Reform Commission of Nova Scotia, 2003) at 24.

¹⁴⁸ *Ibid.*

¹⁴⁹ CBA Submissions to the CLA Review at 3.

¹⁵⁰ City of Toronto Submissions to the CLA Review at 3.

¹⁵¹ CEO Submissions to the CLA Review at 4.

¹⁵² Metrolinx Submissions to the CLA Review at 3.

¹⁵³ OSPE Submissions to the CLA Review at 4.

¹⁵⁴ PPO Submissions to the CLA Review at 19.

¹⁵⁵ COCA Submissions to the CLA Review at 11.

¹⁵⁶ COU Submissions to the CLA Review at 2.

¹⁵⁷ GTSWCA Submissions to the CLA Review at 1.

Stakeholder	Suggested time period
Infrastructure Ontario	60 days (to allow for negotiated invoice review). ¹⁵⁸
International Union of Operating Engineers, Local 793	75 days (to allow claimants with more time to assess, prepare, and register the lien). ¹⁵⁹
Labourers’ International Union of North America, Local 183	60 days (to allow for an assessment on whether the lien is necessary before registration). ¹⁶⁰
Ontario Association of School Business Officials and Ontario Public School Board Association	60 days (to allow payment to flow to subcontractors with modern billing practices). ¹⁶¹
Ontario Electrical League	Extension beyond 45 days (current time period does not align with modern business practices). ¹⁶²
Ontario Sewer & Watermain Contractors Association	30 days after the contractual payment date. ¹⁶³
Thunder Bay Law Association	No less than 60 days. ¹⁶⁴
Ontario Road Builders’ Association	Modest increase to give smaller operators more time to invoice; however, a longer time period may provide incentive for some companies to delay payments even further. ¹⁶⁵

2.1.3 Analysis and Recommendation

While the preservation period in Ontario is generally in line with the other Canadian jurisdictions, a number of significant stakeholders recommended an increase to 60 days.

We are of the view that 60 days is more consistent with prevailing commercial practice, even if prompt payment provisions are introduced into the *Act*.

Recommendation
<ul style="list-style-type: none"> ➤ The time period for preservation of a lien under section 31 of the <i>Act</i> should be extended to 60 calendar days, commencing as currently stipulated by the <i>Act</i>.

¹⁵⁸ IO Supp. (Attachment) to the CLA Review at 5.
¹⁵⁹ Local 793 and PBCTCO Submissions to the CLA Review at 2.
¹⁶⁰ LIUNA 183 Submissions to the CLA Review at 6-7.
¹⁶¹ OASBO and OPSBA Submissions to the CLA Review at 2.
¹⁶² OEL Submissions to the CLA Review at 2.
¹⁶³ OSWCA Submissions to the CLA Review at 6.
¹⁶⁴ Thunder Bay Submissions to the CLA Review at 1.
¹⁶⁵ ORBA Submissions to the CLA Review at 4.

2.2 Termination as a Triggering Event

2.2.1 Context

Termination occurs when a party repudiates a contract, either through its internal termination mechanism or due to a repudiatory breach. Where a contract contains a termination clause, the contract may only be terminated “in accordance with its provisions” unless there is a repudiatory breach.¹⁶⁶ Abandonment occurs when a party stops work on a project. Currently, only abandonment is listed as a statutory trigger for the commencement of the lien preservation period under section 31 of the *Act*: termination is not.

In British Columbia, termination is included with completion and abandonment of the head contract as triggers for the commencement of the lien preservation period. For subcontracts, only completion or abandonment act as triggers.¹⁶⁷

The “termination” issue was commented on briefly by the Alberta Court of Appeal of Alberta in *Tervita Corporation v ConCreate USL (GP) Inc.* Although not expressly stated, the Court of Appeal seemed to equate termination with abandonment, holding that “[t]he contract had been abandoned, at the very latest, by the time of [the plaintiff’s] acknowledgment...that its contract had been terminated”, and held this acknowledgment to be the preservation period trigger.¹⁶⁸ Therefore, the preservation period began when the plaintiff acknowledged that the subcontract had been terminated, not at the later date when the owner recommended that testing not be done. The claimant was thus unable to register its second lien.

2.2.2 Summary of Stakeholder Views

Termination was specifically addressed by the City of Toronto and Metrolinx. Both agreed that “termination” should be added to subsections 31(2)(a)(ii) and 31(2)(b)(ii) of the *Act* to trigger the expiry of lien rights.¹⁶⁹

2.2.3 Analysis and Recommendations

The addition of “termination” as a triggering event helps to fill a possible gap in the *Act*. “Termination” has the same effect as “abandonment”: the work stops. For clarity, “termination” should be included as a triggering circumstance.

A prescribed Notice of Termination or Abandonment should be provided for, and publication should be required indicating the precise date it is claimed that a contract has been “terminated” or “abandoned”.

¹⁶⁶ *Alexander Construction Ltd. v Al-Zaibak*, 2011 BCSC 590; Stephen Coyle and Karen Martin, “Lien Filing Periods: Traps for the Unwary”, *Builders’ Liens – 2015 Update*, Continuing Legal Education Society of British Columbia (November, 2015).

¹⁶⁷ *B.C. Act*, c 45, s 20.

¹⁶⁸ *Tervita Corporation v ConCreate USL (GP) Inc.*, 2015 ABCA 80 at para 16.

¹⁶⁹ City of Toronto Submissions to the CLA Review at 3; Metrolinx Submissions to the CLA Review at 3.

Recommendations

- Termination should be added to the list of events that triggers the commencement of the time limit for preservation of liens under subsections 31(2)(a)(ii), 31(2)(b), 31(3)(a), and 31(3)(b) of the *Act*.
- The *Act* should prescribe a mandatory form of Notice of Termination or Abandonment to be published specifying a date upon which a contract has been abandoned or terminated.

2.3 Certificate of Completion of Subcontract**2.3.1 Context**

Section 33 of the *Act* allows the contractor to ask the payment certifier to certify a subcontract as completed. There is a prescribed form for this certificate.

Some stakeholders have proposed that the issuance of the certificate of completion of subcontract be made mandatory, or mandatory at the request of any lien holder, while the majority of stakeholders cited the administrative burden this would cause as a reason to maintain the current regime.

In 1982, the rationale behind the permissive rather than mandatory language in section 33 was described by the Attorney General's Advisory Committee as follows:

The Committee is of the view that the mandatory certification of completed subcontracts would impose an intolerable administrative burden on the industry. [...] The Committee is of the opinion that a mandatory scheme for the certification of the completion of subcontracts is not practical. In most cases, it is very difficult to determine the date of such completion with accuracy. Furthermore, a mandatory scheme of certification would be an extremely expensive burden for the industry to bear. To make the system work it would be necessary for the owner or payment certifier to be familiar with the terms of all subcontracts. [...] While the system is not often used, it may be of some advantage in some cases.¹⁷⁰

British Columbia, on the other hand, has adopted a “certificate of completion” provision that becomes operative upon the request of any lien holder. In British Columbia, the “certificate of completion” is a statutory form. The provision becomes operative on the request of the lien

¹⁷⁰ Report of the Attorney General's Advisory Committee on the Draft Construction Lien Act, Letter of Transmittal to the Honourable R. Roy McMurtry, Q.C. Attorney General for Ontario, April 8, 1982 in Duncan Glaholt & David Keeshan, *The 2016 Annotated Construction Lien Act* (Toronto: Carswell, 2015) at 808-809 [AG Report].

holder, at which point the payment certifier must determine within 10 days of the request whether the subcontract has been completed.¹⁷¹

This British Columbia regime is similar to that suggested by some stakeholders, where the certificate of completion becomes mandatory upon the request of any lien claimant.

2.3.2 Summary of Stakeholder Views

Many stakeholders who responded regarding the issue opposed making the certificate of subcontract completion mandatory. This group included:

- a) The City of Mississauga,¹⁷²
- b) City of Toronto,¹⁷³
- c) Council of Ontario Universities,¹⁷⁴
- d) Infrastructure Ontario,¹⁷⁵
- e) Metrolinx,¹⁷⁶
- f) Ministry of Transportation,¹⁷⁷
- g) York Region¹⁷⁸

All expressed opposition to making the certificate of completion of subcontract mandatory on grounds of unnecessary administrative burden and delay disproportionate to any benefit.

Those stakeholders who recommended making certificates of completion of subcontract mandatory suggested that it become mandatory on request of the contractor or subcontractor. This group included:

- a) The Council of Ontario Construction Associations which suggested that “[m]ost subcontracts...delay payment of holdbacks to subcontractors until the prime contract is substantially complete”.¹⁷⁹
- b) The Canadian Institute of Quantity Surveyors,¹⁸⁰

¹⁷¹ *B.C. Act*, s 7.

¹⁷² City of Mississauga Submissions to the CLA Review at 6.

¹⁷³ City of Toronto Submissions to the CLA Review at 3.

¹⁷⁴ COU Submissions to the CLA Review at 2.

¹⁷⁵ IO Submissions to the CLA Review at 6.

¹⁷⁶ Metrolinx Submissions to the CLA Review at 3.

¹⁷⁷ MTO Letter Submissions to the CLA Review at 4.

¹⁷⁸ York Region Submissions to the CLA Review at 2.

¹⁷⁹ COCA Submissions to the CLA Review at 10.

¹⁸⁰ CIQS Submissions to the CLA Review at 4.

- c) Ontario Public Works Association,¹⁸¹
- d) Ontario Road Builders Association (unless there is annual release of holdback),¹⁸²
- e) Council of Ontario Construction Associations,¹⁸³
- f) Greater Toronto Sewer and Watermain Contractors Association,¹⁸⁴ which proposed that the certificate of completion of subcontract be mandatory on request of the contractor or subcontractor,
- g) Ontario Sewer and Watermain Construction Association which proposed a scheme similar to that used in British Columbia.¹⁸⁵

2.3.3 Analysis and Recommendations

Most stakeholders were of the view that the certificate of completion of subcontract should not be mandatory.

While the rationale for making the certificate of completion of subcontract mandatory at the request of any lien claimant is easily understood, the practical feasibility of such a measure, particularly for large projects, is questionable as it would cause owners to incur a not insignificant additional administrative burden. Furthermore, our recommendations to permit the early release of holdback (set out in Chapter 5 – Holdback and Substantial Performance) should at least partially relieve the financial burden of the early trades.

Overall, we are of the view that the collective recommendations made in this Report provide sufficient benefits to subcontractors such that making a certificate of completion of subcontract mandatory would provide only a limited incremental gain, with considerable negative administrative consequence.

Recommendation
➤ Certificates of completion of subcontract should not be made mandatory.

3. Perfection

3.1 Context

“Preserved” liens must be “perfected”, unless “sheltered” under the perfected lien of another lien claimant on the same premises.

¹⁸¹ OPWA Submissions to the CLA Review at 2.

¹⁸² ORBA Submissions to the CLA Review at 5.

¹⁸³ COCA Submissions to the CLA Review at 9.

¹⁸⁴ GTSWCA Submissions to the CLA Review at 4.

¹⁸⁵ OSWCA Submissions to the CLA Review at 4.

“Perfection” of a lien requires commencement of an action to enforce the lien, and registration of a certificate of that action on title where the lien attaches to the premises, all within 45 days of the last day upon which that lien could have been preserved, failing which the lien expires.

Section 36 of the *Act*, provides as follows:

What Liens May be Perfected

36. (1) A lien may not be perfected unless it is preserved.

Expiry of preserved lien

(2) A lien that has been preserved expires unless it is perfected prior to the end of the forty-five-day period next following the last day, under section 31, on which the lien could have been preserved.

How lien perfected

(3) A lien claimant perfects the lien claimant’s preserved lien,

(a) where the lien attaches to the premises, when the lien claimant commences an action to enforce the lien and, except where an order to vacate the registration of the lien is made, the lien claimant registers a certificate of action in the prescribed form on the title of the premises; or

(b) where the lien does not attach to the premises, when the lien claimant commences an action to enforce the lien.

...

As was the case with the lien preservation time period, the perfection time period was thought by some to be relatively short when compared to other North American jurisdictions.¹⁸⁶

Concerns have been expressed that the limited time available to perfect a lien is a disincentive to early settlement discussions. Conversely, it has been suggested that extension of the time period would only extend the period of uncertainty.

The triggering date for perfecting a lien varies by province. Generally, it runs from either the last day of the preservation period, the date of preservation, or the date of substantial performance, completion, or abandonment of the contract.

Most provinces use the date of the registration of the claim for lien as the trigger date, while Ontario is the only province to use the last day of the preservation period.¹⁸⁷ From the date of publication of the certificate of substantial performance (or a declaration), completion, or abandonment of the contract, Ontario, along with Newfoundland and Labrador, has the shortest

¹⁸⁶ Ontario Construction Lien Masters, Master Sandler, Comments re: 2010 CLA Proposed Amendments.

¹⁸⁷ Examining Deadlines, *supra* at 4-7.

period to perfect among Canadian provinces, at 90 days. The following chart outlines the perfection periods across Canada, and when those perfection periods are triggered:¹⁸⁸

Province/Territory	Perfection Period
Northwest Territories Nunavut Ontario	45 days from the last day of the preservation period ¹⁸⁹
Newfoundland and Labrador Yukon Territory	90 days from the date of substantial performance, completion, or abandonment of the contract ¹⁹⁰
New Brunswick Nova Scotia Prince Edward Island	90 days from the date of registration of the lien ¹⁹¹
Quebec	6 months days from the date of substantial performance, completion, or abandonment of the contract ¹⁹²
Alberta	180 days from the date of registration of the lien ¹⁹³
British Columbia	1 year from the date of registration of the lien ¹⁹⁴
Manitoba Saskatchewan	2 years from the date of registration of the lien ¹⁹⁵

The mean time to perfect in Canada is 208 days.

Comparatively, the mean time for perfection in the United States is much higher than in Canada, at 412 days.

The maximum time to perfect from the time of completion of a contract varies greatly, from as few as 90 days in Alaska and Tennessee to over six years in Ohio.¹⁹⁶ The most common regime requires perfection within one year after filing or preserving the lien, which is the case in fifteen states.¹⁹⁷

3.2 Summary of Stakeholder Views

York Region,¹⁹⁸ Metrolinx,¹⁹⁹ Infrastructure Ontario,²⁰⁰ and the City of Toronto²⁰¹ suggested keeping the status quo.

¹⁸⁸ *Ibid* at 6-7.

¹⁸⁹ *Ontario Act*, s 36(2); *Northwest Territories Act*, s 24; *Nunavut Act*, s 24.

¹⁹⁰ *Newfoundland and Labrador Act*, s 24; *Yukon Act*, s 22.

¹⁹¹ *New Brunswick Act*, s 27; *Nova Scotia Act*, s 27; *P.E.I. Act*, s 27.

¹⁹² *Civil Code of Quebec*, SQ 1991, c 64, art 2727.

¹⁹³ *Alberta Act*, s 43(1).

¹⁹⁴ *B.C. Act*, s 33.

¹⁹⁵ *Saskatchewan Act*, s 55(1); *Manitoba Act*, s 49.

¹⁹⁶ *Examining Deadlines*, *supra* at 4-5.

¹⁹⁷ *Ibid* at 4-5.

¹⁹⁸ York Region Submissions to the CLA Review at 3.

¹⁹⁹ Metrolinx Submissions to the CLA Review at 3.

²⁰⁰ IO Supp. (Attachment) to the CLA Review at 7.

However, the majority of responding stakeholders suggested extending the time period for various reasons, including the following:

Stakeholder	Suggested Time Period
Greater Toronto Sewer & Watermain Contractors Association	120 days (to allow more time for achieving a resolution before commencing an action and incurring the associated costs). ²⁰²
International Union of Operating Engineers, Local 793	60 days (120 days total) ²⁰³
LIUNA Local 183	90 days (to allow for settlement of the matter and to make the legislation more consistent with other provinces). ²⁰⁴
Council for Ontario Construction Associates	90 days (to allow more time to settle before commencing an action). ²⁰⁵
Canadian Bankers Association	90 days (to allow more time to settle and avoid additional legal fees). ²⁰⁶
Ontario Association of Landscape Architects	Advocated extending the time period to allow for the parties to try to resolve the dispute. ²⁰⁷
Ontario Road Builders' Association	90 or 135 days (45 days is too short for many members, especially small contractors, to meet the requirements for issuing a statement of claim). ²⁰⁸

3.3 Analysis and Recommendations

In theory, a short time period for perfection of a lien is supportive of more expeditious lien proceedings, but in practice, this is not the case. Perhaps this is simply a function of the increasingly complex nature of construction disputes.

Extending the perfection time period would bring Ontario in line with other jurisdictions and give parties an opportunity to resolve their disputes before commencing an action, particularly where a contract calls for stepped dispute resolution.

While the majority of stakeholders expressed support for extending the perfection time period to match those jurisdictions that utilize perfection periods of several months or years, in our view this would run the risk of diminishing the sense of urgency that should be associated with the process.

²⁰¹ City of Toronto Submissions to the CLA Review at 4.
²⁰² GTSWCA Submissions to the CLA Review at 1-2.
²⁰³ Local 793 and PBCTCO Submissions to the CLA Review at 2.
²⁰⁴ LIUNA 183 Submissions to the CLA Review at 6-7.
²⁰⁵ COCA Submissions to the CLA Review at 13.
²⁰⁶ CBA Submissions to the CLA Review at 3.
²⁰⁷ OALA Submissions to the CLA Review at 3.
²⁰⁸ ORBA Submissions to the CLA Review at 6.

Most stakeholders agreed that an increase to 90 days would address the concerns that have been raised. Along with a “preservation” period of 60 days, we recommend that the total perfection period be increased to 150 days, i.e. 90 calendar days following the last date upon which the lien could have been “preserved”.

Recommendation

- The time period for perfection under section 36(2) of the *Act* should be increased to 90 days from the last day upon which that lien could have been preserved.

4. Expiration

4.1 Context

A perfected lien may expire under section 37 of the *Act*:

Expiry of Perfected Lien

37. (1) A perfected lien expires immediately after the second anniversary of the commencement of the action that perfected the lien, unless one of the following occurs on or before that anniversary:

1. An order is made for the trial of an action in which the lien may be enforced.
2. An action in which the lien may be enforced is set down for trial.

A perfected lien expires immediately following the second anniversary of the commencement of the action that perfected that lien, unless prior to that time an order is made for the trial of an action in which the lien may be enforced, or an action in which the lien may be enforced is set down for trial.

Some consider this section of the *Act* necessary to clear title of abandoned liens. Others are not concerned about the concept, only the time periods. Concerns were also raised about lack of mandatory notice prior to the expiration of liens pursuant to section ³⁷.

Ontario’s current two year limit is generally consistent with the other Canadian provinces where one and two year expiry periods are common.²⁰⁹

Alberta	2 years after registration	If no trial within 2 years of the date of registration, any interested party may apply to have the <i>lis pendens</i> vacated and the lien discharged.
New Brunswick	1 year after action	Liens expire one year after an action is commenced if it is not set down for trial. This expiry period does not apply where an

²⁰⁹ *Alberta Act*, s 46(2); *Manitoba Act*, s 49(2); *New Brunswick Act*, s 52.1(1); *Newfoundland and Labrador Act*, s 23(1); *Ontario Act*, s 37(1); *Saskatchewan Act*, s 55(1).

	commenced	application is made to court for an order continuing the action.
Newfoundland and Labrador	1 year after certificate of action registered	Where certificates of action have been registered for 1 year or more, and no appointment has been taken out for the trial of the action, the judge may upon unilateral application made an order vacating the lien.
Saskatchewan	2 years	Where an action has been commenced, the lien expires where the action is not set down for trial within two years. The court may extend this time-limit.

4.2 Summary of Stakeholder Views

Most responding stakeholders suggested keeping the two-year limit.

- a) The Ontario Bankers Association suggested adding time at the perfection stage rather than the two-year expiry period.²¹⁰
- b) The Toronto Transit Commission submitted that setting a matter down for trial is early enough in the litigation process, that no more latitude should be given.²¹¹
- c) York Region,²¹² Metrolinx,²¹³ the Council of Ontario Universities,²¹⁴ and the Ontario Road Builders' Association²¹⁵ expressed support for maintaining the current regime.

Two stakeholders suggested changes:

- a) The Canadian Institute of Quantity Surveyors suggested a one-year limitation period,²¹⁶ while the Council of Construction Associations suggested lengthening the period, arguing that the expectation of setting down for trial within two years is unrealistic in most cases. They suggested mandatory status hearings for actions not set down for trial within the two-year limitation period.²¹⁷
- b) The Advocates' Society suggested that the procedure should be uniform across Ontario. Currently, in regions outside of Toronto, the practice to set a matter down for trial involves serving a trial record, requisition, and affidavit of service. Some regions require a settlement conference, and if the settlement conference is unsuccessful, the matter is set down for trial. In Toronto, the lien claimant can elect to have the matter referred to a

²¹⁰ CBA Submissions to the CLA Review at 3.

²¹¹ TTC Submissions to the CLA Review at 20.

²¹² York Region Submissions to the CLA Review at 3.

²¹³ Metrolinx Submissions to the CLA Review at 3.

²¹⁴ COU Submissions to the CLA Review at 2.

²¹⁵ ORBA Submissions to the CLA Review at 6.

²¹⁶ CIQS Submissions to the CLA Review at 5.

²¹⁷ COCA Submissions to the CLA Review at 13.

Construction Lien Master or proceed with a judge. The Advocates' Society recommended that the *Act* be amended to bring uniformity to setting an action down for trial.²¹⁸

4.3 Analysis and Recommendations

The two-year time limit for the expiry of liens has broad support among stakeholders. Parties are required to move the action along in a timely manner.

Recommendation

- The 2 year time period under section 37 of the *Act* should not be changed.

5. The Abuse of Lien Rights

5.1 Context

Pursuant to section 35 of the *Act*, a lien claimant who preserves or notifies a lien claim which the person knows or ought to know is grossly in excess of the amount which the person is owed, or is not lienable, “is liable to any person who suffers damages as a result”.

Pursuant to section 86 of the *Act*, costs may be ordered against a party, or the solicitor or agent of any party, on a substantial indemnity basis where such a person, “knowingly participated in the preservation or perfection of a lien, or represented a party at the trial of an action where it is clear that the claim for lien is without foundation or is for a grossly excessive amount, or that the lien has expired, or has prejudiced or delayed the conduct of the action”.

Several other provinces impose penalties for exaggerated claims or abuse of process.

- In British Columbia, the court may “cancel” a claim of lien if the claim is vexatious, frivolous or an abuse of process.²¹⁹
- Alberta, Manitoba and Saskatchewan use provisions similar to that in Ontario for exaggerated claims, such that a claimant who exaggerates the lien amount or knows or ought to have known that a lien right does not exist is liable to anyone who suffers damages as a result,²²⁰ though Alberta and Manitoba provide for a “good faith and without negligence” defence.²²¹ The penalties for exaggerating lien claims can include a discharge by the courts along with substantial indemnity costs to the payer party, and potentially punitive and other damages.²²²

²¹⁸ The Advocates' Society Submissions to the CLA Review at 4-5.

²¹⁹ *B.C. Act*, s 25(2).

²²⁰ *Alberta Act*, s 40; *Manitoba Act*, s 40; *Saskatchewan Act*, s 53.

²²¹ Duncan Glaholt & David Keeshan, *The 2016 Annotated Construction Lien Act* (Toronto: Carswell, 2015) at 270 [Annotated Act].

²²² *Brian T. Fletcher Construction Co. v 1707583 Ontario Inc.*, 2009 CarswellOnt 2805 at paras 41-45 (Sup Ct J).

- Several U.S. jurisdictions also have mechanisms to avoid abuse. For example, New York’s lien law contains a “willful exaggeration” clause, whereby the lien may be rendered void and the claimant precluded from re-filing. The claimant may also be liable for damages including bond premiums, any deposits for discharging the lien, attorney fees, and the amount equal to the difference between the exaggerated amount and the actual amount due.²²³
- Florida lien legislation contains an almost identical provision, but adds a good faith defence for the claimant. Florida’s legislation further deems a wilfully exaggerated amount as a fraudulent lien and elevates it into a criminal felony.²²⁴

5.2 Summary of Stakeholder Views

Many stakeholders suggested preserving the status quo.

- a) The Council of Ontario Construction Associations, for example, suggested that the *Act* already contains measures to prevent abuse of lien rights (for example, liability for exaggerated claims), and the abuse of lien rights is not a frequent occurrence.²²⁵
- b) The OBA CLA Reform Committee, however, suggested that the exaggerated lien claim provision provides little in the way of deterrence; rather, the OBA CLA Reform Committee submitted that the *Act* should specify a threshold for exaggerated claims whereby once that threshold is reached, statutory damages would automatically be triggered.²²⁶

There was also a suggestion that lawyers should be obliged to certify that the quantum of a lien is a reasonable and *bona fide* amount.

- a) The Ontario Road Builders’ Association expressed agreement with this suggestion, and also suggested a regime whereby mandatory costs awards be made against parties who register exaggerated liens, regardless of whether the lien action is successful.²²⁷
- b) Conversely, the City of Toronto expressed opposition to a requirement to have lawyers certify the lien amount, arguing that lawyers take instructions from clients and should not be involved in this type of “certification.”²²⁸

²²³ Robert Curshman & Stephen Butler, *Fifty State Construction Lien and Bond Law*, 2nd ed (New York: Aspen Publishers, 2000) at 679.

²²⁴ Fla Stat § 713.31(2)(c).

²²⁵ COCA Submissions to the CLA Review at 12.

²²⁶ OBA CLA Reform Committee Submission to the CLA Review at 13.

²²⁷ ORBA Submissions to the CLA Review at 5.

²²⁸ City of Toronto Submissions to the CLA Review at 4.

5.3 Analysis and Recommendations

Sections 35 and 86 of the *Act* were intended to create a significant disincentive in respect of the preservation and pursuit of grossly inflated liens; however, in practice, this objective has not been uniformly achieved.

Anecdotally, we have repeatedly heard that the exaggeration of the quantum of liens is becoming more and more common, and sections 35 and 86 have failed to effectively regulate this practice, and this is also consistent with our experience.

There are few reported cases where sanctions have been levied in respect of grossly inflated liens.

In our view, stronger sanctions are needed to dissuade lien claimants from exaggerating claims, and compensate parties who are forced to expend resources to defend these claims.

Other jurisdictions provide specific penalties that judges have the discretion to apply where a lien claim has been intentionally exaggerated.

Recommendations

- Section 35 of the *Act*, which imposes penalties for exaggerated claims, should be amended to replace the concept of “grossly inflated” liens with the concept of “wilfully exaggerated” liens, refocussing the threshold at a more sensitive level. As well, the court should be given the discretion to discharge a claim for lien in whole or in part if on a balance of probabilities it is established that the claim is frivolous, vexatious, or an abuse of process.
- The provision should further be amended to allow the court to find, where there is wilful exaggeration, that the lien claimant is liable for any damages incurred as a result of the exaggerated claim, including bond premiums, costs, and, where the court considers it just, the lien amount should be reduced by an amount up to the amount of the difference between the wilfully exaggerated amount and the actual amount of the lien claim; provided that a defence of good faith should be available to the lien claimant.

6. Liens Against Specific Types of Property

Stakeholders have noted that the process of preservation is increasingly difficult in certain circumstances including, among others, condominiums, residential subdivisions, and leasehold interests.

Aspects of this particular sub-issue are also relevant to the issue of lienability, as discussed in Chapter 3 - Lienability.

6.1 Condominiums

6.1.1 Context

With respect to condominiums, it has been suggested that the current preservation mechanism of the *Act* does not allow for the efficient registration of liens. In particular, it has been noted that condominium projects carry a disproportionate cost of registering and vacating liens.

The *Act* was amended in 2010 to require developers to publish a Notice of Intention to Register a Condominium allowing attentive lien claimants to register liens prior to condominium registration.²²⁹

Prior to the time that the Notice of Intention to Register a Condominium is published, the condominium is a single title, owned by the developer or builder and the lien process is simpler.

Once the condominium is registered, however, each unit becomes a separate parcel, and the common elements are collectively owned by all of the unit owners.²³⁰ It is with respect to the latter case, post-registration, that stakeholders have expressed concern. In order to register a lien for work done to the common elements of a condominium after registration, the claimant must first search title for each unit to determine who is the owner and then register with the land registry office a claim for lien on the title of each of the units which includes listing the name and address of the owner of the premises and a description of the premises.²³¹ This is a time consuming and costly process that has prompted several stakeholders to suggest changes.

At the time the *Act* was introduced, roughly one in ten dwellings built in major metropolitan areas in Canada were condominium units. Between 2001 and 2011, roughly one third of the dwellings built were condominium units.²³² Liening condominiums is thus far more common today than at the time the *Act* came into force.

Other Canadian jurisdictions have regimes similar to that in Ontario in that liens must be registered against each unit in a condominium for improvements performed on the common elements. No jurisdiction treats the common elements in a standard condominium as a single entity (identifiable by a single PIN).

Slight differences exist between the jurisdictions in how the lien can be vacated:

²²⁹ Carly Fidler, Andrew Wong & Roger Gillott, “New Amendments to the Construction Lien Act” (2010), online: <<https://www.osler.com/en/resources/regulations/2010/new-amendments-to-the-construction-lien-act>>.

²³⁰ Lianne Armstrong, “Practical new requirement pertaining to registering a Construction Lien against a condominium project” (2012), online: <<http://lernercommerciallitigation.ca/blog/post/practical-new-requirement-pertaining-to-registering-a-construction-lien-against-a-condominium-project/>>.

²³¹ *Ontario Act*, s 34(5); Carol A. Dirks, “Understanding Construction Liens – A Refresher” *Condo Commentary* (Fogler, Rubinoff LLP, Barristers & Solicitors, 2012), online: <http://foglers.com/uploads/press/file/24/Condo_Commentary_Spring_2012.pdf>.

²³² Statistics Canada, Distribution of private households by housing tenure and period of construction, ten CMAAs with the highest number of households in condominiums, 2011 (2011), online: <<https://www12.statcan.gc.ca/nhs-enm/2011/as-sa/99-014-x/2011003/c-g/c-g01-eng.cfm>>.

- a) In British Columbia, an individual owner can apply to the court to have a lien discharged upon payment of their proportionate share of the lien.²³³
- b) In Alberta, the language is mandatory. An owner can pay into the court their proportionate share of the lien and the holder of the lien must provide a discharge.²³⁴
- c) The *Act* is silent on this point, but in *Associated Mechanical Trades Inc. v Kurzbauer*, Master Polika relied on section 14(1) of the *Condominium Act, 1998* for the proposition that a unit owner may discharge the portion of the encumbrance that is applicable to the common interests.²³⁵ It has, however, been noted that section 14 of the *Condominium Act* applies to encumbrances that are registered prior to the Declaration of a condominium corporation. Thus Master Polika cited section 14 for its policy rationale of allowing a unit owner to vacate a lien by posting security.²³⁶

6.1.2 Summary of Stakeholder Views

Most stakeholders who addressed the issue suggested that the process for liening condominium units needs to be simplified.

- a) The Labourers' International Union of North America, Local 183 suggested that condominiums be subject to a general lien, similar to subdivisions, rather than liening unit-by-unit.²³⁷
- b) The OBA CLA Reform Committee²³⁸ and the Council of Ontario Construction Associations²³⁹ suggested that the *Condominium Act* should be amended to create a common elements PIN in the name of the condominium corporation to which a general lien would attach. As the Council of Ontario Construction Associations described it, "the interests of the condominium unit owners would be subject to the lien as if the lien had been registered against title to each individual unit".²⁴⁰ This would reduce the costs associated with registering liens against condominium corporations and be less of an administrative burden for both the lien claimant and the unit owners.
- c) In their joint submissions, the Association of Condominium Managers of Ontario and the Canadian Condominium Institute of Toronto noted several problems that arise from the current regime. An immediate and measurable cost is associated with the title searches for all condominium units, which is required to register the lien against each unit owner. The disbursements can total thousands of dollars, depending on the number of units. Costs will continue to accumulate in court filings given the number of owners involved. In cases where the cost of repairs is relatively low compared to the associated legal costs,

²³³ *Strata Property Act*, SBC 1998, c 43, s 90.

²³⁴ *Alberta Act*, s 78(3).

²³⁵ *Associated Mechanical Trades Inc. v Kurzbauer*, [2008] OJ No 4688; SO 1998, c 19.

²³⁶ "Owners Share the Good and the Bad (Including Construction Liens)" (Nelligan O'Brien Payne LLP, 2006), online: <<http://www.condolawnews.ca/e/owners-share-good-bad-including-construction-liens.cfm>>.

²³⁷ LIUNA 183 Submissions to the CLA Review at 7.

²³⁸ OBA CLA Reform Committee Submission to the CLA Review at 25-26.

²³⁹ COCA Submissions to the CLA Review at 11-12.

²⁴⁰ *Ibid.*

proportionality becomes an issue. It was also noted that most unit owners are either not involved or unaware of the condominium corporation's arrangements with contractors, making it unfair to unit owners to be involved in a court action.²⁴¹

- d) The Association of Condominium Managers of Ontario and the Canadian Condominium Institute of Toronto suggested the removal of the ability to lien condominium corporations. They assert that security for payment in the form of a lien is generally not needed as problems rarely arise in the collection of debts from condominium corporations, given the ability of condominium corporations to collect each owner's proportionate interest under the *Condominium Act*.²⁴²
- e) Prompt Payment Ontario disagreed with the Association of Condominium Managers of Ontario and the Canadian Condominium Institute of Toronto, noting that an exemption for condominiums from the *Act* would reduce payment security. The alternative solution of liening common elements, not individual units, is also not considered a complete solution because there would be no capacity to act on lien rights, that is, the lien holder would not be able to force a sale of common elements.²⁴³
- f) The OBA CLA Reform Committee further suggested that a statutory form be created with all the lots listed and each lot individually described with all of the information required under section 34(5) of the *Act*, rather than registering multiple unit-by-unit liens. It was also suggested that the Director of Titles for Ontario create an index of owners for each condominium, obviating the need to search title for each unit.²⁴⁴

6.1.3 Analysis and Recommendations

Liening the common elements of condominiums has been cited by many stakeholders as being an overly burdensome, administratively time consuming process. For lien claimants with small claims, the cost to lien is disproportionate to the amount claimed. There is unanimity among responding stakeholders that the process needs to be simplified.

Liening the common elements as a single PIN and subjecting the interests of all owners to that lien was suggested by multiple stakeholders. This solution would bring the cost of liening in line with the cost to lien other projects as a single lien would be registered. This process would benefit owners compared to the current regime provided that notice is given by way of a prescribed form to each owner.

Unit owners should be able to post security proportionate to their share of the lien to have the lien vacated as against their interest in the common elements. This would bring the legislation in line with other provinces and with the jurisprudence on the issue.

²⁴¹ ACMO and CCI Submissions to the CLA Review at 3-4.

²⁴² *Ibid* at 4-5.

²⁴³ PPO Supplemental (Responses) Submissions to the CLA Review at 3-4.

²⁴⁴ OBA CLA Reform Committee Submissions to the CLA Review at 27.

Recommendations

- After registration, the common elements in condominium buildings should have a single PIN that is subject to a lien, and the interests of all owners should be subject to this lien.
- Notice of lien should be given to the condominium corporation and the unit owners by way of a prescribed form.
- Condominium unit owners should be able to post security proportionate to their share of the lien to have the lien vacated.

6.2 Residential Subdivisions**6.2.1 Context**

Section 20 of the *Act* provides for a “general lien” where lienable work, services or materials are supplied to more than one premises under a single contract:

20. (1) Where an owner enters into a single contract for improvements on more than one premises of the owner, any person supplying services or materials under that contract, or under a subcontract under that contract, may choose to have the person’s lien follow the form of the contract and be a general lien against each of those premises for the price of all services and materials the person supplied to all the premises. R.S.O. 1990, c. C.30, s 20 (1).

Where subs. (1) does not apply

20. (2) Subsection (1) does not apply and no general lien arises under or in respect of a contract that provides in writing that liens shall arise and expire on a lot-by-lot basis.

According to Glaholt’s 2016 text the *Annotated Act*, the general lien is designed to “assist suppliers of services or materials to subdivisions, or multiple location projects, and avoids the problem of allocating the total supply generally to each of the individual buildings in a subdivision at the time of preservation of a lien.”²⁴⁵

Under section 20 a general lien claim is available if the following conditions are met: (i) there is a single owner of all the premises; (ii) the services or materials to each of those premises is governed by a single contract, and (iii) the contract does stipulate that liens will arise and expire on a lot by lot basis.²⁴⁶ It is this latter condition that poses difficulties for lien claimants, particularly on residential subdivisions.²⁴⁷

²⁴⁵ Annotated Act, *supra* at 193.

²⁴⁶ Section 39(1)(v) of the *Act* stipulates that any person having a lien, who is a beneficiary of a trust under Part II, or who is a mortgagee may, at any time, by written request, require the owner and the contractor to advise on whether the contract provides in writing that liens will arise and expire on a lot-by-lot basis; “Construction Bulletin: Supplying to New Home Subdivisions” (November 2003), Pallett Valo LLP, online:

Section 20(2) of the *Act* is not replicated in other jurisdictions. British Columbia,²⁴⁸ Saskatchewan,²⁴⁹ Newfoundland & Labrador,²⁵⁰ and Prince Edward Island²⁵¹ explicitly allow for a general lien and do not provide a similar exception as that found in section 20(2) of the *Act*.

Outside of Canada, general liens are often permitted with no exception for expiry on a lot-by-lot basis. By way of example, in the state of Florida under section 713.09 of the Florida Statutes a lienor is “required to record only one claim of lien covering his or her entire demand against the real property when the amount demanded is for labor or services or material furnished for more than one improvement under the same direct contract.” This claim for lien is sufficient even though the improvement is for one or more improvements located on separate lots, parcels, or tracts of land.²⁵²

6.2.2 Summary of Stakeholder Views

During the Consultation Process, many stakeholders stated that section 20 of the *Act* should be simplified²⁵³ by removing the exception for lot-by-lot contracts.

- a) The OBA CLA Reform Committee submitted that section 20(2) “increase[s] the cost of a lien, and severely restricts its effectiveness”.²⁵⁴
- b) The International Union of Operating Engineers 793 and Provincial Building and Construction Trades Council of Ontario submitted that section 20(2) as drafted makes it “far too difficult and expensive for lien claimants to register liens especially when the amount in issue is less than \$25,000”.²⁵⁵ It is difficult for lien claimants to specifically isolate the homes worked on in a subdivision, for example, and if required to prove those liens at trial, it is a time-consuming process of calling witnesses who worked on the homes to advise what they worked on and when.
- c) The Residential Construction Council of Ontario and the Ontario Home Builders Association submitted that freedom of contract is paramount and should be preserved in the *Act*. They submitted that “the parties to building contracts are the ones best able to determine what works best for their particularly project”.²⁵⁶ In this regard, they emphasized at their consultation meeting that no changes should be made in respect of the lot-by-lot provisions under the *Act*.

<http://www.pallettvalo.com/a/uploads/news-centre/20140905120310_aesposito0311.pdf>.

²⁴⁷ See, for example, *Yorkwest Plumbing Supply Inc. v Nortown Plumbing (1998) Ltd.*, 2016 ONCA 305.

²⁴⁸ *B.C. Act*, s 16.

²⁴⁹ *Saskatchewan Act*, s 29.

²⁵⁰ *Newfoundland and Labrador Act*, s 31.

²⁵¹ *P.E.I. Act*, s 20(1).

²⁵² Fla. Stat. § 713.09.

²⁵³ See for example LIUNA 183 Submissions to the CLA Review at p 7 noting also that the cost of registering a lien against each lot is prohibitive.

²⁵⁴ OBA CLA Reform Committee Submission to the CLA Review at 26.

²⁵⁵ Local 793 and PBCTCO Submissions to the CLA Review at 4.

²⁵⁶ RESCON-OHBA Submissions to the CLA Review.

- d) At the consultation meeting of the Provincial Building and Construction Trades Council of Ontario it was explained that a contractor is “required to determine exactly how many hours [they] worked on each lot” and that this requirement is “punitive, onerous and not in line with the objectives of the *Act*”.²⁵⁷
- e) As a recommendation, the Ontario Road Builders’ Association noted that “one lien against the parcel of land should be sufficient”.²⁵⁸
- f) From a procedural perspective, the OBA CLA Reform Committee noted that there is “currently no form to allow for multiple liens to be registered as 1 document, increasing significantly the costs to register a Claim for Lien” and that a lawyer must “search every lot in a subdivision that will be liened to exclude a lien on a lot where title has been transferred to a ‘home buyer’” which can ultimately be quite expensive.²⁵⁹
- g) Goldman Sloan Nash & Haber LLP filed a submission that noted “[w]here the contracts or subcontracts call for the liening on a lot-by-lot basis, often the subcontractors and / or suppliers farther down the chain are not aware of this requirement and it adversely impacts their ability to properly protect their lien rights for materials and services supplied to a project.”²⁶⁰ In such circumstances, some lawyers recommend that a prudent subcontractor on a subdivision project should “find out before the first supply if the contract between the owner and contractor provides that liens expire on a lot by lot basis” and if that is the case, the subcontractor must consider its lien rights for each individual lot as the lien rights will expire 45 days after the last supply to each individual lot.²⁶¹ This practice is difficult and cumbersome.

6.2.3 Analysis and Recommendations

The central concern with the current process of liening residential subdivision lands is the exception to the general lien under section 20(2) of the *Act*, which in essence allows owners to require liens to be registered on a lot-by-lot basis.

This has been cited as overly cumbersome and costly, particularly for liens for amounts that are less than \$25,000.

A central objective of the *Act* is to protect those who provide services and materials to an improvement, and those who provide services at the lower end of the construction pyramid are more likely to be negatively affected by this section due to lower claim amounts, and, in some cases, less sophistication with regards to how section 20(2) affects their rights.

²⁵⁷ PBCTCO-TEIBAS Ltd – Official Summary of Consultation Meeting at 4.

²⁵⁸ ORBA Submissions to the CLA Review at 14.

²⁵⁹ OBA CLA Reform Committee Submission to the CLA Review at 26-27.

²⁶⁰ Goldman Sloan Nash & Haber LLP Submission at 5. Goldman Sloan Nash & Haber LLP suggested that “some consideration be given to adding a section to the CLA which requires that all owners who enter into contracts for subdivision work where liens are to be registered on a lot-by-lot basis must publish notice of that requirement in the Daily Commercial News at least 14 days prior to the commencement of any work.”

²⁶¹ Fairley, Scott, General Liens under the Construction Act, Barriston Law (2012), online: <<http://www.barristonlaw.com/blog/2012/10/general-liens-construction-lien-act/>>.

Recommendation

- Section 20(2) should be removed from the *Act* and liens should not be required to be preserved on a lot-by-lot basis.

6.3 Leaseholds**6.3.1 Context**

Some commentators have raised issues with respect to the enforcement of liens against leasehold interests.

Theoretically, liens can attach to leases, and leases can be sold to satisfy liens.²⁶² In Ontario, where the owner is a leaseholder, the landlord's interest will also be subject to a lien if the contractor gives the landlord written notice of the improvement to be made; however, the landlord then has fifteen days to give the contractor notice that the landlord assumes no responsibility for the improvement.²⁶³ Termination or forfeiture of the lease will not affect the lien, except when there is termination for non-payment of rent, in which case the lien holder can pay the rent to the landlord and add that amount to the lien.²⁶⁴ However, experience shows that this right is rarely exercised by the lien claimant.

In practice, however, it is often difficult to enforce such rights. There are five principal problems:

- Contractors, subcontractors and suppliers sometimes assume, wrongly, that an improvement for a tenant automatically creates a right to lien the landlord's interest in the premises. Unless the appropriate notice under section 19 of the *Act* has been given to the landlord, allowing the landlord the opportunity to address its potential liability, or the landlord's conduct has brought it within the definition of "owner", such a lien is not enforceable against the landlord's interest.
- Not all work done for a tenant may be lienable.²⁶⁵
- Section 19(1) as it now stands benefits sophisticated landlords because they can use it to artificially shield themselves from liens.
- Section 24 of the *Act* does not cover payments made by a landlord towards leasehold improvements (although Part II does apply in such circumstances), nor does the right of information under section 39 allow a lien claimant to obtain information about payments due to a tenant or regarding the standing of the lease.

²⁶² Duncan Glaholt, *Conduct of a Lien Action 2016* (Toronto: Carswell, 2015) at 2.11 [Conduct of a Lien Action].

²⁶³ *Ontario Act*, s 19(1).

²⁶⁴ *Ontario Act*, ss 19(3)-(4).

²⁶⁵ *Conduct of a Lien Action*, *supra* at 2.11.

- Leasehold interests also carry an inherent difficulty with respect to searching title to locate the actual tenant for the purpose of registering a lien, as many tenants do not register their leasehold interest on title.

Given these issues, contracting parties may seek recourse to the *Personal Property Security Act*,²⁶⁶ or attempt to have a landlord declared an “owner” under the *Act*.²⁶⁷

Most provinces use a similar regime, with different mechanics:

- The time period for the written response of the landlord to the contractor’s written notice is five days in Alberta, ten days in Saskatchewan, New Brunswick, Prince Edward Island, and fifteen days in Newfoundland and Labrador.
- In Manitoba, the landlord is deemed to be an owner where the improvement was done with the landlord’s consent and for the landlord’s benefit, or where the landlord requires the leaseholder to arrange for the improvement.
- In Nova Scotia, the lien will attach to the landlord’s interest if the landlord provides consent to be subject to the lien with an affidavit verifying that consent.²⁶⁸

British Columbia’s *Builders’ Lien Act* does not contain a corresponding provision. In British Columbia, if a landlord has prior knowledge of an improvement, the landlord will be deemed to have requested the improvement (even if, factually, that was not the case). Landlords can prevent this automatic lien only by filing a statutory Notice of Interest in the land title office.²⁶⁹ The Notice of Interest contains the owner’s name, the nature of the owner’s interest, and a statement that the owner is not bound by a lien claim unless the improvement was made at the owner’s express request.²⁷⁰ The Notice of Interest does not expire and will cover all improvements by all tenants, present and future.²⁷¹ Thus, contractors are able to determine whether a landlord’s interest is lienable prior to commencing with the improvement.

In the U.S., there are four main approaches to the issue of liening a landlord’s interest.²⁷²

- The first approach, which is similar to the approach in British Columbia, requires that a landlord merely have knowledge of the improvement. This is the case in California, Illinois, and Minnesota.²⁷³ If a landlord does have knowledge of the improvement, a

²⁶⁶ RSO 1990, c P.10

²⁶⁷ Conduct of a Lien Action, *supra* at 2.11.

²⁶⁸ *New Brunswick Act*, s 12; *Saskatchewan Act*, s 31; *Alberta Act*, s 15; *Manitoba Act*, s 18; *Newfoundland and Labrador Act*, s 8; *P.E.I. Act*, s 11; *Nova Scotia Act*, s 8(2).

²⁶⁹ *B.C. Act*, ss 3(1)-(2).

²⁷⁰ Builders Lien Forms Regulation, BC Reg 1/98.

²⁷¹ British Columbia, Ministry of Employment and Investment Ministry of Attorney General, *Introducing British Columbia’s New Builders Lien Act* (British Columbia Law Institute, 1997) at 4.2.

²⁷² David Zimmerman and Melissa Orien, *Can I Lien That, Too?* *Construction Lawyer* 28:4 (2008) [Zimmerman and Orien].

²⁷³ Cal Civ Code § 3110 (West 1993); 770 Ill Comp Stat 60/1-1(a) (West 2008); Minn Stat § 514.06 (West 2002).

notice of non-responsibility must be served on the contractor by the landlord to avoid being having their interest in the land liened.

- The second approach requires consent by the landlord. This approach is used in Florida, South Carolina, Massachusetts, New York, and Washington²⁷⁴ and requires affirmative consent by the landlord for the improvement for the lien to attach to the landlord's interests; mere knowledge is insufficient.²⁷⁵
- The third approach requires a finding that the lessee is an agent of the landlord. This approach is used in the District of Columbia, Missouri, and Tennessee.²⁷⁶ In determining whether there is an agency relationship, the court will look at the agreement between the landlord and lessee. In the Tennessee Code, four specific considerations are enumerated: whether the lease requires the lessee to make the improvement, whether the cost is borne by the landlord, whether the landlord maintains control over the improvement, and whether the improvement becomes the property of the landlord at the end of the lease.
- The fourth approach, used in Georgia, Ohio, and Texas,²⁷⁷ is the strictest, requiring the landlord to be privy to the contract between the contractor and leaseholder in order for the landlord's interest to be lienable.

6.3.2 Summary of Stakeholder Views

Stakeholder views were generally as follows:

- a) The OBA CLA Reform Committee reviewed the issue of lienability with respect to leasehold interests and provided an alternative to the present-section 19 of the *Act*. A practical problem that was cited was that “some landlords are preoccupied with creative attempts to make the freehold owner not an “owner” of the leasehold, depending on how much control the landlord exerts over the approval process for leasehold improvements”.²⁷⁸ The OBA CLA Reform Committee proposed a system whereby a leasehold claim for lien should be limited to the parties who actually fund improvements to the leasehold premises – the tenant, a secured lender of the tenant, or the landlord who pays a cash allowance to the tenant. The payer would be required to maintain a holdback without any right to set off against sums to be advanced to the tenant. The lien would only be against a fund and not land, so it would not be necessary to register a claim for lien on title to the property. Section 39 of the *Act* would have to “be amended to allow lien claimants to obtain from landlords, tenants, and secured lenders all relevant information about the lease, a lender's security, the funding available from the landlord and lender, and the state of accounts”.²⁷⁹

²⁷⁴ Fla Stat Ann § 713.10 (West 2006); SC Code Ann § 29-5-10; Mass Gen Laws Ann Ch. 254 § 2; NY Lien Law § 3; RCW 60.04.021.

²⁷⁵ Zimmerman and Orien, *supra*.

²⁷⁶ DC Code § 40-301.01; Mo Rev Stat § 429.010 (2008); Tenn Code Ann § 66-11-102(d).

²⁷⁷ Tenn Code Ann § 66-11-102 (2010); RC 1311.02; Tex Prop Code § 53.021.

²⁷⁸ OBA CLA Reform Committee Submission to the CLA Review at 26.

²⁷⁹ OBA CLA Reform Committee Submission to the CLA Review at 27-28.

- b) The OBA CLA Reform Committee was critical of the system used in British Columbia, where improvements to leasehold interests are deemed to be at the owner’s request unless the owner files a prescribed form with the Land Registry Office that they will not be bound by a lien. The OBA CLA Reform Committee asserted that the system under the *B.C. Act* “only benefits sophisticated landlords and leaves lien claimants without any recourse to any third party fund that the tenant would use to pay for the leasehold improvements”.²⁸⁰
- c) Prompt Payment Ontario highlighted further problems with the lienability of leasehold interests. The first is simply that “leases are seldom registered on title, leaving the claimant with an undefined asset against which to engage the charge of a lien.” The second is that tenants who default on payments are also likely to default on rent payments, which could terminate a lease and extinguish the security interest in the leasehold, although sections 19(3) and (4) allow a lien claimant to pay the landlord the amount of rent owing and add it to the lien claim.²⁸¹
- d) Prompt Payment Ontario suggested that a lien registered against a party holding itself out as the holder of a leasehold interest “should be deemed to apply equally to any other party who may have the actual leasehold interest or a superior leasehold interest.”²⁸²
- e) The Council of Ontario Construction Associations suggested amendments to section 19(1) that would allow any party to serve a Notice to Landlord, or Form 2, and allow for the Form 2 to be served at any time until the completion of the contract.²⁸³ Form 2 subjects the interests of the landlord to the lien unless the landlord provides written notice, within 15 days of receiving the notice, that the landlord assumes no responsibility for the improvement to be made.²⁸⁴

6.3.3 Analysis and Recommendations

In general, we suggest that the *Act* should be amended to include the interests of the party that funded the improvement as an “owner”.

Several U.S. jurisdictions have grappled with this issue, resulting in varying tests on the lienability of a landlord’s interests. The common suggestion among stakeholders was that the lien should attach to the interests of the entity that funds the improvement.

The approach in Tennessee attempts to strike a proper balance between the rights of lien claimants and the interests of landlords by measuring the level of involvement of the landlord in the improvement; such that a landlord’s interests can be measured in substance and not be shielded by a declaration.

²⁸⁰ OBA CLA Reform Committee Submission to the CLA Review at 27-28.

²⁸¹ PPO Submissions to the CLA Review at 11.

²⁸² PPO Submissions to the CLA Review at 20.

²⁸³ COCA Submissions to the CLA Review at 11.

²⁸⁴ *Ontario Act*, s 19(1).

The suggestions of the stakeholders seem to strike a balance between the uncertainty that can arise from the approach in Tennessee and the current system that allows landlords to avoid having their interests liened despite consenting to and indirectly funding an improvement. Landlords that provide a cash allowance to tenants to fund improvements to tenants or otherwise require the improvement to be performed should have their interests lienable, and lien claimants should be able to obtain this information through a section 39 request.

Recommendations

- For improvements to leasehold properties, claims for lien should attach to the interests of the tenant named in the lease and to the interest of the landlord if the landlord funded the improvement through a cash allowance or otherwise required the improvement; provided that the landlord's liability should be limited to an amount equal to any deficiency in the holdback.
- Section 39 of the *Act* should be amended to allow lien claimants to obtain from landlords, tenants, and secured lenders all relevant information about the lease, the lender's security, the funding available from the landlord and lender, and the state of accounts.

1. Overview

The purpose of the holdback provisions – the maintenance of a fund to satisfy liens that may be claimed – must be balanced with the necessity to keep funds flowing down the construction pyramid to avoid affecting subcontractors’ cash flow and ability to carry on with the work.²⁸⁵

Part IV of the *Act* provides that each payer on a contract (the owner) or subcontract (the contractor or subcontractor) is required to retain a basic holdback of 10% of the price of services and materials supplied.

In reality, the money accumulates throughout the performance of the contract in the hands of the owner, or the owner’s lender(s). The holdback must be retained until all liens that may be claimed have expired or have otherwise been satisfied, discharged or provided for under section 44 (payment into court). Part IV also provides for a “finishing holdback” of 10% for work supplied after the date of substantial performance of the contract.²⁸⁶

The holdback obligation is intended to create a fund to which lien claimants may look if they cannot recover from the contractor or subcontractor with whom they have a direct contract.

In 1980, the Ministry of the Attorney General’s Discussion Paper stated as follows in respect of the holdback regime in the *Mechanics’ Lien Act* then in force:

The holdback represents money already earned by those who have supplied services or materials to a construction project. Despite this fact, very often those persons find that the owner has not set aside this money and that their claim to a lien against the premises is lower in priority to those of other secured creditors of the owner. [...] The Act requires the owner to withhold money which has already been earned from those who are entitled to it. [...] The present notional holdback permits owners to retain money belonging to those who have worked on an improvement long after it would be payable if there was no legislation. Thus, the holdback operates as an interest-free loan, used to help finance the owner’s project. This was not the intention of those who created the holdback system, but it has become one of the effects.²⁸⁷

During the Consultation Process, some stakeholders expressed concerns about the timing of the release of holdback on large projects, the assertion by owners of set-offs against the holdback funds after the expiry of the lien period, and the inability of some to recover holdback funds at all.

In this regard, the following issues were considered:

²⁸⁵ Kevin Patrick McGuinness, *Construction Lien Remedies in Ontario* (Toronto: Carswell) at 74 [McGuinness].

²⁸⁶ “Lien Holdback is not for Deficiencies or Incomplete Work”, *Ontario Association of Architects* (December, 2012), online: <www.oaa.on.ca/oaamedia/documents/JointOAAOGCAStatementreUseofHoldbackisnotfordeficienciesDecember2012.pdf>; See also Neil S. Abbott & Erica Maidment, “When is holdback no longer holdback?” (October 2014), online: <www.gowlings.com/KnowledgeCentre/article.asp?pubID=3756>.

²⁸⁷ Discussion Paper on the Draft Construction Lien Act, Ministry of the Attorney General, November 1980 at 13-14 [Discussion Paper].

- Amount of Holdback
- The Definitions of Substantial Performance and Completion
- Finishing Holdback
- Mandatory Release of Holdback
- Phased, Annual and Segmented Release of Holdback
- Deficiency Holdback
- Use of Financial Instruments or Cash for Holdback Purposes

2. Amount of Holdback

2.1 Context

The statutory minimum holdback is defined under subsection 1(1) of the *Act* as “10 per cent of the value of the services or materials supplied under a contract or subcontract required to be withheld from payment by Part IV”. The reasons for setting the holdback at 10 percent were explained by the Ministry of the Attorney General in 1980 as follows:

Traditionally, the holdback rate has been set at the prevailing margin of profit within the construction industry. Where the holdback relates to the profit, the contractor and subcontractor receive enough payment to satisfy their obligations to those who supply services or materials under agreement with them. The current rate of profit in the construction industry is no longer near 15%. It now runs closer to 5%. [...] Reduction of the holdback to the actual levels of profit, approximately 5%, would mean its virtual elimination. This would not be acceptable to most segments of the industry. [...] The 10% figure seems to be a more reasonable rate of holdback [...].²⁸⁸

The statutory holdback is also set at 10% of the contract price under the *Alberta Act*²⁸⁹ (although it is called the “lien fund” under that statute), the *B.C. Act*,²⁹⁰ the *Newfoundland and Labrador Act*,²⁹¹ the *Nova Scotia Act*,²⁹² the *Saskatchewan Act*,²⁹³ the *Northwest Territories Act*²⁹⁴ and the *Yukon Act*.²⁹⁵

²⁸⁸ *Ibid* at 13-10.

²⁸⁹ *Alberta Act*, s 18.

²⁹⁰ *B.C. Act*, s 4.

²⁹¹ *Newfoundland and Labrador Act*, s 12.

²⁹² *Nova Scotia Act*, ss 13(2).

²⁹³ *Saskatchewan Act*, s 34.

²⁹⁴ *Northwest Territories Act*, s 6.

²⁹⁵ *Yukon Act*, s 6.

Under the *New Brunswick Act*²⁹⁶ and under the *P.E.I. Act*²⁹⁷ the holdback is set at 20% where the value of the work and materials supplied does not exceed \$15,000. Where the value of the work is less than \$15,000, the holdback is set at 15%.

Under the *Manitoba Act* the holdback is set at 7.5%.²⁹⁸

2.2 Summary of Stakeholder Views

The vast majority of stakeholders support maintaining the holdback at the current rate of 10%.²⁹⁹

Many commented that the holdback should neither be reduced nor increased and that, should the amount of holdback be increased, contractors would carry higher costs translating to higher costs for owners.³⁰⁰

- a) For example, Metrolinx submitted that the 10% holdback ties up a significant but reasonable portion of capital and it should not be changed.³⁰¹
- b) The Ontario Road Builders' Association took a similar position, explaining that a change in the holdback amount (either an increase or a decrease) will create an industry wide financing and cash flow change. In addition the Ontario Road Builders' Association noted that for a large section of its members, "changes in the holdback are a double-edged sword because many members operate between large contractors and smaller sub-contractors, which mean they alternate between wanting the benefits and / or bearing the burdens of holdback issues".³⁰²
- c) Union stakeholders firmly oppose any reduction in the statutory holdback requirements as they advise generally that it is an amount necessary for the protection of lower tiers of the contractual pyramid.³⁰³
- d) A limited number of stakeholders however, suggested that a reduction of the holdback percentage could reduce costs and improve cash-flow for contractors and subcontractors.³⁰⁴ For example, the Canadian Bankers Association recommended a reduction in the holdback to 5%.³⁰⁵

²⁹⁶ *New Brunswick Act*, ss 15(3).

²⁹⁷ *P.E.I. Act*, s 14.

²⁹⁸ *Manitoba Act*, s 24(1).

²⁹⁹ Mississauga Submissions to the CLA Review at 14b; City of Toronto Submissions to the CLA Review at 2; Colleges Ontario Submissions to the CLA Review at 1; COCA Submissions to the CLA Review at 5; OASBO and OPSBA Submissions to the CLA Review at 1; OGCA Summary to the CLA Review at 4; OPWA Submissions to the CLA Review at 1; York Region Submissions to the CLA Review at 1.

³⁰⁰ Mississauga Submissions to the CLA Review at 14b.

³⁰¹ Metrolinx Submissions to the CLA Review at 2.

³⁰² ORBA Submissions to the CLA Review at 2.

³⁰³ Local 793 Submissions to the CLA Review at 2; LIUNA 183 Submissions to the CLA Review at 3.

³⁰⁴ CIQS Submissions to the CLA Review at 22.

³⁰⁵ CBA Submissions to the CLA Review at 1.

- e) The Surety Association of Canada submitted that it would support a recommendation for “a reduction in the amount of the holdback on contracts where payment bonds are provided, while holdback would remain at 10% where payment bonds are not provided”.³⁰⁶

2.3 Analysis and Recommendations

The quantum of holdback currently provided for under the *Act* is widely accepted among the stakeholders. The stakeholders’ submissions and the EKOS Survey indicate that the majority of stakeholders find the current amount of holdback appropriate. It is high enough to set aside a significant amount of money for the protection of sub-trades and yet low enough to keep funds flowing down the payment chain. In addition, the existing amount of holdback is generally in line with most other Canadian jurisdictions.

Despite the submission of the Surety Association of Canada we did not receive other submissions in relation to a reduction of holdback for bonded projects. Accordingly, we do not propose to make a recommendation to reduce (or increase) the quantum of the holdback.

Recommendation
<ul style="list-style-type: none"> ➤ The amount of holdback should remain at the current amount of 10% of the value of the services, materials and equipment actually supplied to the improvement.

3. The Definitions of Substantial Performance and Completion

3.1 Context

Substantial performance of a contract may be determined by a certification or a declaration to that effect. Section 2 of the *Act* sets out the mechanism for substantial performance as follows:

Contracts, substantial performance and completion

When contract substantially performed

- 2. (1) For the purposes of this Act, a contract is substantially performed,
 - (a) when the improvement to be made under that contract or a substantial part thereof is ready for use or is being used for the purposes intended; and
 - (b) when the improvement to be made under that contract is capable of completion or, where there is a known defect, correction, at a cost of not more than,
 - (i) 3 per cent of the first \$500,000 of the contract price,
 - (ii) 2 per cent of the next \$500,000 of the contract price, and

³⁰⁶ SAC Submissions to the CLA Review at 6.

(iii) 1 per cent of the balance of the contract price.

Idem

(2) For the purposes of this Act, where the improvement or a substantial part thereof is ready for use or is being used for the purposes intended and the remainder of the improvement cannot be completed expeditiously for reasons beyond the control of the contractor or, where the owner and the contractor agree not to complete the improvement expeditiously, the price of the services or materials remaining to be supplied and required to complete the improvement shall be deducted from the contract price in determining substantial performance.

When contract deemed completed

(3) For the purposes of this Act, a contract shall be deemed to be completed and services or materials shall be deemed to be last supplied to the improvement when the price of completion, correction of a known defect or last supply is not more than the lesser of,

(a) 1 per cent of the contract price; and

(b) \$1,000.

Accordingly, statutory substantial performance occurs when the improvement or a substantial part of it is ready for use or is being used for the intended purpose, and when the improvement can be completed (or a defect corrected) at a cost of not more than three percent of the first \$500,000, two percent of the next \$500,000 and one percent of the balance, of the contract price.³⁰⁷ These amounts and percentages have not been modified since 1983.

The concept of substantial performance does not apply to subcontracts; however section 33 of the *Act* provides for a voluntary system for the certification of “completion” of subcontracts which also establishes the time within which the completed subcontractor’s lien expires.³⁰⁸ This voluntary system may give a subcontractor expedited access to holdback funds,³⁰⁹ but it is not mandatory.³¹⁰

3.2 Summary of Stakeholder Views

A number of stakeholders submitted that it would be appropriate to update or review the minimum requirements for substantial performance under section 2(1) of the *Act*, to take into account a number of factors.³¹¹ In summary:

³⁰⁷ *Ontario Act*, s 2(1).

³⁰⁸ See also Duncan Glaholt & David Keeshan, *The 2016 Annotated Construction Lien Act* (Toronto: Carswell, 2015) at 255 [Annotated Act].

³⁰⁹ *Ontario Act*, s 25. See also: Howard Krupat, “Holdback Can Be Released Early? Understanding Early Holdback Release Under Ontario’s Construction Lien Act” *Mondaq* (2014), online: <<http://www.mondaq.com/canada/x/339304/Building+Construction/Holdback+Can+Be+Released+Early+Understan ding+Early+Holdback+Release+Under+Ontarios+Construction+Lien+Act>>.

³¹⁰ “Should the Holdback be Reduced to 5 percent?” *The GTA Construction Report*, May 2007 at A5.

³¹¹ City of Toronto Submissions to the CLA Review at 2; OBA CLA Reform Committee Submission to the CLA Review at 20; COCA Submissions to the CLA Review at 8; OAA Submissions to the CLA Review at 5; York

- a) The Council of Ontario Construction Associations, suggested that the *Act* should be amended to modernize the criteria for substantial performance and update the definition to reflect inflation since 1983. Further, the Council of Ontario Construction Associations suggested the definition should be shifted to the regulations under the *Act* so that it may be updated more often in the future.³¹²
- b) In relation to the traditional delivery model (i.e. as opposed to the AFP model) Infrastructure Ontario submitted that the *Act* should be revised to incorporate specific criteria for determining the achievement of substantial performance and suggested that reductions in the minimum requirements might result in the release of funds while there are still substantial defects and deficiencies outstanding.³¹³
- c) The Ontario Sewer and Watermain Construction Association submitted that when changes are made to the rules for substantial performance, they should be the same for all contracts, including sub-contracts.³¹⁴
- d) The Toronto Transit Commission agreed in part with revisions, submitting that section 2(1) should remain the same, while section 2(2) should be clarified to show that the amount being “deducted from the contract price” should also be deducted from the “cost to complete or correct” to be mathematically consistent.³¹⁵
- e) The Ontario Association of Architects submitted that the concept of substantial performance should be independently applied at the design phase and the contract administration phase as architects are often involved at each of these distinct project phases. The Ontario Association of Architects submitted that such a multiple substantial performance would negate the current situation where the statutory holdback is released after total completion of the architect’s services being the end of the twelve-month warranty review of the work.³¹⁶

In addition, certain stakeholders recommended that consideration should be given to the provision governing the deemed completion value under section 2(3) and that this provision should be updated to reflect inflation from 1983.³¹⁷

A number of stakeholders submitted that the status quo should remain in effect with respect to the requirements for a certificate of substantial performance.³¹⁸

Region Submissions to the CLA Review at 2(e); and TTC Submissions to the CLA Review at 9. The TTC also submitted that the s 2(2) amount should be deducted from the “cost to complete or correct”, not just from the “contract price”.

³¹² COCA Submissions to the CLA Review at 8.

³¹³ IO Submissions to the CLA Review at 4.

³¹⁴ OSWCA Submissions to the CLA Review at 5.

³¹⁵ TTC Submissions to the CLA Review at 9

³¹⁶ OAA Submissions to the CLA Review at 3.

³¹⁷ OAA Submission to the CLA Review at 2.

³¹⁸ CIQS Submissions to the CLA Review at 3; OASBO and OPSBA Submissions to the CLA Review at 2; OPWA Submissions to the CLA Review at 3; ORBA Submissions to the CLA Review at 2.

3.3 Analysis and Recommendations

According to the Bank of Canada, the applicable rate of inflation accounts for the consumer price index over the 33 years (i.e. 1983 to 2016) would be an approximate increase of 120%.³¹⁹ In this regard, if you assume generally that this inflation rate is applicable for the \$500,000 stipulated in section 2(1)(b)(i) and (ii) of the *Act*, then the 2016 amount would be approximately \$1,110,000.

The OBA CLA Reform Committee recommended that we consider increasing the amount to an even \$1,000,000 for the purposes of section 2(1).³²⁰ We see no reason to disagree with this figure as it largely accounts for inflation from 1983 to the present.

Similarly, the \$1,000 deemed completion value under section 2(3) of the *Act* could also be updated to reflect inflation. In this case, we are of the view that an appropriate value for the deemed completion is \$5,000.

Recommendations
<ul style="list-style-type: none"> ➤ Section 2(1) of the <i>Act</i> should be amended to provide that a contract is substantially performed when the improvement or a substantial part thereof is ready for use or is being used for the purposes intended and if it is capable of completion at a cost of no more than 3 percent of the first \$1,000,000.00 of the contract price, 2 percent of the next \$1,000,000.00 of the contract price, and 1 percent of the balance. ➤ Section 2(3) of the <i>Act</i> should be amended to provide that “a contract shall be deemed to be completed and services or materials shall be deemed to be last supplied to the improvement when the price of completion, correction of a known defect or last supply is not more than the lesser of (a) 1 percent of the contract price; and (b) \$5,000.”

4. Finishing Holdback

4.1 Context

Under the *Act*, when a project has been certified substantially performed, the payer upon the contract must retain a separate holdback, called “finishing holdback” equal to 10% of the price of the remaining services to be supplied after the date certified to be the date of substantial performance.³²¹ The finishing holdback period expires 45 days after the earliest of the date of last supply or the date of total completion of the project.³²² The intent of this provision is to provide the same protection to persons who supply materials and services to the project during its final stages as those who supply materials and services in earlier stages, with separate but similar

³¹⁹ Bank of Canada inflation calculator, online: <<http://www.bankofcanada.ca/rates/related/inflation-calculator/>>.

³²⁰ OBA CLA Reform Committee Submission to the CLA Review at 16.

³²¹ *Ontario Act*, s 22(2).

³²² *Ontario Act*, s 27.

statutory rules.³²³ In 1982, the Attorney General’s Advisory Committee explained the reason for the introduction of the holdback for finishing work, as follows:

Because the early release of holdback would jeopardize the finishing trades, subsection 2 creates a second holdback, requiring the retention of 10 per cent of the price of all services and materials supplied from the day certified as the day the contract was substantially performed to the day it was completed.³²⁴

Under the *Act*, where a contractor (or a supplier) supplies services and materials both before and after certification of substantial performance, subsection 31(4) applies and, in effect, splits the contractor’s lien into two separate liens.³²⁵

Regarding the manner in which other provinces treat the issue of finishing holdback:

- a) After the issuance of a certificate of substantial performance in Alberta, the owner must retain 10% of the price of the remaining work (called the Minor Lien Fund) for a period of 45 days from the date of completion of the contract.³²⁶
- b) After the issuance of a certificate of substantial performance in Saskatchewan, the payer on the contract must maintain a separate holdback for the remaining work to be completed,³²⁷ which it must then release 40 days after the contract is completed.³²⁸
- c) After the issuance of a certificate of substantial performance in Manitoba, the *Manitoba Act*, like Ontario, Alberta and Saskatchewan, provides for situations where a contract or subcontract has been substantially performed and where services and materials are provided after substantial performance.³²⁹ Upon substantial performance of the contract, the person primarily liable for payment under the contract shall deduct 7.5% of each payment for the remaining work to be done and retain that amount for at least 40 days after the work has been completed.³³⁰
- d) The concept of “substantial performance” does not exist under the *B.C. Act*. In British Columbia, contracts and subcontracts alike can only be certified complete and there is no separate holdback for finishing work.
- e) Nova Scotia, Northwest Territories and the Yukon do not provide for a separate holdback for finishing work. Nova Scotia, however, is considering formally adopting a separate holdback for finishing work. Currently the *Nova Scotia Act* provides for a general

³²³ McGuinness, *supra* at 81.

³²⁴ Report of the Attorney General’s Advisory Committee on the Draft Construction Lien Act, Letter of Transmittal to the Honourable R. Roy McMurtry, Q.C. Attorney General for Ontario, April 8, 1982 in Duncan Glaholt & David Keeshan, *The 2016 Annotated Construction Lien Act* (Toronto: Carswell, 2015) at 768 [AG Report].

³²⁵ *Ontario Act*, s 31(4).

³²⁶ *Alberta Act*, s 23.

³²⁷ *Saskatchewan Act*, s 43.

³²⁸ *Saskatchewan Act*, s 43(1)(b).

³²⁹ *Manitoba Act*, s 44.

³³⁰ *Manitoba Act*, s 24(2).

holdback which is applicable to finishing work. Sixty days after substantial performance of the contract, the amount of the general holdback may be reduced to 2.5% of the value of the work completed under the contract.³³¹ This is not a separate holdback, but a continuation of the basic holdback which must be maintained until the project is completed.

- f) The Law Reform Commission of Nova Scotia issued a final report in March 2013 suggesting various amendments to the *Nova Scotia Act* which ultimately recommended that a separate holdback for finishing work (i.e. 10% of the work remaining to be done following substantial performance) be implemented.³³²

4.2 Summary of Stakeholder Views

Most of the stakeholders who made submissions on the issue of finishing holdback were opposed to the elimination of the finishing holdback.³³³ For example, the Council of Ontario Construction Associations submitted that “the finishing trades need the protection of the [Act]” and that, should the definition of substantial performance is modernized as the Council of Ontario Construction Associations has recommended, “the value and importance of the finishing holdback will increase accordingly”.³³⁴ In considering the impact of removing finishing liens, LIUNA Local 183 submitted that as “the amount of finishing work is typically a fraction of the work already performed, it would be impractical to oppose such a finite holdback and burden the system with civil claims over relatively small amounts”.³³⁵

Some stakeholders, however, submitted that finishing holdback is a duplication of the basic holdback and that it is often irrelevant and does not seem to advance an important policy goal.³³⁶ Specifically, the Canadian Institute of Quantity Surveyors stated, “the holdback for finishing work acts as a crutch and excuse for not being diligent in determining substantial performance”.³³⁷

4.3 Analysis and Recommendations

Most participating stakeholders agreed that the elimination of holdback for finishing work would be unfair to contractors who supply services and materials after substantial performance (and for certain types of subcontractors, such as landscapers, most or all of their services and materials are often supplied after that time). The current provisions align with the legislation in the other

³³¹ *Manitoba Act*, s 13(3).

³³² Law Reform Commission of Nova Scotia, “Final Report Builders’ Lien Act” (March 2013) at 13 [Nova Scotia Final Report].

³³³ City of Toronto Submissions to the CLA Review at 2; LIUNA 183 Submissions to the CLA Review at 4; Metrolinx Submissions to the CLA Review at 2; OAA Submissions to the CLA Review at 2-3; York Region Submissions to the CLA Review at 1.

³³⁴ COCA Submissions to the CLA Review at 10.

³³⁵ LIUNA 183 Submissions to the CLA Review at 4.

³³⁶ ORBA Submissions to the CLA Review at 3.

³³⁷ CIQS Submissions to the CLA Review at 2-3.

Canadian jurisdictions where the concept of substantial performance was adopted, and is applied, to permit an earlier release of holdback than would otherwise occur after completion.³³⁸ (In Nova Scotia, where there is no separate holdback requirement for finishing work, the legislature is considering introducing it.³³⁹)

Given the support for maintaining the current finishing holdback provisions, and the corresponding limited support for removing the provision, we see no credible reason to jeopardize the rights of the subcontractors that rely on a finishing holdback at the end of a project.

Recommendation

- The finishing holdback provisions of the *Act* should remain unchanged.

5. Mandatory Release of Holdback

5.1 Context

Currently, sections 26 of the *Act* permits, rather than requires, the release of basic holdback as follows:

Payment of basic holdback

26. Each payer upon the contract or a subcontract **may, without jeopardy, make payment** of the holdback the payer is required to retain by subsection 22 (1) (basic holdback), so as to discharge all claims in respect of that holdback, where all liens that may be claimed against that holdback have expired as provided in Part V, or have been satisfied, discharged or provided for under section 44. [Emphasis added]

Section 25 of the *Act* provides for the release of holdback in respect of completed subcontractors and is also permissive rather than mandatory. Section 25 provides as follows:

Payment where subcontract certified complete

25. Where a subcontract has been certified complete under section 33, each payer upon the contract and any subcontract **may, without jeopardy, make payment** reducing the holdbacks required by this Part to the extent of the amount of holdback the payer has retained in respect of the completed subcontract, where all liens in respect of the completed subcontract have expired as provided in Part V, or have been satisfied, discharged or provided for under section 44 (payment into court). [Emphasis added]

³³⁸ *Alberta Act*, s 21(1); *Manitoba Act*, s 24(2); *Ontario Act*, s 22(2); *Saskatchewan Act*, s 43(1); and *Nova Scotia Act*, s 13(3).

³³⁹ Nova Scotia Final Report, *supra* at 13.

Under section 32 of the *Act*, the date of substantial performance is determined by the payment certifier, and must be set out in a certificate of substantial performance, or if there is no payment certifier by the owner and the contractor jointly, at the request of the contractor.

Not only is the certification of substantial performance mandatory upon application (ss. 32(1)), if achieved, but any person who fails to make a determination within a reasonable amount of time after receipt of an application may be found liable for damages “to anyone who suffers damages as a result” (ss. 32(3)). Publication of the certificate triggers the commencement of the preservation period.

Significantly, the concept of “substantial performance” does not exist in all Canadian provinces. It was introduced in Ontario to address the issue of delay in holdback release. Prior to the introduction of this concept, the holdback could not be released until the contract work was certified complete, no matter how small the outstanding amount of work, and this caused cash flow issues in the industry.³⁴⁰ The policy for the introduction of the doctrine in the *Mechanics’ Lien Act* in the late 1960s was as follows:

The burden which the holdback imposes increases in direct proportion to the length of time that the holdback is retained. However, the benefit of the holdback decreases as the project nears completion, because the chances of either the contractor or a principal subcontractor becoming insolvent at this stage of the project are low. The purpose of the inclusion of the substantial performance concept was to speed the release of the holdback, particularly in the case of major building projects.³⁴¹

Once all liens that may be claimed against the holdback have expired, the funds lose their status as holdback and become merely funds owing to the contractor pursuant to the contract.³⁴² When this occurs, the owner may set-off any debts or claims it has against the contractor, whether related to the project or not.³⁴³ While section 30 of the *Act* prohibits set-off against the holdback, it does not otherwise prohibit the deduction of costs to rectify deficiencies and to complete work. The ability to set-off in such a manner accords with a basic principle underlying the *Act* being that, apart from the holdback, in protecting those who supply work and materials, the owner is not to be prejudiced.³⁴⁴

However, a number of stakeholders have proposed that the release of holdback should not be permissive, but mandatory.

³⁴⁰ AG Report, *supra* at 800-807.

³⁴¹ *Ibid* at 801.

³⁴² *Ontario Act* at ss 22, 26 and 27.

³⁴³ *Ontario Act* at ss 17(3) and 30.

³⁴⁴ *Bestdoor Co. v Toronto Economic Development Corp.*, 2005 CarswellOnt 1708 (Sup Ct J) at para 18. See also *Ontario Act* at s 12.

- a) Subsection 41(1) of the *Saskatchewan Act*³⁴⁵ allows subcontracts to be certified as substantially performed. Specifically, section 41(1) states that “at the request of the subcontractor, the payment certifier ... shall, within seven days after the day of the request ... determine whether a subcontract has been substantially performed” and, where he or she determines that it has been substantially performed, “certify the substantially performance by signing a certificate in the prescribed form and delivering it to the subcontractor”.³⁴⁶ The *Saskatchewan Act* also imposes liability for refusal to certify under section 41(2) pursuant to section 42.³⁴⁷

Under subsection 43(1) of the *Saskatchewan Act*, where a contract has been certified as being substantially performed, each payer on the contract and any subcontract *shall* (if money is due and payable under the contract or subcontract) make payment of the holdback amount calculated as of the day of the certification of substantial completion forty days after the certificate is given. The payer must also make payment of the holdback retained after the day of substantial performance, 40 clear days after the contract is complete (or abandoned).³⁴⁸

- b) Where a subcontract has been substantially performed, section 45 of the *Saskatchewan Act* requires that each payer on the contract (or subcontract) shall (if money is due and payable) make payment reducing the holdback by the amount of the holdback retained in respect of the substantially performed subcontract 40 clear days following the date on which a copy of the certificate of substantial completion being given pursuant to section 41 as described above.³⁴⁹

5.2 Summary of Stakeholder Views

A number of stakeholders recommended the mandatory release of holdback, as the current uncertainty adversely affects a contractor’s ability to plan and to accept contracts for new work.³⁵⁰

- a) The OBA CLA Reform Committee and the Ontario General Contractor’s Association submitted that changing the release of holdback to be mandatory upon expiry of the lien period (provided no liens have been registered) would remedy the unfairness of set-off claims that are brought without notice and only after the expiration of liens.³⁵¹

³⁴⁵ *Saskatchewan Act*, s 41(1).

³⁴⁶ *Saskatchewan Act*, s 41(1).

³⁴⁷ *Saskatchewan Act*, s 42.

³⁴⁸ *Saskatchewan Act*, s 43(1).

³⁴⁹ *Saskatchewan Act*, s 45.

³⁵⁰ CBA Submissions to the CLA Review at 2; CIQS Submissions to the CLA Review at 2-3; GTSWCA Submissions, to the CLA Review at 3; OALA Submissions to the CLA Review at 2; OSPE Submissions to the CLA Review at 5.

³⁵¹ OBA CLA Reform Committee Submissions to the CLA Review at 22; OGCA Submissions to the CLA Review at 6. See also ORBA Submissions to the CLA Review at 3.

- b) Prompt Payment Ontario submitted that, “holdback monies should be solely for the purpose of providing security to suppliers and sub-contractors who have not been paid by a contractor. Holdback monies should not be treated as security for performance of the contract”.³⁵²

Prompt Payment Ontario also submitted that mandatory rather than optional early release of holdback upon the certification of completion of subcontracts would be preferable and would better balance the interests of improved cash flow with the need to protect trades.³⁵³

- c) The Ontario Association of Architects submitted that, “regardless of which triggering mechanism is incorporated in the [Act] it should be mandatory and not left to the discretion of the ‘payer’ (owner) as this may not improve the cash flow under a contract”.³⁵⁴ The Council of Ontario Construction Associations proposed that the release of holdback could become mandatory if a subcontractor requests such release, stating this would achieve the goal of making owners bear the burden of financing a project without putting owners in the jeopardy of paying the holdback twice.³⁵⁵
- d) The Ontario Sewer and Watermain Construction Association submitted that holdback should be mandatory for work performed and materials supplied on projects lasting more than one year.³⁵⁶

Some stakeholders submitted that they do not support the mandatory/automatic holdback release³⁵⁷ or, alternatively, that the timing of release of the holdback should be negotiated in the terms of the contract.³⁵⁸ Others oppose the mandatory release of holdback after the expiration of lien rights because it is not flexible and may not be well suited for all projects.³⁵⁹

- a) While the Surety Association of Canada asserted that contractual payment terms should be freely agreed to by parties, it also stated that it would be in favour of a recommendation that required parties to resume payment under agreed contractual terms “when the requirements under the *Act* to withhold holdback and other funds is satisfied or expires”.³⁶⁰
- b) The Ministry of Transportation submitted that, “adding mandatory provisions for early release of holdback will create multiple administrative processes, increase inefficiencies

³⁵² PPO Submissions to the CLA Review at 17.

³⁵³ PPO Supplementary Submissions to the CLA Review at 17.

³⁵⁴ OAA Supp. (3) Submissions to the CLA Review at 6.

³⁵⁵ COCA Submissions to the CLA Review at 10.

³⁵⁶ OSWCA Submissions to the CLA Review at 5.

³⁵⁷ City of Toronto Submissions to the CLA Review at 2;

³⁵⁸ Colleges Ontario Submissions to the CLA Review at 1. See also ORBA Supplementary Submissions to the CLA Review at 3.

³⁵⁹ AMO Submissions to the CLA Review.

³⁶⁰ Surety Association of Canada Submissions to the CLA Review at 7.

and timelines to confirm quality of work, invoicing, lien status and to process payments”.³⁶¹

A significant concern raised by owner stakeholders, with respect to the mandatory release of holdback relates to an owner’s right to set-off legitimate claims against any amount owing to a contractor, which includes the amount of the holdback once it loses its character as such, in accordance with the *Act*.³⁶²

- a) The Toronto Community Housing Corporation submitted that the mechanism by which owners are able to withhold funds for set-off is often negotiated by contracting parties.³⁶³ Any statutory requirement for automatic holdback release would undermine this current structure, which Toronto Community Housing Corporation submitted allows for balance and would only create an incentive for additional, contractual retainage funds to address deficiencies and other project completion issues.³⁶⁴ Finally, Toronto Community Housing Corporation submitted that a significant additional administrative burden would result for owners from the imposition of a mandatory holdback release regime.³⁶⁵
- b) Although opposed to the mandatory release of holdback, in its submissions the Ontario Road Builders’ Association made some suggestions for the Review’s consideration, in the event that the mandatory release of holdback is recommended. The Ontario Road Builders’ Association submitted that if mandatory release of holdback was to be implemented, it should be subject to (a) a right of payers to continue to withhold amounts necessary to cure defects and complete work and (b) the right of parties to contract out of the provision in order to efficiently arrange performance security.³⁶⁶

5.3 Analysis and Recommendations

The issue of mandatory release of holdback polarized reactions among stakeholders, with general contractor and subcontractor groups generally advocating for change and owner groups opposed to change.

Section 26 of the *Act* was drafted using permissive language (i.e. “may”) rather than mandatory language (“shall”) to address the end of the owner’s obligation to retain basic holdback (set out under section 22(1)) and to give the owner some certainty with respect to potential liability for making payments. This intention is reflected in the comments found in the Ministry of the Attorney General Discussion Paper from 1980, which states as follows:

³⁶¹ MTO Submissions to the CLA Review at 2.

³⁶² IO Submissions to the CLA Review at 3; Metrolinx Submissions to the CLA Review at 2; OPWA Submissions to the CLA Review at 1-2; TTC Submissions to the CLA Review at 2; York Region Submissions to the CLA Review at 1, 3.

³⁶³ TCHC Submissions to the CLA Review at 3.

³⁶⁴ TCHC Submissions to the CLA Review at 3.

³⁶⁵ TCHC Submissions to the CLA Review at 3.

³⁶⁶ ORBA Supplementary Submissions to the CLA Review at 3.

The Draft Act contains provisions designed to provide for the conclusive determination of the date of substantial performance of a contract or the completion of a subcontract. The expiration of lien rights under this Act is directly related to these dates. It is hoped that these modifications to the law will enable the speedy release of holdback funds, without jeopardy to owners or disregard for the rights of any person who has worked on the improvement.³⁶⁷

At the time of the 1983 modifications, the effect of section 26 on an owner's right to set-off was not directly noted as a primary concern. However, as noted by some of the stakeholders in the Consultation Process, contractors and subcontractors are not opposed to the application of the owner's right of set-off where appropriate and necessary, but they take issue with the potential for abuse of the permissive language. This concern relates to exaggerated amounts being retained, without prior notice, for extended periods of time. In fact, concern was expressed that some owners intentionally wait until after the substantial performance liens expire before announcing their intention to set off, such that the subcontractors are "ambushed" and their withheld funds go to satisfy the general contractor's contractual obligations to the owner.

Recognizing the necessity of a balance between the (sub)contractors' right to be paid in full and the owner's right to set-off in the event of a legitimate claim, the Ontario Road Builders' Association suggested that mandatory release of holdback language in the *Act* should be aligned with the language in the *Saskatchewan Act*. In doing so, the Ontario Road Builders' Association suggested that the application of such a provision should be subject to a payer's right of set off.³⁶⁸

As noted above, the *Saskatchewan Act* provides that "each payer on the contract and any subcontract shall, **if the money is otherwise due and payable under the contract or subcontract ... make payment**".³⁶⁹ If the *Act* is to be amended to provide some certainty to contractors and subcontractors regarding payment of the holdback, in order to be effective and balanced, it could be amended to include language similar to the language adopted in the *Saskatchewan Act*.

From a contractor/subcontractor perspective, the *Saskatchewan Act* language may discourage the potential abuse of payer set-offs as it would place an onus on a withholding owner to show that the set-off and the amount set-off are legitimate, so long as liability for interest and costs were to apply for failure to show that the set-off was warranted and in the appropriate amount, interest and cost consequences could be imposed. However, this approach would not address the concern regarding the potential exposure to "ambush" set-off.

³⁶⁷ Discussion Paper, *supra* at 14-15.

³⁶⁸ ORBA Submissions to the CLA Review at 8.

³⁶⁹ *Saskatchewan Act*, s 43(1).

Recommendation

- The *Act* should be amended to provide for the mandatory release of holdback, but **not** the mandatory early release of holdback; that is to say, “may” should be revised to “shall” in sections 26 and 27 of the *Act*. The owner should be required to publish a notice of non-payment/set-off to interdict the obligation to pay where the owner, in good faith, intends to assert a set-off in relation to the contract (as further provided for in Chapter 8 – Promptness of Payment).

6. Annual, Phased and Segmented Release of Holdback

6.1 Context

The phasing of construction projects is an increasingly common practice within the construction industry, particularly with respect to larger-scale projects which span over a number of years, including public-private partnership / AFP projects. Phasing may involve multiple prime contracts for each phase of the construction process.

Other Canadian jurisdictions allow for phased partial release of holdback on larger construction projects. For example, Manitoba, Saskatchewan and Newfoundland and Labrador allow for early or progressive release of holdback to take place on larger projects, with Saskatchewan allowing for either progressive release or annual release of holdback for phased construction projects.³⁷⁰

Some commentators have suggested that the consistent adoption of phased substantial completion or phased release of holdback across the provinces would be beneficial, particularly to those who perform early work packages. However, other considerations must also be taken into consideration including the relevance of the minimum standards set out in section 2 of the *Act*, the implications of phased holdback release on milestone payments, and how the practice would affect trades that carry on work through various phases of a project.

- a) In Manitoba, the holdback may be reduced when an individual subcontract is substantially performed in accordance with the requirements of subsection 25(2).³⁷¹ Subsection 25(5), also drafted to be permissive, allows for a reduction in the holdback once a subcontract has been certified substantially performed. Therefore, subsections 25(5) through 25(8) govern the mandatory issuance of certificates of substantial

³⁷⁰ Vince Versace, “Better understanding of holdbacks needed across the country” *Daily Commercial News* (June 11, 2013), online: <<http://dailycommercialnews.com/Associations/News/2013/6/Better-understanding-of-holdbacks-needed-across-the-country-DCN055701W/>>. In Manitoba, release of holdback can occur when an individual subcontract is substantially performed, and partial release of holdback may occur when any identified project phase of the main contract is substantially performed. Manitoba Association of Architects & Winnipeg Construction Association, “Proposed procedure for building takeover and completion of construction contract inspections, specific retention and Builders Liens holdback” (December 24, 2001) WCA / MAA Technical Bulletin Series – Technical Bulletin #8, online: <<http://www.mbarchitects.org/docs/TB-08.pdf>>.

³⁷¹ *Manitoba Act*, s 25(2).

performance of subcontracts, as between the contractor and a subcontractor³⁷² or as between a subcontractor and a sub-subcontractor.³⁷³ A subcontractor who has applied for, but has not received, a certificate of substantial performance, may apply to a judge for an order declaring that the subcontract has been substantially performed.³⁷⁴

- b) The *P.E.I. Act* creates a statutory scheme akin to a phased or annual release of holdback scheme.³⁷⁵ This scheme, however, only applies to government contracts for highway construction, where the contract provides that the completion of the work is scheduled for the calendar year following the calendar year in which the contract is signed. The consultant may certify that the work scheduled for completion in the first year has been completed to the consultant's satisfaction. The work so certified is then deemed to have been completed on December 1 of the first calendar year and the owner shall reduce the amount to be retained as holdback by the corresponding portion of the holdback (i.e. depending on the type of project under section 14 the holdback will be 15% of 20%).³⁷⁶
- c) Both the *Saskatchewan Act* and the *Newfoundland and Labrador Act* expressly authorize the phased/annual release of holdback on a broader range of projects than the *P.E.I. Act* does. The *Saskatchewan Act* allows for annual holdback payments on large contracts with a completion schedule longer than a year and for a price (at the time the contract is entered into) in excess of \$25,000,000.
- d) Like the *Saskatchewan Act*, the *Newfoundland and Labrador Act* allows for partial annual release of holdback on larger multi-year construction projects. In 1991, section 12.1 was added to address the release of holdback for contracts with a completion schedule intended to last more than one year for a price in excess of \$20,000,000. In relation to such projects, section 12.1 of the *Newfoundland and Labrador Act* provides that where the contract provides for a schedule longer than 1 year, no proceedings have been commenced to enforce a lien/charge against the holdback and notice of early release has been given and posted, then the holdback can be paid out 30 days after the day notice of early release is completed pursuant to section 12.2.³⁷⁷

Practitioners in Newfoundland and Labrador however have noted that the above provisions are not often applied in practice.

³⁷² *Manitoba Act*, s 25(6).

³⁷³ *Manitoba Act*, s 25(7).

³⁷⁴ *Manitoba Act*, s 25(8).

³⁷⁵ *P.E.I. Act*, s 14.1.

³⁷⁶ *P.E.I. Act*, s 14.1. See also Bristow et al, *supra* at 6-51.

³⁷⁷ *Newfoundland and Labrador Act*, s 12.1.

6.2 Summary of Stakeholder Views

6.2.1 Early Release Generally

A number of stakeholders submitted that they would support a statutory regime that would allow the release of holdback in tranches upon completion of certain portions of the work, for instance for projects where payment is based on milestones.³⁷⁸

Other stakeholders, however, expressed some concern about releasing holdback in tranches.

- a) The Ontario Association of School Business Officials submitted that, while partial releases of holdback could be considered, this would impose an additional administrative burden on all parties.³⁷⁹ In addition, the holdback would be of a lower value at substantial performance, thereby limiting the amount of funds available for set-offs, which may cause owners to retain deficiency holdbacks.³⁸⁰
- b) Toronto Transit Commission submitted that a permissive, flexible approach to holdback release based on the particularities of each contract, rather than mandatory or prescribed tranches, would be easier to administer and would have a logical connection to the contract work.³⁸¹
- c) Enbridge submitted that if there were changes to phasing-in or phased-released of holdbacks, “this should not affect Enbridge’s ability to use these holdbacks to ensure these above items are completed for critical safety issues, maintenance and operational purposes. Without these holdbacks there may be unintended consequences”.³⁸²
- d) Prompt Payment Ontario explained in its submissions that the release of holdback in tranches would favour early-completing trades (who would presumably receive 100% of their holdback) unlike those trades who supply the bulk of their labour, services and materials near the end of the project and whose holdback recovery would be limited to the amount of holdback left for distribution.³⁸³ Prompt Payment Ontario also submitted that there are ambiguities that are created by the phasing of large projects and recommended that each contracted segment of work should be subject to certification of substantial performance which should be published.³⁸⁴ Prompt Payment Ontario further suggested that the certification of substantial performance should trigger lien rights applicable to that section of work, allowing a portion of holdbacks to be released.³⁸⁵
- e) Toronto Transit Commission submitted that, with respect to design services contracts, both annual releases and percentage completion releases may artificially separate work

³⁷⁸ Enbridge Submissions to the CLA Review at 2; Metropolitan Plumbing & Heating Contractors Association Submissions to the CLA Review at 3; York Region Supplementary Submissions to the CLA Review at 1.

³⁷⁹ OASBO Supplemental (New Issues) Submissions to the CLA Review at 2.

³⁸⁰ OASBO Supplemental (New Issues) Submissions to the CLA Review at 2

³⁸¹ TTC Supplementary Submissions to the CLA Review at 2.

³⁸² Enbridge Submissions to the CLA Review at 2.

³⁸³ PPO Supplemental (New Issues) Submissions to the CLA Review at 4.

³⁸⁴ PPO Submissions to the CLA Review at 17.

³⁸⁵ PPO Submissions to the CLA Review at 17.

for a particular drawing or RFI response into different parts.³⁸⁶ Contract driven milestones could be crafted to ensure the release of holdback for all design work up to the award of the construction contract, provided a certificate of substantial performance is published for that milestone.

Generally, all stakeholders who made submissions with respect to the early release of holdback for services rendered prior to the commencement of construction, agreed that a distinction should be drawn³⁸⁷ between the design service phase and the construction phase³⁸⁸ but opinions varied with respect to its practical application.

- a) The City of Toronto submitted that the distinction should not necessarily be tied to arbitrary time intervals that have no relationship to the project or significant milestones that are being met, as this would make it harder to distinguish work that is being certified from continuing work.³⁸⁹
- b) Taking a different approach, the Consulting Engineers of Ontario submitted that work undertaken by engineers that is not “construction related” should be excluded from the application of the *Act*, while work involving construction-related work, should be subject to it.³⁹⁰
- c) The Ontario Association of Architects submitted that formalizing two phases for substantial performance of the architect’s services should negate the current situation where the statutory holdback is released after total completion of the architect’s services.³⁹¹ The Ontario Association of Architects also submitted that substantial performance should apply to architectural services, in the same manner as it currently applies to contractors,³⁹² and that the concept of substantial performance should apply to both the design phase and the contract administration phase.³⁹³

The Ontario Association of Architects further submitted that the triggering mechanism for the completion of the design portion should be the start of construction.³⁹⁴ In the construction phase, substantial performance of the architect’s services should coincide with substantial performance of the contractor’s work.³⁹⁵ It was also suggested that, in the context of design build contracts, “commencement of the Work” should be redefined to

³⁸⁶ TTC Supplemental (New Issues) Submissions at 3. See also OAA Submissions to the CLA Review at 2-3.

³⁸⁷ City of Toronto Submissions to the CLA Review at 2; CEO Submissions to the CLA Review at 4; OAA Submissions to the CLA Review at 2-3; OASBO-OPSBA Submissions to the CLA Review at 1-2; OSPE Submissions to the CLA Review at 4; and York Region Submissions to the CLA Review at 1.

³⁸⁸ City of Toronto Submissions to the CLA Review at 2-3; CEO Submissions to the CLA Review at 3; OAA Submissions to the CLA Review at 2-3; OASBO and OPSBA Submissions to the CLA Review at 1-2; OSPE Submissions to the CLA Review at 3; and York Region Submissions to the CLA Review at 1.

³⁸⁹ City of Toronto Submissions to the CLA Review at 2.

³⁹⁰ CEO Submissions to the CLA Review at 3. See also OSPE Submissions to the CLA Review at 3.

³⁹¹ OAA Submissions to the CLA Review at 3.

³⁹² OAA Submissions to the CLA Review at 1-2.

³⁹³ OAA Submissions to the CLA Review at 2.

³⁹⁴ OAA Supp. (3) Submissions to the CLA Review at 1-2.

³⁹⁵ OAA Supp. (3) Submissions to the CLA Review at 1-2.

mean the earlier of the date the construction contract is signed or the date of the start of construction.³⁹⁶

- d) Infrastructure Ontario submitted that the *Act* should be revised to incorporate specific criteria for determining the substantial performance of consulting agreements, master services agreements and design and professional services agreements.³⁹⁷

6.2.2 Annual Release

The concept of the annual release of holdback received mixed reactions from stakeholders.

- a) Generally, municipalities and the Ontario Sewer and Watermain Construction Association submitted that they support the annual release of holdback on multi-year contracts.³⁹⁸
- b) The Provincial Building and Construction Trades Council of Ontario stated that any amendments to holdback provisions needs to weight the competing rights of parties who preform work at different stages of a project.³⁹⁹
- c) The Toronto Transit Commission cautioned that, “the proposed solutions of annual or percentage completion releases may work in certain scenarios, however, they may also create artificial distinctions that in practice are difficult to administer but which permissive milestones defined in the contract may avoid”.⁴⁰⁰
- d) On the other hand, the Canadian Bankers Association and York Region opposed the concept of annual release of holdback in their respective submissions, for different reasons.⁴⁰¹
- e) The Canadian Bankers Association and York Region submitted that the conditions or triggering events for the release of holdback should be stated clearly and tied to the work or project completion rather than arbitrary release dates such as calendar dates (e.g. annually).⁴⁰²

6.2.3 Phased Release

Many stakeholders supported the idea of phased release of holdback in general terms.

For example, the Canadian Bankers Association submitted that a reduction in the holdback amount combined with earlier and more frequent releases of holdback would be in the best interests of all stakeholders, as these changes would result in more funds flowing down the

³⁹⁶ OAA Supp. (3) Submissions to the CLA Review at 1-2.

³⁹⁷ IO Supp. (Attachment) to the CLA Review at 4.

³⁹⁸ OSWCA Submissions to the CLA Review at 5.

³⁹⁹ Local 793 and PBCTCO Submissions to the CLA Review at 2.

⁴⁰⁰ TTC Supplemental (New Issues) Submissions to the CLA Review at 2-3.

⁴⁰¹ CBA Submissions to the CLA Review at p. 2, OAA Submissions to the CLA Review at 3; and York Region Supplemental (New Issues) Submissions to the CLA Review at 2.

⁴⁰² CBA Submissions to the CLA Review at 2.

construction pyramid and less funds tied up with owners, leading to earlier and/or more frequent payments to contractors, more timely resolution of disputes between owners and contractors, lower risk of holdback deficiencies, and lower claims for deficiencies when they do occur.⁴⁰³

Other stakeholders also submitted that they would support the release of holdback upon the completion of project phases, as this would accelerate payment for work done in the early stages of a project, without compromising the protection available to trades working later on the project.⁴⁰⁴

Several stakeholders agreed, however, that a “one-size-fits-all” approach to the release of holdback no longer aligns with the realities of the industry and instead a project-specific approach should be adopted.⁴⁰⁵

Some stakeholders made suggestions regarding the practical application of phased release of holdback.

- a) For example, the Consulting Engineers of Ontario submitted that “any revised or new payment statute governing Ontario’s construction and design industry should require the provision for the release of holdback on design services, or other services if they continue to be covered under the *Act* to realistically reflect the nature and completion of the services provided”.⁴⁰⁶
- b) The City of Toronto suggested that holdback of large amounts of project funds over very long periods of time could be addressed through phased certification but that the *Act* would have to offer some flexibility with respect to the length and the definition of phases, it would have to be permissive rather than mandatory about the application of any phased release provisions.⁴⁰⁷
- c) In the same vein, the Ministry of Transportation submitted that it would support permissive provisions allowing the early release of holdback, at the owner's discretion or in accordance with negotiated contract terms, but that mandatory early release provisions would create multiple administrative processes, increase inefficiencies and timelines to confirm quality of work, invoicing, and lien status, and to process payments.⁴⁰⁸

⁴⁰³ CBA Submissions to the CLA Review at 2.

⁴⁰⁴ COCA Submissions to the CLA Review at 8; OPWA Submissions to the CLA Review at 1; PPO Submissions to the CLA Review at 17; ORBA Supplementary Submissions to the CLA Review at 2; Local 793 and PBCTCO Submissions to the CLA Review at 2; Thunder Bay Law Association Submissions to the CLA Review at 1; and York Region Submissions to the CLA Review at 1.

⁴⁰⁵ OGCA Submissions to the CLA Review at 6; TTC Supplementary Submissions to the CLA Review at 2.

⁴⁰⁶ CEO Submissions to the CLA Review at 4.

⁴⁰⁷ City of Toronto Submissions, to the CLA Review at 2. See also Metrolinx Submissions, to the CLA Review at 2.

⁴⁰⁸ MTO Submissions to the CLA Review at 2; see also TCHC Submissions to the CLA Review at 3.

- d) Ontario Road Builders' Association members are generally supportive of increasing the number of dates for the release and early release of holdbacks and submitted that a staged release of holdback similar to the one employed in Saskatchewan would be useful.⁴⁰⁹

The Ontario Road Builders' Association noted that subcontractors who finish their work early in the project schedule may have to increase their subcontractor price significantly in order to be able to manage their cash flow.⁴¹⁰ Some Ontario Road Builders' Association members did caution that administering partial releases of holdbacks might be administratively burdensome and would recommend that early release be implemented as an optional rather than a mandatory change.⁴¹¹

- e) The OBA CLA Reform Committee made some practical suggestions with respect to necessary amendments to the *Act* in order to implement a phased release of holdback regime. The express recognition in the *Act* of holdback release bonds or other forms of holdback security provided by payees would likely alleviate concerns regarding compliance with the *Act*.⁴¹² Further, the *Act* could stipulate that a payer who relies upon such security, or upon the issuance of a Certificate of Completion by a payment certifier and releases holdback funds would not be liable for any deficiency in the holdback fund.⁴¹³

Other stakeholders, however, raised concerns about the potential effects of phased release of holdback.

- a) The Canadian Institute of Quantity Surveyors submitted that early release is normally based on substantial performance of a subcontract or prime contract and that the danger of a where land is under one title is the lack of protection once the holdback on earlier phases is released.⁴¹⁴ The Canadian Institute of Quantity Surveyors also submitted that this issue could likely be overcome by requiring signed lien releases on the early phases of the work.⁴¹⁵

6.2.4 Segmented Release

Specifically with respect to AFP agreements, it has been drawn to our attention that certain AFP projects are conducted such that multiple improvements are built under a single Project Agreement. For example, two hospitals, geographically separate, may be contracted for under a single Project Agreement by a single Project Co. Under the *Act* as it currently stands, a unitary

⁴⁰⁹ ORBA Supplementary Submissions to the CLA Review at 2.

⁴¹⁰ ORBA Supplementary Submissions, to the CLA Review at 2-3.

⁴¹¹ ORBA Supplementary Submissions to the CLA Review at 3.

⁴¹² OBA CLA Reform Committee Submissions to the CLA Review at 24.

⁴¹³ OBA CLA Reform Committee Submissions to the CLA Review at 24.

⁴¹⁴ CIQS Submissions to the CLA Review at 2. See also Local 793 and PBCTCO Submissions to the CLA review at 2 and LIUNA 183 to the CLA Review at 4, where the union stakeholders advised that they "cautiously support" the idea of phased/early release of holdback. OGCA, along with LIUNA Local 183 and Local 793 suggested that the Review consider the approach adopted in the Saskatchewan *Builders' Lien Act*. See OGCA Submissions to the CLA Review at 2.

⁴¹⁵ CIQS Submissions to the CLA Review at 2.

holdback is required, yet the construction of the two buildings may proceed on different schedule, and one could achieve substantial performance before the other. The potential problem would only be exacerbated in the event that the contract called for the construction of a dozen schools, for example. It has been proposed that, in such circumstances, there is no policy reason not to allow the two improvements to be treated separately for the purposes of calculating and releasing holdback, so long as payment certification is applicable and accounting is properly conducted in respect of each improvement.

6.3 Analysis and Recommendations

Numerous stakeholders, including engineers and consultants made submissions to the effect that the current “one-size-fits-all” statutory scheme of the *Act* does not accord with the realities of the construction industry in Ontario today. This issue arises in particular with certain types of AFP projects (roadworks, seasonal work such as landscaping) and with large or “mega-projects”, such as multi-year infrastructure projects.

Arguably, a mechanism for the phased release of holdback based on the completion (or substantial performance) of certain portions, tranches or milestones is already contemplated under subsection 2(2) of the *Act*. This subsection, however, and in particular the words “where the improvement or a substantial part thereof is ready for use or is being used for the purpose intended and [...] where the owner and the contractor agree not to complete the improvement expeditiously”, has not been interpreted by the courts as allowing parties to pre-emptively agree to release the holdback in phases or according to milestones. Instead, in the name of preserving certainty for the benefit of all parties involved in the project, the courts have limited the use of subsection 2(2) by parties.

Part of the difficulty in interpreting section 2 of the *Act* stems from the fact that subsection 2(1) refers to the substantial performance of “a contract” while subsection 2(2) refers to “the improvement”, which is consistent with section 14(1), pursuant to which a lien attaches to “an improvement”. The difficulty that arises, when a single improvement is to be completed under several contracts is that under section 14(1) lien rights still attach to the entire improvement.

Another proposed statutory mechanism for the early release of holdback is the annual release of holdback for projects over a threshold dollar value.

Further, in our view, there is no policy impediment to allowing for the segmentation of holdback where a contract has payment certifier and separate accounts are maintained for each improvement.

Recommendation

- We recommend that the *Act* should be amended to permit partial release of holdback on either a phased or annual basis, if provided for in the construction contract entered into by the parties, subject to a significant monetary and time-based threshold in the case of annual release.
- We also recommend that the *Act* should be amended to allow for the segmentation of holdback for projects involving clearly separable improvements, particularly for AFPs.
- We recommend that there be no provision for mandatory early release of holdback for design consultants in respect of services supplied up to the commencement of construction; but the *Act* permit the designation of a design phase for the purposes of phased release of holdback.

7. Deferral Agreements

7.1 Context

Currently, subsection 2(2) of the *Act* provides for limited exceptions to the basic principle of substantial performance (and corresponding release of holdback) as follows:

(2) For the purposes of this Act, where the improvement or a substantial part thereof is ready for use or is being used for the purposes intended and the remainder of the improvement cannot be completed expeditiously for reasons beyond the control of the contractor or, where the owner and the contractor agree not to complete the improvement expeditiously, the price of the services and materials remaining to be supplied and required to complete the improvement shall be deducted from the contract price in determining substantial performance.

The circumstances in which this section applies and its purpose, were intended as follows:

The purpose of this provision is to provide for the possibility of severing a completed part of an improvement from the improvement as a whole where the completed part is of use to the owner and the remainder of the improvement cannot be completed expeditiously. This may be advantageous to all parties involved in the project, since it will prevent a prolonged and unexpected delay in the release of the holdback.⁴¹⁶

Ontario courts have generally resisted finding that separate contracts for one project involve separate holdbacks that could be released upon the substantial performance of each contract. Rather, the courts have demonstrated a tendency to find that multiple contracts for the same project each form part of one general contract requiring only one holdback.⁴¹⁷

⁴¹⁶ AG Report, *supra* at 707.

⁴¹⁷ *Sanderson Percy & Co v Foster* (1923) 53 OLR 519 (CA); *Bob Dionisi & Sons Ltd. v F.J. Davey Home for the Aged (Algoma)* (1992), 3 CLR (2d) 162 (Ont Ct Gen Div).

Commentators have considered the application of subsection 2(2) as a potential mechanism for the release of holdback on staged or phased projects, referring to a 1992 case, *Bob Dionisi & Sons Ltd. v F.J. Davey Home for the Aged (Algoma)*, where the early release of holdback issue was addressed. The Court considered whether section 2 of the *Act* “contemplated a second or indeed a greater number of uses of the section to provide succeeding releases from the holdback amount, and more generally, whether there was one improvement or three improvements”.⁴¹⁸ The Court held that the release of holdback, after the completion of a phase of the Project, did not comply with section 2 of the *Act*.

Consequently, a contractual term permitting the early release of holdback for a portion of the work is of little use to a contractor “as the release of holdback in respect of a designated portion of the work may leave an owner liable for that holdback”.⁴¹⁹ In a subsequent decision of the Divisional Court, *Soo Mill & Lumber Company Limited v J.J.’s Hospitality Limited* (1996), the Court found that a contract can relate to more than one improvement.⁴²⁰ Although this decision may be relied upon by contractors seeking release of holdback before overall substantial completion, “it leaves subcontractors in a precarious situation because they may not know at the time of contract when the holdback will be paid out nor the extent of the owner’s holdback liability”.⁴²¹

In a more recent case, also decided under section 2 of the *Act*, *Echafauds Plus (Laval) Inc. v RBG Environmental Inc.*,⁴²² Master Wiebe held that an agreement between an owner and contractor to terminate one construction contract, issue a certificate of substantial performance, release holdback and enter a new contract was not consistent with subsection 2(2) of the *Act*, for two reasons. First, there was no evidence that the work was being used or was ready for use for the purpose intended, and second there was no evidence that the purpose of the second agreement was to delay the completion of the first agreement; instead it was intended to serve the commercial convenience of the owner and the contractor. Master Wiebe noted that the intention of s.2 is to create certainty for all parties affected by the *CLA* system, namely the owners, payment certifiers, contractors, subcontractors and suppliers. Therefore, the definition of substantial performance should not be open-ended.

⁴¹⁸ *Ibid* at 88.

⁴¹⁹ *Ibid*. In this case the court considered General Condition GC 5.4.1. of the standard form CCDC2-2008 Stipulated Price Contract which reads as follows:

“5.4.1 When the *Contractor* considers that the *Work* is substantially performed, or if permitted by the lien legislation applicable to the *Place of the Work* a designated portion thereof which the *Owner* agrees to accept separately is substantially performed, the *Contractor* shall, within one *Working Day*, deliver to the *Consultant* and to the *Owner* a comprehensive list of items to be completed or corrected, together with a written application for a review by the *Consultant* to establish *Substantial Performance of the Work* or substantial performance of the designated portion of the *Work*. Failure to include an item on the list does not alter the responsibility of the *Contractor* to complete the *Contract*”.

⁴²⁰ *Ibid*; *Soo Mill & Lumber Company Limited v J.J.’s Hospitality Limited* (1996), 30 OR (3d).

⁴²¹ *Ibid* at 89.

⁴²² *Echafauds Plus (Laval) Inc. v RBG Environmental Inc.*, 2014 ONSC 4744.

In our view, these three cases are indicative of the market reality that owners and contractors, when faced with a commercial incentive to do so, will enter into agreements that defer or “carve-out” the completion of part of the originally contracted work, and, in doing so, will provide for the release of substantial performance holdback whether the improvement is ready for its intended use or not. Some parties call these deferral agreements and some call them “carve-out” agreements. In fact, such agreements are becoming more and more common. The lengths to which parties are prepared to go is perhaps exemplified by the *Echafauds* case, where the owner and contractor actually terminated and then reconstituted their contract in order to allow for a deferral of a portion of the work and the release of holdback. While the issue of deferral agreements was not isolated as an item on the Review’s issues list, the concept of deferral agreements came up in discussion with a number of stakeholders. In these discussions, the support for allowing deferral agreements was strong.

7.2 Analysis and Recommendations

We have been unable to isolate any policy reason that such agreements should not be allowed, so long as they are optional to both the contractor and the owner, provide for certification of the substantial performance of the reduced scope of the contract (without the requirement that the improvement be ready for its intended use), and publication of the certificate of substantial performance. Where a deferral agreement is entered into, the deferred work should then be added to the “finishing” work.

Recommendation
<p>➤ We recommend that the <i>Act</i> should be amended to allow for deferral agreements to be entered into between owners and contractors provided that such agreements are for the purpose of allowing certification and publication of substantial performance, subject to an appropriate threshold.</p>

8. Deficiency Holdback

8.1 Context

While the 10% basic holdback may not have been intended for use by owners in relation to deficiencies, in Ontario and other provinces, such as B.C., some contracts provide for a contractual deficiency holdback in addition to the holdback provided for under the relevant lien legislation.⁴²³

By way of example, contracting parties in the United States make use of the concept of retainage as a form of deficiency holdback. There, the related state legislation merely aims at regulating

⁴²³ Adam Zazada, *So, You’re Dealing with a Lien Holdback*, Clark Wilson LLP (June 2004), online: <<http://www.cwilson.com/resource/newsletters/article/211-dealing-with-a-lien-holdback.html>>.

retainage practices in the industry.⁴²⁴ Commentators have described retainage as “[a] common contract approach to reducing a contractee’s risk that its contractor will fail to perform its contractual obligation” by “withhold[ing] a percentage of the sums due until the work is substantially complete”.⁴²⁵

In that regard, it has been said that “retainage is often a subject of bitter dispute between parties to a construction contract”.⁴²⁶ In order to ameliorate the issue in the US, some states have implemented limitations on the amount that can be subject to retainage on construction contracts. For example, under New York law, retainage is permitted by an owner but only so long as the amount retained is a “reasonable amount”. The contractor may then withhold a reasonable amount and so on down the chain. Further, in New York, the owner must release the retainage no later than 30 days after final approval of the work under a construction contract. If such retainage is not released on time, by statute it will accrue interest.⁴²⁷

8.2 Summary of Stakeholder Views

Some stakeholders submitted that they were in support of the use of contractual deficiency holdbacks,⁴²⁸ although others suggested that such a holdback does not need to be legislated as it can be described in the construction contract.⁴²⁹

- a) The Ontario Association of School Business Officials submitted that it strongly supports “the continued use of deficiency holdbacks, separate from the lien holdbacks” as they allow “the general contractor to be aware of and make the necessary financial allowances for each of the sub-trades as a contract progresses rather than being advised of the issues towards the end of the project when project funds may have already been released to the subcontractors”.⁴³⁰

On the other hand, other stakeholders strongly oppose the introduction of a statutory deficiency holdback.⁴³¹

- a) The Surety Association of Canada submitted that imposing an additional holdback against the correction of deficiencies would be punitive, unnecessary and

⁴²⁴ Neil S Abbot, Kenneth W Movat and Kerry R Powell, “Canada and the U.S.: Differences in Constructions Laws (May 2010), online: <<https://www.gowlings.com/KnowledgeCentre/article.asp?pubID=2042>>.

⁴²⁵ Dennis C Bausman, *Retainage Practice in the Construction Industry* (Alexandria, VA: Foundation of the American Subcontractors Association, Inc., 2004) at 1.

⁴²⁶ Vincent T. Pallaci, *Limits on Retainage*, (May 15, 2011), online: <<http://newyorkconstructionlawupdate.blogspot.ca/2011/05/limits-on-retainage.html>>.

⁴²⁷ *Ibid.*

⁴²⁸ OASBO and OPSBA Submissions to the CLA Review at 3; York Region Supplemental (New Issues) Submissions to the CLA Review at 1.

⁴²⁹ City of Toronto Supplemental (New Issues) Submissions to the CLA Review at 2.

⁴³⁰ OASBO Supplemental (New issues) Submissions to the CLA Review at 2.

⁴³¹ CEO Submissions to the CLA Review at 5; PPO Supplemental (New Issues) Submissions to the CLA Review at 3; SAC Supplementary Submissions to the CLA Review at 1.

counterproductive to the objective of bringing about more timeliness and certainty of payment within the Ontario construction industry.⁴³²

- b) Prompt Payment Ontario submitted that the practice of withholding exaggerated amounts relative to the cost of correction or completion, and/or the practice of withholding arbitrary amounts or percentages of construction contract prices, is both unwarranted and antithetical to the objectives of improving cash flow to trades.⁴³³
- c) Instead, Prompt Payment Ontario further submits, any amount for which certification is withheld (where the project involves an independent payment certifier) or for which any payment may otherwise be withheld by the owner (for projects where there is no independent payment certifier) must be limited to a reasonable valuation of the cost of correction or completion.⁴³⁴

No stakeholders specifically recommended that the use of contractual deficiency holdbacks be capped or otherwise limited.

8.3 Analysis and Recommendations

As noted above, no other jurisdiction considered has enacted a statutory deficiency holdback. Instead, in every one of these jurisdictions, deficiency and warranty holdbacks are negotiated contractual terms. While some stakeholders generally supported the concept of deficiency holdback, no stakeholder advocated for the implementation of such a holdback by means of legislation. Rather, there was significant opposition to any such recommendation by a variety of other stakeholders noted above.

Accordingly, we see no reason why the concept of a deficiency holdback should be the subject of a legislative prohibition or statutory regulation.

Recommendation
<ul style="list-style-type: none">➤ The <i>Act</i> should not be amended to provide for a statutory deficiency holdback; nor should it be amended to restrict the deficiency holdback provisions that parties may negotiate between themselves in their contracts.

9. Use of Financial Instruments for Holdback Purposes

9.1 Context

The definition of holdback under section 1(1) of the *Act* does not specify the form in which holdback should be maintained, rather only that it should be 10 per cent of the value of services

⁴³² SAC Supplementary Submissions to the CLA Review at 1.

⁴³³ PPO Supplemental (New Issues) Submissions to the CLA Review at 3.

⁴³⁴ PPO Supplemental (New Issues) Submissions to the CLA Review at 3.

or materials supplied under a contract or subcontract.⁴³⁵ Further, the specific form is not provided under section 22(1) which provides details on how holdback is to be retained as further discussed above. That said, the predominant industry practice is that holdback is maintained in cash.

Interestingly, what can and can't constitute holdback in Ontario is somewhat vague. Canadian Author Duncan Glaholt points out that the most prevalent misconception is "that cash is actually held back at each level". Generally, one would assume based on the requirements of section 22(1) that cash would have to be maintained in order to satisfy the holdback, however, Glaholt points out that "[i]n effect, the holdback is more often merely a stacked series of claims upon a final draw by the contractor on the owner's funds".⁴³⁶ For this reason, among others, certain stakeholders and commentators have posited that another form of financial instrument should satisfy the otherwise broad definition of holdback in lieu of cash.

Looking abroad, the United States, 21 states explicitly permit contractors to substitute or request permission to substitute some type of security (with 5 states explicitly allowing letters of credit) in lieu of cash for retainage.⁴³⁷

9.2 Summary of Stakeholder Views

Almost all stakeholders who made submissions on this issue indicated that they would or would be willing to support the use of certain financial instruments in lieu of cash.⁴³⁸

- a) The City of Toronto for example submitted that "any financial instrument that takes the place of cash holdback must be easily accessible".⁴³⁹ In this regard the City noted that it would consider "an irrevocable and unconditional letter of credit in certain circumstances" so long as any letter of credit in lieu of cash holdback provision was "permissive, not mandatory" and it does not interfere with section 12 of the *Act* (i.e. set

⁴³⁵ *Ontario Act*, s 1(1).

⁴³⁶ Annotated Act, *supra* at 200.

⁴³⁷ Foundation of the American Subcontractors Association, *Retainage Laws in the 50 States 2016* (Columbus: Kegler Brown Hill & Ritter, 2016) at iii. See Alabama, Ala Code § 39-2-12(11) (1975); Arizona, Ariz Rev Stat § 34-221 (2015); Arkansas, Ark Code Ann § 22-9-501(a) (2014); California, Cal Public Contract Code § 10263; Cal Gov Code § 16430; Colorado, Colo Rev Stat § 24-91-105; Connecticut, Conn Gen Stat § 3-112a (2012); Delaware, Del Code Ann tit 29 § 6962(5)(c); Florida, Fla Stat Ann § 255.052; Hawaii, Hawaii Rev Stat § 103-32.1; Kansas, Kan SA § 16-1904; Louisiana, La Rev Stat Ann § 38.2249; Minnesota, Minn Stat § 15.73; Mississippi, Miss Code Ann § 31-5-15; Missouri, Mo Rev Stat § 436.306; § 436.309; § 436.312 (2011); New Hampshire, NH Rev Stat Ann § 21-I:20; New Jersey, NJ Stat Ann § 27:7-34; Oklahoma, Okla Stat tit 61 § 113.2 (2014); Oregon, Or Rev Stat § 701.435; Tennessee, Tenn Code Ann § 12-4-108(c) and (d); Washington, Wash Rev Code 60.28.011.

⁴³⁸ City of Toronto Supplemental (New Issues) Submissions to the CLA Review at 2; CEO Submissions to the CLA Review at 4; OASBO Supplemental (New Issues) Submissions to the CLA Review at 2; OSPE Submissions to the CLA Review at p. 4; PPO Supplemental (New Issues) Submissions to the CLA Review at 3; SAC Supplemental (New Issues) Submissions to the CLA Review at 1; and York Region Supplemental (New Issues) Submissions to the CLA Review at p. 1.

⁴³⁹ City of Toronto Supplemental (New Issues) Submissions to the CLA Review at 2.

off by a trustee).⁴⁴⁰ In relation to use of bonds, the City of Toronto was not supportive as they noted that such bonds were “difficult to realize on”.⁴⁴¹

- b) The Surety Association of Canada submitted that it was in favour of a recommendation for security “holdback with a form of bond or other security that would enable all (or more) funds to flow through the payment chain while ensuring holdback is funded”. The Surety Association of Canada also supported the concept of allowing the posting of an instrument to replace holdback at the outset of projects.⁴⁴²

Certain stakeholders expressed concerns about the use of bonds for this purpose, which they asserted can be expensive, difficult to realize on and administratively burdensome.⁴⁴³

9.3 Analysis and Recommendations

It is our view that there are certain circumstances where requiring holdback, whether legislatively or by industry practice, to be in the form of cash only simply does not accord with the notion of a modernized *Act*. In that regard, and given the submissions of the stakeholders, we recommend allowing (permissively) alternative forms of holdback (i.e. surety bonds or recognized letters of credit) in order for parties to take fuller advantage of available financial products and loosen the restrictions on projects. This also avoids the obligation of certain owners to maintain cash in circumstances where that may otherwise be administratively cumbersome.

Recommendation
<ul style="list-style-type: none">➤ We recommend that the current scheme should be supplemented by allowing the replacement of cash holdback with a Letter of Credit or a demand-worded Holdback Repayment Bond.

⁴⁴⁰ *Ibid* at 2.

⁴⁴¹ *Ibid* at 2.

⁴⁴² Surety Association of Canada Supplemental (New Issues) Submissions to the CLA Review at 1.

⁴⁴³ City of Toronto Supplemental (New Issues) Submissions to the CLA Review at 2; Metrolinx Submissions to the CLA Review at 2. See also OASBO Supplemental (New Issues) Submissions to the CLA Review at 2.

1. Overview

The *Act* states that the procedure in a lien action is, as far as possible, to be summary in nature. In order to facilitate this objective, section 67 of the *Act* expressly requires leave of the court for parties to take interlocutory steps other than those specifically provided for under the *Act*. As well, section 50(2) of the *Act* prohibits the joinder of trust claims with a lien claim. Stakeholders have raised concerns that, as things have evolved since 1983, the summary procedure provisions actually cause unnecessary steps in proceedings, extend timelines, and result in increased costs. In that regard, stakeholders expressed concern that proceedings under the *Act* are no longer summary in practice. Specifically, concerns were raised about the requirement to seek leave of the court to take certain interim interlocutory steps⁴⁴⁴ in proceedings because these requirements were seen to be complicating proceedings. Concerns were also raised regarding smaller claims, particularly home renovation projects, which are subject to the same procedure as larger claims, notwithstanding the principle of proportionality set out in section 67 of the *Act*.

The *Act* was intended to provide an expeditious forum for the summary resolution of disputes involving suppliers of services and materials against the owner of the improved property, with whom they have no privity of contract.⁴⁴⁵ Section 67 of the *Act* provides as follows:

Procedure Generally Summary Procedure

67. (1) The procedure in an action shall be as far as possible of a summary character, having regard to the amount and nature of the liens in question.

To that end, Part VIII of the *Act* provides a set of procedures unique to construction lien actions. The *Rules of Civil Procedure* and the *Courts of Justice Act* are applied except where they are inconsistent with the provisions of the *Act*.⁴⁴⁶

Commentators have noted the discord between the legislative intent and the nature of lien actions in practice, in that the steps often overlap between lien actions and other actions and the summary nature of lien actions has seemed to disappear.⁴⁴⁷

In assessing the summary procedure provisions of the *Act*, we have considered the suggestions proposed by stakeholders and the use of summary procedure provisions under the *Rules of Civil Procedure* (the “*Rules*”) and in the lien legislation of other provinces.

⁴⁴⁴ Interlocutory steps are steps to seek orders that are not final orders on the parties.

⁴⁴⁵ David Bristow et al, *Construction Builders’ and Mechanics’ Liens in Canada*, 7th ed, looseleaf, (Toronto: Carswell, 2005) at 11-1 [Bristow et al].

⁴⁴⁶ Duncan Glaholt & David Keeshan, *The 2016 Annotated Construction Lien Act* (Toronto: Carswell, 2015) at 378 [Annotated Act].

⁴⁴⁷ Leonard Ricchetti & Gina Rogakos, “Construction Lien Act”, McMillan LLP (July 2008) at 14, online: <http://www.mcmillan.ca/Files/112339_Construction_Liens.pdf>.

In this regard, the following issues were raised with stakeholders through both the Information Package and Consultation Process and have been considered by the Review:

- Changes to the Summary Nature of Proceedings under the *Act*, including:
 - Leave to Bring Motions
 - Leave to Conduct Oral Examinations for Discovery and Discovery of Documents
 - Leave to Bring Third Party Claims
 - Appeals from Interlocutory Orders
- Joinder of Lien Claims and Trust Claims
- Case Management and References to Masters
- Monetary Thresholds and Special Considerations for Home Renovation Projects

2. Changes to the Summary Nature of Proceedings Under the *Act*

2.1 Context

As noted above, a party is not permitted to take certain steps in a lien action without leave of the court. This includes bringing any motion for interlocutory relief, conducting oral examinations for discovery and obtaining discovery of documents, and issuing third party claims.

Stakeholders expressed concern that, in reality, these provisions complicate the very issues they attempt to simplify, not because they were improperly drafted, but because the legal landscape has changed considerably since 1983. Presently, motions, oral discoveries, and documentary disclosure are considered necessary and appropriate steps and are granted almost as of course, making the requirement to seek leave of the court an unnecessary, almost administrative step in many cases.

2.1.1 Leave to Bring Motions

A party in a construction lien action cannot bring motions, or take any other interlocutory steps, without leave of the court. Section 67(2) provides:

Interlocutory Steps

67. (2) Interlocutory steps, other than those provided for in this Act, shall not be taken without the consent of the court obtained upon proof that the steps are necessary or would expedite the resolution of the issues in dispute.

This provision requires the party bringing the motion to demonstrate that the remedy sought is “necessary” to permit the issues between the parties to be decided or would expedite the

resolution of the issues. In some cases, the courts have strictly enforced these provisions. For example, in *1188710 Ontario Limited v Gartner*,⁴⁴⁸ the Superior Court of Justice refused to grant an adjournment of a construction lien trial to consolidate it with an action in relation to a subrogated insurance claim related to damage to the same property. The Court found that the issues were distinct enough to be tried separately, and even though there might have been overlap, section 67 of the *Act* required that the lien action be tried expeditiously; trying both actions together would require additional witnesses and additional issues to be argued, thereby lengthening the resolution of the lien matter. Leave to bring the interlocutory motion to adjourn was therefore refused.⁴⁴⁹ In many cases, however, stakeholders have expressed a concern that the requirement to obtain leave to bring motions adds costs and results in delays.

With regard to other provinces, only Saskatchewan and Newfoundland and Labrador require leave of the court to proceed with certain interlocutory steps.⁴⁵⁰ In Manitoba and Nova Scotia, the process is slightly different. Lien actions for any amount are governed by the ordinary procedure of the court, except where varied by their respective lien legislation⁴⁵¹ and in Manitoba, interlocutory steps are governed by the normal court processes, but any party may apply to a judge for directions on any of these interlocutory steps.⁴⁵² The legislation in the remainder of the common law provinces does not contain summary procedure provisions and does not require leave to conduct interlocutory steps; rather, actions are governed by the regular rules of court.⁴⁵³

2.1.2 Leave to Conduct Examinations for Discovery and Documentary Production

The requirement to obtain leave of the court to conduct oral examinations for discovery and discovery of documents is also tied to the summary procedure provision in the *Act*. Unlike civil proceedings governed by the *Rules of Civil Procedure*, the *Act* does not provide for oral examinations for discovery or discovery of documents. Instead, leave must be obtained under section 67(2) to proceed with discoveries. To obtain leave to conduct discoveries, the party seeking leave must be prepared to demonstrate that discoveries are necessary or would expedite the resolution of the matters in dispute.⁴⁵⁴

In this regard, since 1983, the construction lien litigation landscape has significantly changed. For example, the emergence of larger and larger projects, along with the use of new project delivery models, has affected the complexity and the scale of construction disputes today, as has the use of new methods of communication, such as email and texting. These developments have

⁴⁴⁸ *1188710 Ontario Limited v Gartner*, 2012 ONSC 4025.

⁴⁴⁹ *Ibid* at paras 13-17.

⁴⁵⁰ *Newfoundland Act*, s 42(2); *Saskatchewan Act*, s 91(2).

⁴⁵¹ *Manitoba Act*, s 60; *Nova Scotia Act*, s 34(1).

⁴⁵² *Manitoba Act*, s 67(3).

⁴⁵³ *Annotated Act*, *supra* at 465.

⁴⁵⁴ *Ibid* at 464-465.

necessitated the adoption of eDiscovery guidelines, to address the exponentially expanded number of documents to be produced and analyzed during discoveries and at the trial of a construction lien matter.

Due to the summary nature of the lien action, the Court may impose time limits on examinations for discovery or limit the nature of documentary disclosure.⁴⁵⁵ Master MacLeod has described this requirement as having “the effect of making all lien actions potentially case managed”.⁴⁵⁶ Such restrictions can have a beneficial effect in terms of streamlining the discovery process, thereby saving costs and time. Often, parties conduct discoveries on consent and without leave, but issues may later arise as to the scope of the discovery. The benefit of seeking leave of the court is that the court can give direction as to the real issues that should be the focus of discovery, and order customized plans for examinations for discovery, discovery of documents, and Scott Schedules.⁴⁵⁷ Concern was raised during the Consultation Process that examinations for discovery are often difficult and unnecessarily time consuming due to the lack of preparation of witnesses being examined and the lack of adequate documentary disclosure in advance of the discovery. Guidance on the scope of discoveries as well as sanctions for unduly delaying the process were suggested as methods to bring increased efficiency to the process.

Where the parties agree to conduct documentary discovery, or the court orders documentary discovery, the *Rules of Civil Procedure* require that the parties have a discovery plan.⁴⁵⁸ The tension between the *Act*'s summary procedure and mandatory discovery planning in all actions under the *Rules of Civil Procedure* has attracted discussion among commentators. In particular, reference has been made to Master MacLeod's decision in *Lecompte Electric Inc. v Doran (Residential) Contractors Ltd.* in relation to the principle that “counsel acting in lien actions are well advised to take the obligation to consider proportionality seriously when creating a discovery plan”.⁴⁵⁹ Considering section 67 and the principle of proportionality, counsel should collaborate with each other to develop a discovery plan that is “focused, streamlined and ... cost effective and efficient”.⁴⁶⁰ As noted by the Council of Ontario Construction Associations below, however, discovery plans may complicate proceedings, particularly in those cases where counsel are uncooperative, and this may detract from the summary nature of lien proceedings under the *Act*.

⁴⁵⁵ Karen Groulx, “Red Hot Topics in Construction Law: E-Issues in Construction Disputes” (March, 2012) [Groulx].

⁴⁵⁶ *Lecompte Electric Inc. v Doran (Residential) Contractors Ltd.*, 2010 ONSC 6290 at para 4 [*Lecompte*].

⁴⁵⁷ A Scott Schedule is a document produced by each party which particularizes “the elements of its claims and identif[ies] the documents it relies upon for each”; Groulx, *supra* at 5.

⁴⁵⁸ *Rules of Civil Procedure*, RRO 1990, Reg 194, r 29.1.

⁴⁵⁹ Andrew J Heal, “Common Errors in Construction Litigation – Best Practices to Avoid Them and What to do When They Occur”, Blaney McMurtry LLP at 32; *Lecompte, supra*.

⁴⁶⁰ *Lecompte, supra* at para 20.

2.1.3 Leave to Bring Third Party Claims

Section 56 of the *Act* provides that third parties may only be joined with leave of the court and “for the purpose of claiming contribution or indemnity from the third party in respect of that claim”.⁴⁶¹ The motion is made on notice, and the party bringing the motion must demonstrate that the trial of the third party claim will not:

- i. unduly prejudice the ability of the third party or of any lien claimant or defendant to prosecute a claim or conduct a defence, or
- ii. unduly delay or complicate the resolution of the lien action.⁴⁶²

This provision aims to make the resolution of lien claims the “primary purpose of the procedures” under the *Act*.⁴⁶³ The provision does not address the issue of consolidation of claims or trial one after the other. Only three other provinces refer to third party claims in their respective lien legislation; Saskatchewan, Manitoba, and Nova Scotia all expressly allow for third party claims without leave of the court.⁴⁶⁴

2.1.4 Appeals From Interlocutory Orders

Section 71(3) of the *Act* prohibits appeals from interlocutory orders.⁴⁶⁵ In contrast, the *Courts of Justice Act* allows appeals of interlocutory orders in civil actions in section 19(1)(b). The Ontario Court of Appeal has held that section 71 of the *Act* takes priority over the *Courts of Justice Act*.⁴⁶⁶ While this provision was introduced in 1983, Glaholt and Keeshan suggest that it “merely codified established principles of common law”.⁴⁶⁷ This proposition stems from in *Macon Drywall Systems Ltd. v H.P. Hyatt Construction Ltd.*, (*Macon*)⁴⁶⁸ where, after a review of the *Mechanics’ Lien Act* in force at the time and the case law up until that point, Justice Lerner wrote:

The Mechanics' Lien Act, R.S.O. 1970, c. 267, s. 43, contains the only reference to appeals and provides no appeal from an interlocutory order...

...

The Mechanics' Lien Act is a creature of statute and designed to prevent owners obtaining the benefit of buildings erected and worked on at their insistence without paying for them. The Act is devised to enforce claims for liens expeditiously, informally and as cheaply as possible. To that end, multiplicity of proceedings such as third party

⁴⁶¹ *Ontario Act*, s 56.

⁴⁶² *Ibid.*

⁴⁶³ Report of the Attorney General’s Advisory Committee on the Draft Construction Lien Act, 1982, Appendix A to Duncan Glaholt & David Keeshan, *The 2016 Annotated Construction Lien Act* (Toronto: Carswell, 2015) at 903 [AG Report].

⁴⁶⁴ *Ibid* at 420.

⁴⁶⁵ *Ontario Act*, s 71(3).

⁴⁶⁶ *Bird Construction Co. v C.S. Yachts Ltd.* (1990), 37 CLR 225 (Ont CA).

⁴⁶⁷ Annotated Act, *supra* at 511; see *Macon Drywall Systems Ltd. v H.P. Hyatt Construction Ltd.*, [1972] 3 OR 189 (H Ct J).

⁴⁶⁸ [1972] 3 OR 189-199.

proceedings, mortgagee remedies by way of judgment under this Act, claims by one defendant against another that are completely independent of the plaintiff's claim are avoided. The object of the Act is to enforce liens at the least possible expense, and, in order to do this, the procedure should be as far as possible of a summary character.

Therefore, it seems that the common law impetus for the prohibition of appeals from interlocutory orders is rooted in part in the notion of ensuring the summary nature of legal proceedings under the *Act*. The *Courts of Justice Act* balances the need for finality and the policy consideration of preventing protracted litigation with a litigant's right of appeal by requiring leave of another judge to appeal interlocutory orders.⁴⁶⁹

2.2 Summary of Stakeholder Views

Some stakeholders were satisfied with the current regime, while others advocated for change. Stakeholders who supported the current regime commented as follows:

- a) Infrastructure Ontario suggested that the status quo be maintained.⁴⁷⁰
- b) The Toronto Transit Commission noted that, in Toronto, the Masters' review of issues is an "effective process," where the Masters determine which interlocutory steps are required and to what extent they should be carried out.⁴⁷¹
- c) Prompt Payment Ontario suggested that alternative dispute resolution mechanisms, such as adjudication, would obviate the need for summary procedures.⁴⁷²

Other stakeholders favoured changes, including the following:

- a) The Ontario Public Works Association expressed support for a general review of the summary procedure provisions in light of the complexity of projects today in the hopes of making procedures more efficient.⁴⁷³
- b) The Council of Ontario Construction Associations submitted that the requirement for leave is a waste of time and resources. In lien references before a master, "obtaining leave of the Court is routine and easy... Furthermore, in jurisdictions without masters, most counsel are co-operative in facilitating oral and documentary discovery".⁴⁷⁴ They went on to state that "some counsel and parties use the prohibition on discovery as a technique to delay and obstruct lien actions, [and] in such cases it is necessary to bring a motion".⁴⁷⁵ As a recommendation, it was suggested that "Section 67 of the *Act* should be

⁴⁶⁹ Garry Watson, "Finality and Civil Appeals – A Canadian Perspective" (1984) *Law and Contemporary Problems* 47:3 at 6-7.

⁴⁷⁰ Infrastructure Ontario Supp. (Attachment) to the CLA Review at 27.

⁴⁷¹ TTC Submissions to the CLA Review at 41.

⁴⁷² PPO Submissions to the CLA Review at 49.

⁴⁷³ OPWA Submissions to the CLA Review at 4.

⁴⁷⁴ COCA Submissions to the CLA Review at 23.

⁴⁷⁵ *Ibid.*

amended to make oral examinations for discovery and documentary disclosure mandatory subject to the discretion of the Court to modify the scope and duration of discovery”.⁴⁷⁶

Regarding discovery plans, the Council of Ontario Construction Associations commented that “Discovery Plans are a failed experiment”.⁴⁷⁷ In cases where counsel and parties are co-operative, “Discovery Plans contribute little or nothing to the process of the litigation”.⁴⁷⁸ In cases where a party or their counsel is being uncooperative, “requiring the parties to agree on a Discovery Plan creates another opportunity for delay and obstruction”.⁴⁷⁹ The Council of Ontario Construction Associations suggested that “the ideal reform would be to have Rule 29.1 of the Rules of Civil Procedure revoked. At a minimum...the Discovery Plans [should] be made optional in lien and trust actions”.⁴⁸⁰

- c) The OBA CLA Reform Committee suggested allowing interlocutory steps “such as affidavits of documents and discoveries to be permitted in larger cases” and further suggested limiting the duration of cross-examinations.⁴⁸¹
- d) The City of Toronto suggested amendments to make the summary procedure more efficient by dispensing with the requirement to seek leave to bring a motion, and allowing document production and examinations for discovery to be performed on agreement of the parties, failing which the party seeking discovery could ask the court for directions. Overall, the City of Toronto suggested that interlocutory steps could be agreed to by the parties, thus creating “a more efficient and economical summary procedure”.⁴⁸²
- e) Few stakeholders made submissions on appealing interlocutory orders. Metrolinx expressed support for discussion around the ability to appeal an interlocutory order.⁴⁸³ The City of Toronto commented on the appropriateness of appeals from interlocutory orders, suggesting that it would depend on whether, after the completion of the Review, lien actions are treated as complex litigation shaped like civil actions or if the *Act* contains a more summary procedure.⁴⁸⁴
- f) The Advocates’ Society suggested that, for actions that exceed \$250,000, production and discovery should be mandatory; leave of the court would not be required. The Advocates’ Society also suggested that, above a monetary threshold (\$100,000 was suggested), mandatory mediation should be required for lien actions.⁴⁸⁵ Finally, the Advocates’

⁴⁷⁶ *Ibid.*

⁴⁷⁷ COCA Submissions to the CLA Review at 23.

⁴⁷⁸ *Ibid.*

⁴⁷⁹ *Ibid.*

⁴⁸⁰ *Ibid.*

⁴⁸¹ OBA CLA Reform Committee Submission to the CLA Review at 17, 19.

⁴⁸² City of Toronto Submissions to the CLA Review at 8.

⁴⁸³ Metrolinx Submissions to the CLA Review at 5.

⁴⁸⁴ City of Toronto Submissions to the CLA Review at 8.

⁴⁸⁵ The Advocates’ Society Submissions to the CLA Review at 2-4, 6.

Society suggested allowing third party claims under section 56 to proceed without leave of the court, with the caveat that the *Act* provide for case management of all lien claims to prevent multiple-party claims from becoming unwieldy.⁴⁸⁶

2.3 Analysis and Recommendations

Generally, in circumstances in which the failure of the summary procedure provisions of the *Act* are widely acknowledged, we are of the view that a greater conformity to the *Rules of Civil Procedure* will save intermediates steps that have become largely unnecessary, and the attendant expense, and simplify proceedings for the broader bar and bench.

2.3.1 Leave to Bring Motions

The requirement to obtain leave for interlocutory proceedings is not widespread in Canada, with only the legislation in Saskatchewan and Newfoundland and Labrador containing similar provisions requiring leave. This requirement has been cited as unnecessary in many cases, adding costs that would otherwise not be incurred. An alternative that would maintain the purpose of the provision would be to require that proceedings under the *Act* be summary in nature and be case managed so as to attempt to ensure efficient progress of actions, but remove the requirement for leave to bring motions. The summary nature of the *Act* would still be a consideration for the court in assessing whether to grant the remedy sought in the motion.

Recommendation

- The requirement to seek leave of the court to bring motions under section 67(2) should be removed from the *Act*, but, as noted below, construction lien actions should be case managed.

2.3.2 Leave to Conduct Examinations for Discovery and Documentary Production

Stakeholders expressed concern with the requirement to seek leave to conduct oral examinations for discovery and examinations of documents, particularly because such motions are usually granted on consent. In these cases, the lawyer is still required to go to the jurisdiction where the land is situated as that is where the motion is heard. This requirement may result in costs and delays. When oral examinations for discovery are conducted, the preparedness of the witness being examined may affect the overall summary nature of the proceedings. The importance of discoveries has increased with the increased complexity of construction lien actions. Parties typically require examinations for discovery and documentary production, and the requirement to obtain leave is an additional cost and administrative burden that is unnecessary.

⁴⁸⁶ The Advocates’ Society Submissions to the CLA Review at 2-4.

Stakeholders expressed frustration with discovery plans as unnecessarily complication lien proceedings and distracting from the summary nature of such proceedings.

Recommendations

- The requirement to seek leave of the court to conduct oral examinations for discovery and examination of documents under section 67(2) should be removed from the *Act*, but, as noted, lien actions should be case managed so that production of documents and examinations for discovery can be appropriately streamlined, applying the principle of proportionality.
- The use of discovery plans should be at the discretion of the case management judge.

2.3.3 Leave to Bring Third Party Claims

Ontario is the only province to expressly require leave of the court to bring third party claims. The purpose of this leave requirement is to ensure that the resolution of the lien claim is the primary purpose of the proceedings. The risk with this approach is that the issues and evidence in the third party claim will typically overlap with the issues and evidence in the lien claim, thereby creating inefficiencies when re-litigating issues. We recommend that a more efficient approach would be to allow third party claims that relate to the lien action to be commenced as of right.

Recommendation

- The requirement to seek leave of the court to bring third party claims under section 56.2 should be removed from the *Act*.

2.3.4 Appeals From Interlocutory Orders

As construction lien matters have grown more complex since 1983, the ability to appeal interlocutory orders would allow for procedural precedents to be promulgated from the senior echelons of the court, and would allow parties in complex litigation to exercise rights that are otherwise available in civil actions. Extending the right to appeal from interlocutory orders must be balanced with the objective of summary procedure under the *Act*. Therefore, leave of a judge of the Superior Court of Justice should be required to avoid unnecessary protracted litigation and ensure that only meritorious appeals are heard.

Recommendation

38. The prohibition of appeals from interlocutory orders under section 71(3) should be amended to allow appeals from interlocutory orders with leave of a judge of the Divisional Court.

3. Joinder of Lien Claims and Trust Claims

3.1 Context

The *Act's* procedural regime does not apply to breach of trust actions which must proceed in accordance with the *Rules of Civil Procedure* and the *Courts of Justice Act*. This is, in part, why a trust claim cannot be included with a lien claim, despite the fact that trust claims and lien claims share in a commonality of parties and factual circumstances.⁴⁸⁷ Section 50(2) of the *Act* provides:

50(2) A trust claim shall not be joined with a lien claim but may be brought in any court of competent jurisdiction.

The prohibition against the joinder of lien and trust claims stems from the Report of the Attorney General's Advisory Committee on the Draft *Construction Lien Act* in 1982. At that time, it was decided that the issues in relation to lien claims and trust claims may be very different, and the resolution of lien claims should be the primary concern under the *Act*.⁴⁸⁸

Ontario is the only common law province that prohibits the joinder of lien and trust claims. Manitoba allows for the joinder of other claims related to the construction or improvement of land without leave of the court, but if a joined issue cannot be conveniently tried with the other issues in that action, or cause undue prejudice to other lien claimants or parties, a separate trial on that issue may be ordered on application from any party.⁴⁸⁹

3.2 Summary of Stakeholder Views

The Advocates' Society submitted that, while section 50(2) prohibits trust claims from being joined to lien claims, in practice courts have been willing to join these types of proceedings. The Advocates' Society submitted that the *Act* should allow these types of claims to be joined without requiring leave of the court for greater efficiency. The OBA CLA Reform Committee,⁴⁹⁰ the Thunder Bay Law Association,⁴⁹¹ the Council of Ontario Construction Associates,⁴⁹² the Provincial Building and Construction Trades Council of Ontario, the International Union of Operating Engineers (Local 793)⁴⁹³ and the Toronto Transit Commission were also of the view that lien claims and trust claims ought to be joined, although the Toronto Transit Commission

⁴⁸⁷ Duncan Glaholt, *Conduct of a Lien Action 2016* (Toronto: Carswell, 2015) at 6.9; *Ontario Act*, s 50(2).

⁴⁸⁸ AG Report, *supra* at 882-883.

⁴⁸⁹ *Manitoba Act*, s 66.

⁴⁹⁰ OBA CLA Reform Committee Submissions to the CLA Review at 14. The OBA CLA Reform Committee suggested that eliminating section 50(2) could allow for an expedited process.

⁴⁹¹ Thunder Bay Law Association Submissions to the CLA Review at 1.

⁴⁹² Council of Ontario Construction Associations Submissions at 23. Specifically, COCA noted that it was its view that the cost of prohibiting the joinder of lien claims and trust claims outweighs the benefit as the claimants will have issues in common.

⁴⁹³ Local 793 and PBCTCO Submissions to the CLA Review at 12.

suggested leave of the court be required, and only “if the matters concern largely the same issues”.⁴⁹⁴

The Advocates’ Society further suggested that counterclaims under section 55 should be restricted to claims related to the improvement, as plaintiffs’ claims are currently restricted in this manner.

3.3 Analysis and Recommendations

The removal of the prohibition against joinder of lien and trust claims would make the *Act* consistent with legislation from the other provinces, where such a prohibition does not exist. It is particularly concerning because the prohibition of joinder can be circumvented by a court order for a trial together or one after another, resulting in unnecessary costs and delays. The very problem this provision seeks to address is exacerbated by the duplication of proceedings it can cause, contributing to the courts’ backlog and costs to the parties. The provision has been heavily criticized by stakeholders, most of whom have suggested its removal, and none of whom proposed its retention. In keeping with the summary procedure provisions of the *Act*, parties should be able to join lien and trust claims without leave of the court, subject to a motion by any party that opposes the joinder on grounds that the joinder would cause undue prejudice to other lien claimants or parties.

Recommendation

- The prohibition on joinder of lien claims and trust claims under section 50(2) should be removed from the *Act*, subject to a motion by any party that opposes joinder on the grounds of undue prejudice to other parties.

4. Case Management and References to Masters

4.1 Context

4.1.1 Case Management

It was suggested during the Consultation Process that case management be made mandatory for construction lien matters. Case management has its origins in the work of the Joint Committee on Court Reform (the “JCCR”). In 1988, the JCCR introduced case management as a pilot project to address delays in the court system. Actions commenced under the *Act* were excluded from the case management pilot project. In 1994, when case management became permanently implemented under Rule 77, construction lien cases continued to be excluded.

In 1995, the Civil Justice Review (the “CJR”), a joint initiative of the Chief Justice of the Ontario Court of Justice and the Attorney General of Ontario, consulted with various

⁴⁹⁴ TTC Submissions to the CLA Review at 41.

stakeholders in the construction industry to develop alternative methods of dispute resolution for actions commenced under the *Act*. These consultations resulted in a series of recommendations incorporated into the Supplemental Report released by CJR in 1996. One of the recommendations made in the Supplemental Report was that construction lien cases should be case managed. Notably, this same report also recommended that construction lien cases be subject to mandatory mediation even before the introduction of Rule 24.1.⁴⁹⁵ Despite this report, construction lien actions remained excluded from Rule 77.

In 2001, the Report of the Evaluation Committee for the Mandatory Mediation Rule Pilot Project again recommended that construction lien matters be subject to Rule 77 case management for the timely resolution of disputes, but construction lien matters again remained excluded.⁴⁹⁶

The CJR outlined the benefits of case management as follows:

- earlier dispute resolution;
- reduction of legal costs;
- elimination of delays and backlog;
- efficient allocation of judicial, quasi-judicial and administrative resources;
- protection of the parties by ensuring that the individual litigant receives information about the time limits provided in the rules;
- easier access to the most appropriate method of resolving a particular dispute.⁴⁹⁷

4.1.2 References

Often, and particularly in Toronto and Ottawa, Construction Lien Masters manage construction lien disputes. Section 58 of the *Act* empowers Masters to conduct construction lien actions by means of a reference of the entire action or any part of it on motion to a judge by any party at the close of pleadings.⁴⁹⁸ This procedure is important as it “empowers Masters, who have a recognized expertise in complex construction lien matters, to conduct these actions”⁴⁹⁹ and

⁴⁹⁵ Further information at Ontario, Ministry of the Attorney General, *Case Flow Management: An Assessment of the Ontario Pilot Projects in the Ontario Court of Justice*, A Report to the Courts Administration Division (Toronto: Queen’s Printer for Ontario, November 1993) at 10-11; and also at Ontario Civil Justice Review, First Report (Toronto: Ontario Civil Justice Review, March 1995) c 14; Ontario Civil Justice Review, *Supplemental and Final Report* (Toronto: Ontario Civil Justice Review, November 1996) c 5.1.

⁴⁹⁶ Evaluation Committee of the Ontario Civil Rules Committee, *Report of the Evaluation Committee for the Mandatory Mediation Rule Pilot Project*, (Toronto: March, 12, 2001) at 1, 12.

⁴⁹⁷ Ontario Civil Justice Review, *Supplemental and Final Report* (Toronto: Ontario Civil Justice Review, November 1996) c 5.1.

⁴⁹⁸ Annotated Act, *supra* at 431.

⁴⁹⁹ *Ibid.*

reduces the resourcing strain on the Superior Court in Toronto and Ottawa (the only two regions that currently have Masters).

Pursuant to the *Act*, a motion for a reference is made to a judge with notice at the close of pleadings. In addition, a judge at trial may direct a reference to the appropriate Master (section 58(3)). Sections 58(4) and (4.1) set out the broad powers of a Master (or consensual third party) on a reference and essentially, this person exercises the powers of court.⁵⁰⁰ Further, in the jurisdictions of Toronto and Ottawa, Construction Lien Masters preside over an expedited reference procedure, when available.

According to Master Albert, one of Toronto's current Construction Lien Masters, in the recent decision of *4361814 Canada Inc. v Dalcour Inc.*,⁵⁰¹:

Case management was practiced in Toronto construction lien references long before the case management reforms introduced into civil actions in Toronto, Ottawa and Windsor in the 1990's by Civil Justice Review. In construction lien references case management is grounded in section 67 of [the *Act*] and rules 54 and 55.

[...]

The construction lien reference procedures in place in Toronto seize the reference master of all steps in the reference, including the trial. As such the reference master becomes familiar with the facts of the case, the issues, and the dynamics between the parties and their lawyers. This level of familiarity is considered beneficial because it leads to the efficiencies demanded by the *Act* and the reference rule. This legislative scheme is presumed to be fair and just. It permits the reference master to take into account, in each attendance, his or her accumulated knowledge of the case, gained from previous contact with the reference.⁵⁰²

Section 58 resulted from the 1960 decision of the Supreme Court of Canada in *Ontario (Attorney General) and Display Services Co. Ltd. v Victoria Medical Building Ltd.*, which had held that the power conferred on the provincial master under the then Ontario *Mechanics' Lien Act* could only be derived from a judgment of a federally appointed Superior, County, or District Court judge.⁵⁰³ Specifically, the court in *Display Services* ruled that “this assignment of the power of final adjudication on mechanics' lien matters went beyond the assignment of mere matters of procedure and amounted to an unconstitutional appointment of a judge under section 96 of the *British North America Act*”.⁵⁰⁴ As noted in the text *Construction, Builders' and Mechanics' Liens in Canada*, the

⁵⁰⁰ *Ibid.*

⁵⁰¹ *4361814 Canada Inc. v Dalcour Inc.*, 2015 ONSC 1481.

⁵⁰² *Ibid* at paras 9-12.

⁵⁰³ *Attorney General for Ontario and Display Services Co. Ltd. v Victoria Medical*, [1960] SCR 32 [*Display Services*].

⁵⁰⁴ David Bristow et al, *supra* at para 1.5.

“[the] Ontario Legislature, following the decision in *Display Services*, amended the relevant section of the *Mechanics' Lien Act* to provide that in the Judicial District of York the action was to be tried by a judge of the Supreme Court, but, on motion, a judge of the Supreme Court might refer the whole action to the master for trial pursuant to section 71 of the *Judicature Act*, or, at the trial, the judge might direct a reference to the master pursuant to section 70 or 71 of the *Judicature Act*. The Ontario *Construction Lien Act* contains a similar provision in section 58”.⁵⁰⁵

As it stands, and to oversimplify, “under section 58(1) of the Construction Lien Act and Rule 54.02(1) of the Rules of Civil Procedure, only judges can make [the required] reference orders”⁵⁰⁶ for case management under section 58 of the Act. Section 58 “specifically prohibits a master from doing so and reserves the power to a judge. That is necessary for constitutional reasons since the authority of the master to try the case is delegated authority (*Ontario (Attorney General) v Victoria Medical Building Ltd. (1959)*, [1960] S.C.R. 32)”.⁵⁰⁷

Accordingly, support for increasing the jurisdiction of Masters must be tempered by the restrictions under section 96 of the *Constitution Act* and by the availability of Masters in the various regions. Currently, Masters sit in only Toronto and Ottawa. In *Attorney General for Ontario and Display Services Co. Ltd. v Victoria Medical*, the court was particularly concerned with Masters having the power of final adjudication.⁵⁰⁸ The response of the legislature was to maintain the Superior Court judge’s jurisdiction over the matter by directing a reference, and ultimately either approving, rejecting, or varying the report of the Master. The practice in Toronto is to have lien actions conducted by reference to Masters,⁵⁰⁹ thus consideration should be given to the suggestion that matters be deemed to be referred to Masters at the close of pleadings as a matter of course.

4.2 Summary of Stakeholder Views

4.2.1 Case Management

Stakeholders were generally supportive of mandatory case management. The Advocates Society submitted that case management powers “ought to be extended to every lien action once an order for trial has been obtained or an action set down for trial. This would ensure that lien actions do not become unwieldy or unduly delayed, as is all too often the case in civil litigation”.⁵¹⁰

⁵⁰⁵ *Ibid.*

⁵⁰⁶ *Unimac-United Management Corp. v Cobra Power Inc.*, 2013 ONSC 7936 at para 27.

⁵⁰⁷ *1652472 Ontario Inc. v Miwel Construction Ltd.*, 2013 ONSC 4433 at para 21.

⁵⁰⁸ *Display Services*, *supra* at 44.

⁵⁰⁹ Annotated Act, *supra* at 431.

⁵¹⁰ The Advocates Society submissions to the CLA Review at 4.

LIUNA Local 183 suggested that more difficult cases should be case managed in a manner similar to Rule 77 of the Rules of Civil Procedure, with construction lien masters having the same powers as judges under that rule.⁵¹¹

Prompt Payment Ontario noted that the expedited reference procedure employed under the *Act* is similar to a case management process used in non-lien actions and that the case management procedure utilized by construction lien masters has not been extended to regions outside Toronto and Ottawa. Prompt Payment Ontario submitted that this beneficial process should be extended on a province-wide basis.⁵¹²

4.2.2 References

The OBA CLA Reform Committee made two suggestions regarding references. First, they suggested that consideration should be given to “allowing a Reference to be permitted to be obtained on a without notice basis, subject to the right to set it aside by an affected person”.⁵¹³ Second, they suggested that “consideration should be given to whether parties can obtain a Judgment [or] Reference *ex parte* (similar to the order fixing day, time and place for trial under s. 60) and requiring that the order be served on all persons who would be entitled to notice under s. 60(2)”.⁵¹⁴

When the Review met with the Construction Lien Masters as part of the Consultation Process, the Masters discussed procedural concerns. Specifically, the Masters asked us to consider whether there is a more expeditious way to get to a reference (specifically, whether the judgment has to be a judgment of the judge or the court). The Masters suggested that it could be a judgment of the court, thus allowing the master to refer the matter. In addition, the Masters suggested that we consider whether it is possible to obtain an order for a reference and a trial at the same time.⁵¹⁵ We discussed with the Masters the constitutional concerns raised if a trial is referred to someone who is not a section 96 judge.

4.3 Analysis and Recommendations

As lien actions have grown in size and complexity, the Construction Lien Masters have played an invaluable role in resolving disputes. In Toronto and Ottawa, they have specialized expertise in lien matters and help to reduce the stress on Superior Court judges. Stakeholders expressed support for mandatory case management, and mandatory case management for construction lien matters has been recommended in numerous reports. A mandatory regime could provide immediate support for a backlogged system. Case management is a useful tool in and should be mandatory.

⁵¹¹ LIUNA 183 submissions to the CLA Review at 12.

⁵¹² PPO Submissions to the CLA Review at 19-20.

⁵¹³ OBA CLA Reform Committee Submission to the CLA Review at 19

⁵¹⁴ OBA CLA Reform Committee Submission to the CLA Review at 19

⁵¹⁵ Lien Masters – Official Summary of Consultation Meeting.

Recommendations

- | |
|---|
| <ul style="list-style-type: none"> ➤ Lien actions should become subject to case management in all regions. |
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5. Monetary Thresholds and Special Considerations for Home Renovation Projects

All lien actions under the *Act* are heard in the Superior Court of Justice under the same procedure. While the Court has discretion regarding interlocutory steps, the process may be overly cumbersome for lien claimants where smaller amounts are at issue.

5.1 Context

Many stakeholders expressed concern with the costs associated with pursuing small lien claims in the Superior Court of Justice and being subject to the same procedure as high claims. The purpose of summary procedure under the *Act* is to keep actions as “summary”, that is, as simple, quick, and cost-effective, as possible. The *Rules of Civil Procedure* have undergone several changes as a result of studies and proposals by the Civil Rules Committee to streamline the process as much as possible, with proportionality being a significant consideration, and the *Act* should incorporate the changes that have worked thus far.

Attempts at cost- and time-savings have been implemented in the *Rules of Civil Procedure* through monetary thresholds by which certain actions will be governed by more “summary” rules. Actions for less than \$25,000 are governed by the *Rules of the Small Claims Court*,⁵¹⁶ and actions for \$25,000 to \$100,000 are governed by the Rule 76 “simplified procedure” rules. In both of these instances, certain monetary thresholds apply to determine the forum and rules governing the action. There are limits on interlocutory steps, such as time limits on examinations for discovery. The purpose of the simplified rules is to promote the expeditious resolution of disputes and reduce the strain on the judicial system, and the process has been well-received.⁵¹⁷ The effect of establishing monetary thresholds to govern the specific procedure in civil actions has largely been positive, resulting in cost savings and a reduced burden on the courts. At present, these monetary thresholds do not apply to construction lien actions.

a) Small Claims

The Small Claims Court hears civil claims that are under \$25,000. The process under the *Rules of the Small Claims Court* is summary in comparison to the *Rules of Civil Procedure*, with an aim to keep fees and the allocation of court resources proportionate to the amount of the claim. Several stakeholders expressed support for a procedure where lien claims of under \$25,000 would be referred to the Small Claims Court. Stakeholders expressed concern that the cost to

⁵¹⁶ *Courts of Justice Act*, RSO 1990, c C.43, s 23(1); *Small Claims Court Jurisdiction and Appeal Limit*, O Reg 626/00, s 1(1).

⁵¹⁷ Justice Coulter Osborne, “Summary of Findings and Recommendations,” *Civil Justice Reform Project* (2007) at 22 [Osborne Report].

pursue small lien claims in the Superior Court is disproportionate to the amount of the claims and takes up valuable court time.

The proposition to refer lien matters to the Small Claims Court is constitutionally challenging as the Small Claims Court is not a “section 96” court under the *Constitution Act, 1867*. The Law Reform Commission of Nova Scotia (“Commission”) recently considered an identical proposal as part of a review of specific sections of the *Builders’ Lien Act*.⁵¹⁸

The Commission noted that provincial legislatures cannot grant authority over lien trials to an inferior tribunal.⁵¹⁹ This proposition stems from the Supreme Court of Canada decision in *Attorney General for Ontario and Display Services Co. Ltd. v Victoria Medical*, where as noted above, the Court held that only a Superior Court judge has ultimate jurisdiction over a lien matter when considering the jurisdiction of Masters as Masters are not federally appointed.⁵²⁰ The Commission also noted that the Small Claims Court does not have the capacity to make declaratory orders (this is also the case in Ontario under section 97 of the *Courts of Justice Act*).

Ultimately, however, the Commission recommended that, similar to the process under section 58 of the *Act*, Superior Court judges can act as “gatekeepers” and refer lien matters under \$25,000 to the Small Claims Court for a determination of issues that are within its jurisdiction, such as issues of liability in contract and tort, determinations of amounts owing, and the allocation of holdback funds.⁵²¹ The reference would be made upon an election by any party to the action, subject to an objection by any other party.⁵²² The Small Claims Court would issue a report for a Superior Court judge to review and either accept, reject, or vary upon an objection by any party.⁵²³

In Ontario, referring matters involving amounts of under \$25,000 to the Small Claims Court could have additional benefits for lien claimants in terms of cost savings. Under section 67(5) of the *Act*, lien claimants with claims of under \$25,000 can be represented by a person authorized by the *Law Society Act*,⁵²⁴ that is, a non-lawyer.⁵²⁵ However, we note that Master Albert held in *Hayes v Silva* that this does not authorize paralegals to represent lien claimants.⁵²⁶ This is because under the *Law Society Act*, Bylaw 4, paralegals do not have standing to appear at the Superior Court of Justice outside of the Small Claims Court. It is unclear whether this is an oversight or an intention to preclude paralegals from providing legal services in small lien claims. If lien claims are heard in the Small Claims Court paralegals would be able to act for lien claimants.

⁵¹⁸ Law Reform Commission of Nova Scotia, *Final Report: Builders’ Lien Act*, (2013) [Nova Scotia Final Report].

⁵¹⁹ *Ibid* at 26.

⁵²⁰ *Display Services*, *supra*.

⁵²¹ Nova Scotia Final Report, *supra* at 27-28.

⁵²² *Ibid* at 35-36.

⁵²³ *Ibid* at 38-39.

⁵²⁴ RSO 1990, c L.8.

⁵²⁵ AG Report, *supra* at 938.

⁵²⁶ *Hayes v Silva*, 2011 ONSC 3109 at para 9.

b) Simplified Procedure

The simplified rules were instituted in 1996. In 2007, Justice Osborne led the Civil Justice Reform Project (“Osborne Report”), which made a series of recommendations regarding the *Rules of Civil Procedure*. Finding that the simplified procedure was working well, the Osborne Report recommended expanding the scope of the simplified procedure. This included increasing the monetary threshold for when claims would fall within the simplified procedure, allowing for limited discovery, and limiting interlocutory appeals.⁵²⁷

Under the simplified procedure, claims that fall between \$25,000 and \$100,000 follow a distinct procedure carved out of the *Rules of Civil Procedure*. This includes limited discovery, where parties can conduct up to two hours of oral discovery. Examination for discovery by written questions and answers, cross-examinations of affiants, and examinations of witnesses on motions are prohibited.⁵²⁸ Further, on motions, supporting materials and motion records are not required,⁵²⁹ obviating the need for voluminous motion materials.

Trials under the simplified procedure are also summary in nature, where evidence is given by affidavit, and the affiant can be examined for no more than ten minutes and cross-examined for no more than 50 minutes. Each party only has 45 minutes to give their oral arguments.⁵³⁰

Appeals from interlocutory orders to the Divisional Court require leave to appeal from a Superior Court judge, and the motion for leave is to be made in writing.⁵³¹ This follows Justice Osborne’s recommendation that some restriction on appeal rights from interlocutory orders would promote cost-effective litigation.⁵³² Under the *Rules of Civil Procedure*, a balance was struck where leave is required to appeal interlocutory orders (as opposed to final orders) but the leave application is to be submitted in writing.

c) Special Considerations for Home Renovation Projects

Stakeholders also expressed concern specifically with home renovation projects, particularly where the amounts in question are less than \$25,000. Frequently, the cost of litigation is disproportionate to the amount of the dispute, and many parties in these situations do not understand or apply the *Act*. These concerns were expressed in *Lore v Tortola*, where a judge curiously penalized a lien claimant for pursuing the lien in Superior Court despite the lien being

⁵²⁷ Osborne Report, *supra* at 22-30.

⁵²⁸ *Rules of Civil Procedure*, RRO 1990, Reg 194, r 76.04.

⁵²⁹ *Ibid*, r 76.05(3).

⁵³⁰ *Ibid*, r 76.12(1).

⁵³¹ *Ibid*, r 62.02; *Courts of Justice Act*, RSO 1990, c C.43, s 19(1).

⁵³² Osborne Report, *supra* at 30.

worth less than \$25,000, preferring the lien claimant to withdraw the lien and commence the action in Small Claims Court.⁵³³

Construction lien legislation across Canada applies uniformly to all construction projects without exceptions for home renovations and without monetary thresholds. Several U.S. jurisdictions offer additional protections for home owners. While lien rights still attach, separate schemes exist within the lien legislation. In Texas, for example, in a contract between a homeowner and contractor, the courts are not required to order homeowners to pay costs and attorney fees in lien actions.⁵³⁴ Contractors are also required to deliver a statutory disclosure statement outlining the homeowner's rights and responsibilities in plain language as well as a list of all subcontractors with their names, addresses, and telephone numbers.⁵³⁵ Further, before final payment is made to the contractor, the contractor must provide the homeowner with an affidavit stating that all of the subcontractors have been paid in full, or who is still owed money.⁵³⁶

In New Jersey, a lien cannot be registered against an owner's interests in relation to a residential improvement until two conditions are satisfied: (1) Notice of Unpaid Balance must first be delivered within 60 days of the completion of the project; and (2) within ten days of serving the Notice of Unpaid Balance, a Demand for Arbitration must be served. An arbitrator will determine the validity of the lien or any rights to setoff. If the lien is determined to be valid, the claimant then has 10 days to preserve the lien, but this cannot be later than 120 days after completion of the contract.⁵³⁷

5.2 Summary of Stakeholder Views

Generally, stakeholders supported implementing changes that would adopt some of the procedures adopted for smaller dollar value matters in the *Rules of Civil Procedure*, including the following:

- a) During the Consultation Meetings, the Advocates' Society noted that small projects, particularly home renovation projects, take up significant court time. In practice, Masters sometimes move the case to small claims court, on consent of the parties, and bring it back to enforce the judgment. The steps required for these actions can be altered to make the proceedings more summary in nature. To varying degrees, a tiered system for dispute resolution based on monetary thresholds was suggested.⁵³⁸

⁵³³ 2008 CarswellOnt 1054 at paras 17-18. We would submit that while in theory it could have been a small claims matter, it was nevertheless the plaintiff's right to proceed to the Superior Court of Justice under the *Act* as written.

⁵³⁴ Tex Prop Code § 53.156.

⁵³⁵ Tex Prop Code § 53.256.

⁵³⁶ Tex Prop Code § 53.259.

⁵³⁷ NJ Rev Stat § 2A:44A-20, 21.

⁵³⁸ TTC Submissions to the CLA Review at 35, 37; The Advocates' Society Submissions to the CLA Review at 2.

- b) The OBA CLA Reform Committee suggested that matters below \$25,000 that cannot be resolved automatically should go to the Small Claims Court or alternatively, be exempt from the Act.⁵³⁹
- c) The Toronto Transit Commission submitted that there should be a streamlined process for small lien claims under \$50,000 and subject to a simplified procedure model rather than the small claims model.⁵⁴⁰
- d) The Provincial Building and Construction Trades Council of Ontario and the Ontario Association of Architects commented that small claims court would be preferable below a threshold as “a lien under \$25,000 is not cost effective”.⁵⁴¹
- e) The Labourers’ International Union of North America, Local 183 suggested that a small claims court procedure could be created in order to resolve construction lien claims under \$50,000 with a set of procedures similar to that used in small claims court.⁵⁴²
- f) On the other end of the threshold discussion, the Thunder Bay Law Association suggested that the *Act* should adopt the normal litigation process set out in the Rules of Civil Procedure for any claims in excess of \$100,000. This submission noted that adopting such a process would avoid the necessity of having to set up a Settlement Meeting to discuss and resolve such issues.⁵⁴³
- g) We also received a submission from a paralegal who suggested that the *Act*, or perhaps Bylaw 4 of the *Law Society Act*, be amended to allow paralegals to represent litigants in lien actions worth under \$25,000 as this would be more cost effective for those claimants.

With regards to home renovation projects, similar proportionality concerns were raised by the OBA CLA Reform Committee:

The OBA CLA Reform Committee noted two central concerns with home renovation projects: (1) the failure to maintain holdback and (2) the cost of litigation. With respect to the holdback, it was suggested that it does not make sense to retain holdback due to the relatively lower values of the contracts, and the lack of understanding of the holdback in the sector. The OBA CLA Reform Committee suggested that a radical proposal would be to exempt home renovation projects from the *Act*. Alternatively, the OBA CLA Reform Committee suggested that a penalty could be

⁵³⁹ OBA CLA Reform Committee Submissions to the CLA Review at 31.

⁵⁴⁰ TTC Submissions to the CLA Review at 35.

⁵⁴¹ *Ibid.* In this regard, we received a submission from Brad Comeau Professional Corporation that suggested the Small Claims Court should be an acceptable court in which to commence an action and issue a certificate of action to comply with the *Act* as the current requirement of commencing an action in the Superior Court is cost prohibitive to the majority of contractors.

⁵⁴² LIUNA 183 submissions to the CLA Review at 12.

⁵⁴³ Thunder Bay Law Association Submissions to the CLA Review at 1.

imposed on contractors and subcontractors who register liens but fail to maintain holdback from their own subcontractors and suppliers.⁵⁴⁴

The OBA CLA Reform Committee also noted the disproportionate costs associated with registering and preserving liens in home renovation projects. The OBA CLA Reform Committee suggested that a radical proposal would be to have lien matters below \$25,000 to go to the Small Claims Court. While this would cause contractors and subcontractors to lose the security of the lien, this would be tempered by the fact that there would no longer be a holdback requirement. Alternatively, the OBA CLA Reform Committee suggested that matters below \$25,000 could be exempt from the *Act* altogether.⁵⁴⁵

5.3 Analysis and Recommendations

Some form of tiered system based on monetary thresholds was suggested by stakeholders, who pointed to the \$25,000 threshold as a figure where the cost of the litigation process outweighs the benefits of liening. Stakeholders also suggested a simplified process for smaller claims, but varied as to the threshold from \$50,000 to \$250,000. If modelled after the *Rules of Civil Procedure*, three tiers would be established: claims under \$25,000, claims between \$25,000 and \$100,000, and claims over \$100,000.

Considering the concerns raised by stakeholders, the lowest tier would be the most “summary” in nature. Leave of the court would be required for interlocutory steps, and, where granted, production and discovery would be limited in time and scope or such actions could be addressed through the Small Claims Court. Summary trials could also reduce costs and the burden on the courts by reducing the amount of time parties have to examine and cross-examine witnesses and tender oral arguments.

The Small Claims Court is not a “section 96” court, thus lien actions would have to be referred to the Small Claims Court by a Superior Court of Justice judge. Lien claims of under \$25,000 should therefore be deemed at the close of pleadings to be referred to the Small Claims Court for liability issues, amounts owing, and the allocation of holdback to be reported on by a Deputy Judge, with a Superior Court judge having jurisdiction over the matter.

The next tier would see limited discoveries, while for lien actions worth over \$100,000, given the potential complexity of the claim(s) and the inevitable requirement to exchange documents, production and discovery may be required without leave of the court.

The adopting of “tiers” of claims will resolve the issue of proportionality in home renovation projects without sacrificing the security that the lien provides to those persons who have supplied services or materials to home renovation improvements. In this regard, we adopt the reasoning in

⁵⁴⁴ OBA CLA Reform Committee Submissions to the CLA Review at 31.

⁵⁴⁵ OBA CLA Reform Committee Submissions to the CLA Review at 31-32.

the 1983 Report of the Attorney General on the Draft Construction Lien Act to maintain the application of the *Act* to home renovation projects:

If one agrees with the view that an owner should be liable to persons who have supplied services or materials to the improvement of his premises, and that the premises should stand as security for their payment, then it is difficult to justify the exemption of a class of owners from such liability. While consumer home improvements variably involve low-dollar amounts when compared to other forms of construction activity, such as major heavy construction projects, they may nevertheless involve substantial amounts of money. The suppliers of services and materials to the home improvement market are particularly vulnerable, because they are often small businesses which lack financial services. Furthermore, the effort to exempt such improvements from the scope of the *Act* would inevitably result in the drawing of arbitrary distinctions between apparently identical supplies of the same types of services and materials.⁵⁴⁶

We are of the view that this reasoning still applies today, and the other recommendations made which address proportionality satisfy the concerns raised by stakeholders.

Recommendations

- Regarding small lien claims, including most home renovation claims, of an amount less than \$25,000, the *Act* should be revised to require such lien claims to be referred to the Small Claims Court for a report on liability, amounts owing, and the allocation of holdback by a Deputy Judge, with a Superior Court judge retaining ultimate jurisdiction.⁵⁴⁷
- Regarding claims between \$25,000 and \$100,000, the *Act* should be revised to provide for a simplified procedure with limited examinations for discovery and a summary trial procedure.

⁵⁴⁶ AG Report, *supra* at 649.

⁵⁴⁷ Paralegals should, therefore, be entitled to represent lien claimants in small claims court.

1. Overview

A set of statutory trusts are contained in Part II of the *Act*. The trust provisions are a separate set of rights, in addition to the lien rights provided in the *Act*.⁵⁴⁸ The trust provisions are essentially designed to keep all funding within the “construction pyramid” until all accounts for work and services are paid in full.⁵⁴⁹

The trust provisions provide remedies to unpaid contractors, subcontractors and suppliers not only against the corporate owner, contractor or subcontractor but also personally against their directors, officers and any employees or agents who have “effective control” of the corporation or its relevant activities. “Effective control” is a question of fact in every case, and courts are not bound by the form of any transaction. Personal liability for breach of the Part II 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*.⁵⁵⁰ Clearly, in cases of defalcation, Part II provides powerful remedies.

However, as was noted by the Ministry of the Attorney General in 1980, when the *Act* was last reviewed “[t]he trust rights give some protection to suppliers of services and materials primarily

⁵⁴⁸ Recently, in *Stuart Olson Dominion Construction Ltd. v Structal Heavy Steel*, 2015 SCC 43, the Supreme Court of Canada commented on the fact that lien remedies and trust remedies are two separate remedies, stating as follows:

Ensuring payment of contractors and subcontractors and encouraging liquidity in the flow of funds to them are both significant preoccupations in the construction industry. In addition to common law remedies, two statutory remedies have been developed in provincial legislation to protect those who provide services or materials to a project: construction liens (also known as mechanic’s or builder’s liens) and statutory trusts (para 1).

⁵⁴⁹ The Supreme Court of Canada in *Minneapolis-Honeywell Regulator Co. v Empire Brass Co. (Minneapolis-Honeywell Regulator Co. v Empire Brass Co. [1955] SCR 694 [Minneapolis-Honeywell])* commented on the purpose of statutory trust provisions stating as follows:

The Act is designed to give security to persons doing work or furnishing materials in making an improvement on land. Speaking generally, the earlier sections give to such persons a lien on the land, but that is limited to the amount of money owing by the owner to the contractor under the contract when the notice of the lien is given to him; only thereafter does he pay the contractor at any risk.

For obvious reasons this is but partial security; too often the contract price has been paid in full and the security of the land is gone. It is to meet that situation that s. 19 [the trust provision of the Act] has been added. The contractor and the subcontractor are made trustees of the contract moneys and the trust continues while employees, materialmen or others remain unpaid. (*Minneapolis-Honeywell, supra* at paras 2 and 3. The Supreme Court of Canada recently re-affirmed in *Stuart Olson Dominion Construction Ltd. v Structal Heavy Steel*, 2015 SCC 43, that lien and trust remedies are two distinct remedies that exist independently and can be pursued concurrently.)

The goal of this statutory trust was therefore to increase the potential for recovery beyond that provided by a lien remedy. In commenting on the purpose of statutory trust provisions, the Manitoba Court of Appeal in *Provincial Drywall* stated that “[t]he trust provisions are designed to help assure that money payable by owners, contractors and subcontractors flows in a manner which is in accord with the contractual rights of those engaged in a building project and it is not diverted out of the proper pipeline” (*Provincial Drywall Supply Ltd. v Gateway Construction Co. et al* (1993), 85 Man R (2d) 116 (CA) at para 47).

⁵⁵⁰ *Criminal Code*, RSC 1985, c C-46, s 336.

in cases where an owner, contractor or subcontractor becomes bankrupt”.⁵⁵¹ Our review of the trust provisions of the *Act* focusses on their utility in the context of an insolvency or bankruptcy.

In particular, where there is an insolvency or bankruptcy, and federal legislation in the form of either the *Bankruptcy and Insolvency Act* (“*BIA*”) or the *Companies’ Creditors Arrangements Act* (“*CCAA*”) becomes operative, there is a significant risk that trust claims will be treated just like any other unsecured claim such that opportunities for recovery are limited, particularly given the following:

- 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;⁵⁵²
- the Canada Revenue Agency’s super-priority for unpaid source deductions; and⁵⁵³
- the super-priority of post-filing debtor-in-possession financing or receiver’s interim financing.⁵⁵⁴

We note that these issues affect lien claimants as well trust claimants, but for the purpose of this Chapter, given that the main purpose of the trust provisions is to address insolvency and bankruptcy situations, our primary focus is on trust claims and we will discuss the following issues:

- Trust provisions in Ontario and other jurisdictions
- Trust claims in insolvency proceedings (a brief review of relevant case law)
- Potential Solutions
 - Holdback Trust Accounts and Project Bank Accounts
 - Mixed Trust Accounts and Accounting Mechanisms
 - Surety Bonds

⁵⁵¹ Ministry of the Attorney General, *Discussion Paper on the Draft Construction Lien Act*, November, 1980 at 6.

⁵⁵² John Margie, “Comstock Canada Ltd. (Re), A Model of Efficiency” (2015) J. Can. C. Construction Law [Margie].

⁵⁵³ s 224 of the *Income Tax Act*, RSC 1985, c 1 (5th Supp).

⁵⁵⁴ Michael McGraw, “Priorities of Construction Liens and Interim Financing in Insolvency Proceedings”, Parts I and II (April 9, 2014), online: <www.oba.org/Sections/Construction-Law/Articles-2014/April-2014>.

2. Context

2.1 Trust Provisions in Ontario and Other Jurisdictions

There are two kinds of trusts, common law trusts and statutory trusts such as those contained in Part II. In order for a common law trust to come into existence, three certainties must exist, namely:

1. certainty of intention;
2. certainty of objects; and
3. certainty of subject matter.⁵⁵⁵

Statutory construction trusts are distinguished from common law trusts by “the degree of knowledge required to find liability”.⁵⁵⁶ In order for a stranger to the trust to be liable for a breach of common law trust it must have knowingly received trust funds or knowingly assisted in a breach of trust.⁵⁵⁷ The statutory construction trust, on the other hand, expressly “traces funds into the hands of strangers to the trust”⁵⁵⁸ and is not dependent on the application of common law principles.

2.2 Trust Claims in Insolvency Proceedings

Before considering the solutions utilized in other jurisdictions to address the problems encountered in respect of statutory trusts, it is necessary to review the relevant case law.⁵⁵⁹

The main concern expressed by stakeholders about the current trust provisions in Part II of the *Act* is with respect to their enforceability in the event of the insolvency and/or bankruptcy of a payer (an owner, contractor or subcontractor).⁵⁶⁰

As noted by Justice Morawetz in the *Comstock* case (a CCAA proceeding):

⁵⁵⁵ Under the common law, “for a trust to come into existence, it must have three essential characteristics ... First, the language of the alleged settlor must be imperative; second, the subject matter or trust property must be certain; third, the objects of the trust must be certain.” (Law of Trusts in Canada by D.W.M. Waters, 2d ed (Toronto: Carswell, 1984) at 107); see also *Iona Contractors Ltd. (Receiver of) v Guarantee Co. of North America*, 2015 ABCA 240 [*Iona Contractors*].

⁵⁵⁶ David Bristow et al, *Construction Builders’ and Mechanics’ Liens in Canada*, 7th ed, looseleaf (Toronto: Carswell, 2005) at 9-6 [Bristow et al].

⁵⁵⁷ *Ibid.*

⁵⁵⁸ Duncan Glaholt, *Conduct of a Trust Action* (Toronto: Carswell, 2011) at 3 [Conduct of a Trust Action].

⁵⁵⁹ For readers who are interested in an in depth consideration of construction trusts law, we highly recommend reading Duncan W. Glaholt, *Construction Trusts: Law & Practice* (Scarborough: Carswell, 1999) and *Conduct of a Trust Action*, *supra*.

⁵⁶⁰ RSC 1985, c B-3. Section 67(1) of the BIA excludes certain assets from the property of the bankrupt to be divided among the bankrupt’s creditors, and in particular “property held by the bankrupt in trust for any other person”.

This motion underscores the inherent difficulty which surrounds the attempted reorganization of certain entities, in particular, real estate companies and construction companies. By definition real estate companies and construction companies operate on a project-by-project basis. In many cases, each project is the subject of specific- purpose financing. In the case of real estate companies, secured creditors vary on a project-by-project basis. With respect to construction companies, creditors, including construction lien trust claimants, vary on a project-by-project basis and the assets or trust funds also vary on a project-by-project basis. The legal rights of these creditors vary to such a degree that quite often they cannot be grouped in one class. The community of interest is often lacking, resulting in fragmented interests.⁵⁶¹

The *Act* is provincial legislation which falls under the Province’s jurisdiction over property and civil rights. Given the doctrine of constitutional paramountcy, in the case of an **operational conflict** between provincial legislation, i.e. the *Act*, and federal legislation, including the *BIA*, the federal legislation will prevail. As long as all the parties involved in a construction project remain solvent, there is no issue about the enforceability of the trust provisions of the *Act*. But when there is an insolvency and the scheme of the priorities set out in the *BIA* is applied, operational conflicts may be found to arise.

The *BIA* governs the distribution of the estates of bankrupt entities. The scheme imposed under the *BIA* can be generally summarized as follows:

The *Bankruptcy and Insolvency Act* incorporates numerous provisions that determine the priority of payments to claimants in a bankruptcy. In the most general terms, the scheme is:

- (a) Under s. 67(1), only “property of the bankrupt” is available for distribution to any class of claimants. **Under s. 67(1)(a) property “held by the bankrupt in trust for any other person” is not considered to be property of the bankrupt, and so is not available to the creditors of the bankrupt.**
- (b) Under s. 136(1), the scheme of distribution is made “subject to the rights of secured parties”. Secured parties are thus entitled to enforce their security in accordance with provincial law, without regard to the scheme in the Bankruptcy and Insolvency Act.
- (c) Section 136 next lists, in order of priority between themselves, a dozen categories of claims that have priority over general unsecured claims...
- (d) Finally, s. 141 provides that all other claims will be payable rateably, subject to a few specific statutory exceptions.⁵⁶² [Emphasis added]

As noted recently by the Alberta Court of Appeal 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

⁵⁶¹ *Comstock Canada Ltd. (Re)* (2013), 33 CLR (4th) 336 (Ont Sup Ct) at para 16.

⁵⁶² *Iona Contractors*, *supra* at para 26

claims are included in these various categories is a matter of federal law. This ensures the uniformity of bankruptcy law across Canada.⁵⁶³

In 1995, in *Husky Oil Operations Ltd. v Minister of National Revenue*⁵⁶⁴, the Supreme Court of Canada rejected a broad “bottom line” approach pursuant to which any provincial law that affected a final result in bankruptcy would create an operational conflict and also rejected a narrow “jump the queue” approach pursuant to which an operational conflict could only be said to arise if there was a “manifest intent” to change priorities in bankruptcy. Instead, the Court set out the following propositions to be applied:

(1) **provinces cannot create priorities between creditors or change the scheme of distribution on bankruptcy under s. 136(1) of the Bankruptcy Act;**

(2) while provincial legislation may validly affect priorities in a non-bankruptcy situation, once bankruptcy has occurred **section 136(1) of the Bankruptcy Act determines the status and priority of the claims** specifically dealt with in that section;

(3) **if the provinces could create their own priorities or affect priorities under the Bankruptcy Act this would invite a different scheme of distribution on bankruptcy from province to province, an unacceptable situation; [...]**

(4) the definition of terms such as "secured creditor", if defined under the Bankruptcy Act, must be interpreted in bankruptcy cases as defined by the federal Parliament, not the provincial legislatures. Provinces cannot affect how such terms are defined for purposes of the Bankruptcy Act.

(5) in determining the relationship between provincial legislation and the *Bankruptcy Act*, the form of the provincial interest created must not be allowed to triumph over its substance. **The provinces are not entitled to do indirectly what they are prohibited from doing directly;** [and]

(6) there need not be any provincial intention to intrude into the exclusive federal sphere of bankruptcy and to conflict with the order of priorities of the *Bankruptcy Act* in order to render the provincial law inapplicable. **It is sufficient that the effect of provincial legislation is to do so.**⁵⁶⁵ [Emphasis Added]

These principles definitively establish when provincial legislation will be found to be inoperative, therefore “[w]hether any provincial scheme is in operational conflict with the bankruptcy regime must be determined by examining the purposes and effects of the provincial legislation within its statutory context.”⁵⁶⁶ In considering changes to the existing trust provisions of the *Act*, it is therefore important to understand how the courts have applied these propositions.

⁵⁶³ *Iona Contractors, supra* at para 26

⁵⁶⁴ [1995] 3 SCR 453 [Husky Oil].

⁵⁶⁵ *Ibid* at paras 33 and 40.

⁵⁶⁶ *Iona Contractors, supra* at para 30.

Regarding provincial statutory trusts, in *British Columbia v Henfrey Samson Belair Ltd.*⁵⁶⁷ the Supreme Court of Canada considered the exclusion of trust funds from the bankrupt's property under section 47(a) of the Bankruptcy Act (now section 67(1) of the *BIA*, referred to above in bold). This section exempts trust property in the hands of the bankrupt from distribution to creditors "giving trust claimants absolute priority"⁵⁶⁸ The question before the court was whether or not a statutory trust established by provincial legislation should be considered to be a trust within the meaning of what is now section 67(1) of the *BIA*. The Court noted that the intention of parliament in enacting this provision was "to permit removal of property which can be specifically identified as not belonging to the bankrupt **under general principles of trust law** from the distribution scheme established by the Bankruptcy Act"⁵⁶⁹ [emphasis added]. Therefore, the exception set out in section 67(1) applies to statutory trusts established by provincial legislation **only if** such trusts bear the attributes of a common law trust.⁵⁷⁰ The attributes of a common law trust include establishing the three certainties being:

1. certainty of intention,
2. certainty of subject matter (identification of the property subject to the trust), and
3. certainty of object.⁵⁷¹

The Court also held that funds that are deemed to be trust funds by statute may lose their character as trust funds if they become untraceable and may become part of the estate to be distributed to creditors, in accordance with the priority regime under the *BIA*.⁵⁷²

In the 2005 decision of *GMAC Commercial Credit Corp. – Canada v TCT Logistics Inc.*⁵⁷³, the Ontario Court of Appeal addressed whether or not provincial statutory trust funds were trust funds within the meaning of section 67(1)(a) of the *BIA* and whether or not these statutory trust funds constituted property available for distribution to creditors in the bankruptcy. The Court invoked the principle of paramountcy and relied on the *Henfrey Samson* and *Husky Oil* cases to find that even if the provincial legislation created a deemed trust in favour of the carriers, provincial legislation "cannot operate to reorder the priorities in bankruptcy" and to find that

⁵⁶⁷ [1989] 2 SCR [Henfrey Samson]. This case was originally decided by the British Columbia Supreme Court under s 47(a) of the *Bankruptcy Act*, RSC 1970, c B-3, which has since been replaced by s 67(a) of the *Bankruptcy Act*, R.S.C. 1985, c. B-3. Beyond *Henfrey Samson* and *Husky Oil*, *supra*, operational conflicts between provincial legislation and the *BIA* have been considered in several other cases including: *Quebec (Deputy Minister of Revenue) v Bourgault (Trustee of)*, [1980] 1 SCR 35; *Deloitte Haskins and Sells Ltd. v Alberta (Workers' Compensation Board)*, [1985] 1 SCR 785; *Federal Business Development Bank v Québec (Commission de la santé et de la sécurité du travail du Québec)*, 1988 CanLII 105 (SCC).

⁵⁶⁸ *Henfrey Samson*, *supra* at para 33.

⁵⁶⁹ *Ibid.*

⁵⁷⁰ L.W. Houlden and Geoffrey B. Morawetz, *Houlden and Morawetz Bankruptcy and Insolvency Analysis* (Toronto: Carswell, WestlawCanada online service) at F§5 — Trust Property.

⁵⁷¹ *Iona Contractors*, *supra*. Application for leave to appeal was dismissed by the Supreme Court of Canada on April 14, 2016.

⁵⁷² *Henfrey Samson*, *supra* at para 46.

⁵⁷³ 2005 CarswellOnt 636 (CA) [GMAC].

section 67(1)(a) of the *BIA* did not exclude “funds that are subject to a deemed trust but are not held in accordance with general trust principles”.⁵⁷⁴ In determining that the funds at issue did not satisfy the common law test for trusts, the Court found that “once the purported trust funds are co-mingled with other funds, they can no longer be said to be effectively segregated for the purpose of constituting a trust at common law”.⁵⁷⁵

In another 2005 Ontario Court of Appeal decision, *Graphicshoppe Ltd., Re*,⁵⁷⁶ the issue under consideration was whether or not the bankrupt’s employees could recover their pension contributions which Graphicshoppe had co-mingled in its single general bank account. The Court of Appeal, relying on *Henfrey Samson*, held that, once the funds had been co-mingled in Graphicshoppe’s general account and converted into other property by the company, they were no longer traceable and had lost their character as trust funds and therefore could not be excluded from the property of the bankrupt under s.67(1)(a) of the *BIA*. The Court stated as follows:

For present purposes, I am prepared to accept that *Henfrey Samson* falls short of holding that co-mingling of trust and other funds is, by itself, fatal to the application of s. 67(1)(a) of the *BIA*. **Once however, the trust funds have been converted into property that cannot be traced, that is fatal. And that is what occurred here.**⁵⁷⁷

In the 2014 Ontario Superior Court case of *Royal Bank of Canada v Atlas Block Co.*,⁵⁷⁸ the Court considered the issue of whether or not Part II trust funds lose their character as trust funds when they are not segregated but are co-mingled, in the context of *BIA* proceedings. A court appointed receiver in a bankruptcy sought directions on whether or not a supplier of materials had a trust claim under the *Act*. The court noted that section 67(1)(a) 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”.⁵⁷⁹ The court examined the three certainties described above (i.e. certainty of intention, certainty of subject matter and 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.”⁵⁸⁰ Accordingly, the priorities under the *BIA* governed the disposition of the funds.⁵⁸¹

⁵⁷⁴ *Ibid* at para 15.

⁵⁷⁵ *Ibid* at para 19.

⁵⁷⁶ 2005 CarswellOnt 7008.

⁵⁷⁷ *Ibid* at para 123.

⁵⁷⁸ *Royal Bank of Canada v Atlas Block Co.* (2014), 37 CLR (4th) 286 [*Atlas Block*].

⁵⁷⁹ *Ibid* at para 34. The court also noted that three Saskatchewan decisions had found that the deemed trust under comparable legislation in Saskatchewan did not survive bankruptcy.

⁵⁸⁰ *Ibid* at para 45.

⁵⁸¹ *Ibid* at para 48.

Recently, 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)*⁵⁸² 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. As the Court was able to trace some of the funds to deposits made by one residential housing unit owner, it found the amount of those deposits to be excluded from the property of the estate in bankruptcy.⁵⁸³ Moreover, relying on the principles enunciated in *Re Hallett's Estate*⁵⁸⁴ namely, that a trustee may be presumed to have spent all its own money first before spending any trust monies in its possession, and that the onus is on the trustee to rebut such presumption by identifying its own funds, the court concluded that the entire sum in the bank account of the general contractor retained their trust character and were excluded from property of the trustee in bankruptcy.⁵⁸⁵

*The Alberta Court of Appeal also recently considered the interaction between the Alberta trust provisions and federal bankruptcy legislation in its decision in Iona Contractors Ltd. (Receiver of) v Guarantee Co. of North America.*⁵⁸⁶ Notably, the Supreme Court of Canada dismissed leave to appeal in this case on April 14, 2016. Under section 22 of the *Alberta Act*, once a certificate of substantial completion is issued, any "payment by the owner" is subject to the trust. The owner's primary obligation at that stage was noted to be a chose in action which was stated to be the subject matter of the trust. It was further found that there was no deliberate attempt to reorder priorities in bankruptcy, that the province was not trying to do indirectly what it could not do directly, and that the trust provisions were "merely a collateral part of a complex regime designed to create security for unpaid contractors."⁵⁸⁷ Therefore, the court concluded that there was no operational conflict.

In *Iona*, the Alberta Court of Appeal commented on the *Atlas Block* decision and similar decisions⁵⁸⁸ noting that in such decisions, the courts have essentially read the Supreme Court of Canada authorities as "essentially holding that no statutory trust will be effective after bankruptcy".⁵⁸⁹ As noted by the Alberta Court of Appeal, in *Husky Oil* and *Henfrey Samson Belair*, this in fact was not the approach taken by the Supreme Court of Canada. To the contrary,

⁵⁸² 2015 NSSC 274 [*Kel-Greg*].

⁵⁸³ *Ibid* at paras 11-12.

⁵⁸⁴ (1880) 13 Ch.D. 696 (CA)

⁵⁸⁵ *Kel-Greg*, *supra* at paras 14-15.

⁵⁸⁶ *Iona Contractors*, *supra*.

⁵⁸⁷ *Iona Contractors*, *supra* at para 37

⁵⁸⁸ See also *Duraco Window Industries (Sask.) Ltd. v Factory Window & Door Ltd.* (1995), 1995 CanLII 5740 (SK QB); and, 135 Sask R 235 and *Roscoe Enterprises Ltd. v Wasscon Construction Inc.* (1998), 169 Sask R 240.

⁵⁸⁹ *Iona Contractors*, *supra* at para 43.

the Supreme Court “essentially recognized that some provincial statutory trusts could be effective.”⁵⁹⁰

On the facts of Iona, because the trust clearly existed before the bankruptcy of the contractor and the trust funds were quantified and traceable in the hands of the owner (the owner had segregated the trust funds into a separate account), the trust was not defeated by the bankruptcy and the funds were not available to the trustee in bankruptcy for distribution to secured creditors under the BIA. In the circumstances trust provisions of the *Alberta Act* were found to meet the requirements of a common law trust, including the requirement of certainty of subject matter.

In summary, the difficulty in reconciling cases like *Iona* and *Kel-Greg* on the one hand, and as *Atlas Block*, on the other, creates uncertainty. The uncertainty has been alleviated somewhat given that leave to appeal to the Supreme Court of Canada was denied in *Iona* such that it has arguably been established that a provincial statutory trust can be effective in the face of a bankruptcy proceeding, if there is no operational conflict with insolvency legislation. However, there still remains a significant practical concern as to whether or not a provincial statutory trust will satisfy the three certainties necessary to establish a common law trust, particularly the certainty of subject matter requirement. A possible solution to address this concern about certainty of subject matter, which would have to be adopted by the legislature, was indirectly suggested by the Court in the *Atlas Block* decision as follows:

In *Ivaco Inc., Re* [...] the Court of Appeal for Ontario dealt with a deemed trust under the provincial pension benefits legislation. The Court held that a deemed trust “is, in a sense a legal fiction”. Only a trust at common law is exempt from the bankrupt’s estate. The designation “deemed trust” does not “by itself create a true trust. **If the province wants to require an employer to keep its unpaid contributions to a pension plan in a separate account it must legislate that separation. It has not done so**”.⁵⁹¹ [Emphasis added]

Clearly, this is a reference to the possible implementation of legislation that requires parties to open project trust accounts or project bank accounts, a potential solution that will be considered below and has been implemented in other jurisdictions.

A different possible solution would be to accept that the risk of operational conflicts will inevitably call into question any attempt to enforce a provincial statutory trust regime, given the paramountcy doctrine. If an alternative mechanism of protection is required for subcontractors and suppliers in an insolvency situation, mandatory surety bond protection for subcontractors and suppliers is a potential solution.

The insolvency issue affects lien claimants, as well as trust claimants, given the potential for operational conflicts between insolvency legislation and lien legislation. Lien claimants, like

⁵⁹⁰ *Iona Contractors, supra* at para 43.

⁵⁹¹ *Atlas Block, supra* at para 41, citing *Ivaco Inc., Re* (2006), 25 CBR (5th) 176 (Ont CA) at para 46. It is important to note, however, that this passing comment by the court provides no assurance that a separate account would not also be attacked on the basis of paramountcy.

trust claimants are subject to stay provisions that preclude lien claimants from commencing actions absent court approval and must also cope with the Canada Revenue Agency's super-priority and with the super-priority of post-filing debtor-in-possession financing or receiver's interim financing.

The *Comstock* case addressed a situation where the court adopted a unique mechanism to address the rights of lien claimants in the context of a CCAA proceeding. When Comstock applied for protection under the CCAA, it was crucial that at no time the flow of funds be stopped on Comstock's ongoing key projects, otherwise any hope of realizing amounts due to Comstock and, by extension, the creditors' recovery prospects, would have been jeopardized.⁵⁹² To that end, the Court granted an Initial Order which did not exclude the preservation and perfection of construction liens from the application of the CCAA automatic stay of proceedings. Soon after the Initial Order was issued, liens were preserved on one of Comstock's projects and the lien claimants were required to attend at court to explain why they had preserved liens in contravention of the Initial Order. The problem was that the rights of lien claimants could not be ignored, but at the same time, liens could not be registered because if they were registered funds would have stopped flowing and Comstock's projects would have come to a halt. The monitor's solution, as ordered by the Court, first consisted of an Amended and Restated Initial Order which expressly excluded the registration of liens under the *Act*, the *Manitoba Act*, the *Alberta Act* or the *B.C. Act*.⁵⁹³ Then, on August 7, 2013, the court issued a Lien Regularization Order, which, in effect, entirely circumvented the application of the *Act* and created an alternative to the statutory lien remedy by giving lien claimants a court ordered charge in lieu of their liens.⁵⁹⁴ This solution was unique and risky for the lien claimants but commentators have taken the position that it was an "elegant solution", and the best chance the lien claimants had of making any recovery.⁵⁹⁵ Although criticized by some, the monitor's solution in Comstock was a practical one which provided for the orderly administration of Comstock's estate and permitted Comstock to continue its operations long enough to complete its projects.⁵⁹⁶

In any event, it is clear that there is a need for a solution to the insolvency issue. In considering potential solutions below, we have evaluated whether these solutions are designed to fit within the context of the *Act* (and are not a one-off solution as was adopted in *Comstock*), do not create an operational conflict with federal insolvency legislation, and are not unduly onerous for the construction industry.

⁵⁹² Robin B. Schwill, "Staying Alive! A History of the Drama of the Comstock Proceedings" (2015) 4 J Insolv Inst C [Schwill].

⁵⁹³ Margie, *supra* at 83.

⁵⁹⁴ *Ibid* at 84.

⁵⁹⁵ See Margie, *supra* and Schwill, *supra*.

⁵⁹⁶ Margie, *supra* at 85-86.

2.2.1 The Trust Regime in Ontario

2.2.1.1 The Trust Provisions of the *Act*

As noted above, the trust obligations of the *Act* are set out in Part II of the *Act* and provide remedies that are in addition to the lien rights provided in the *Act*, as noted above.⁵⁹⁷ There are three statutory trusts created in Part II as follows:

(a) The Owners Trust

Section 7(1) states as follows:

Amounts received for financing a trust

7. (1) **All amounts received by an owner**, other than the Crown or a municipality, **that are to be used in the financing of the improvement**, including any amount that is to be used in the payment of the purchase price of the land and the payment of prior encumbrances, **constitute**, subject to the payment of the purchase price of the land and prior encumbrances, **a trust fund for the benefit of the contractor**. R.S.O. 1990, c. C.30, s. 7 (1). [Emphasis added]

According to section 7(2) of the *Act*, the owner has a trust obligation in respect of amounts payable on a certificate of payment “that applies even when the money is not borrowed or acquired for the purposes of financing the improvement.” This section is “aimed at those situations where the owner is financing the improvement out of general revenues” and the trust arises where “a payment certifier certifies an amount payable under the construction contract, and attaches to an amount in the owner’s hands or which the owner receives subsequently that is equal to the amount so certified”.⁵⁹⁸

Section 7(3) creates a similar trust over monies in the owner’s hands “after a certificate of substantial performance has been issued or a declaration of substantial performance has been made by the courts.”⁵⁹⁹

Section 7(4) provides that an owner in possession of trust funds shall “not appropriate or convert any part of a fund to the owner’s own use or to any use inconsistent with the trust until the contractor is paid all amounts related to the improvement owed to the contractor by the owner”.⁶⁰⁰

(b) The Contractor’s and Subcontractor’s Trusts

In relation to the contractor’s and subcontractor’s trust, section 8(1) provides as follows:

8. (1) All amounts,

⁵⁹⁷ Duncan Glaholt & David Keeshan, *The 2016 Annotated Construction Lien Act* (Toronto: Carswell, 2015) at 78-79 [Annotated Act].

⁵⁹⁸ *Ibid* at 77.

⁵⁹⁹ *Ibid* at 77-78.

⁶⁰⁰ *Ontario Act*, s 7(4).

- (a) owing to a contractor or subcontractor, whether or not due or payable; or
- (b) received by a contractor or subcontractor,

on account of the contract or subcontract price of an improvement constitute a trust fund for the benefit of the subcontractors and other persons who have supplied services or materials to the improvement who are owed amounts by the contractor or subcontractor. R.S.O. 1990, c. C.30, s. 8 (1).⁶⁰¹

Section 8(2) provides as follows:

(2) The contractor or subcontractor is the trustee of the trust fund created by subsection (1) and the contractor or subcontractor shall not appropriate or convert any part of the fund to the contractor's or subcontractor's own use or to any use inconsistent with the trust until all subcontractors and other persons who supply services or materials to the improvement are paid all amounts related to the improvement owed to them by the contractor or subcontractor.

(c) The Vendor's Trust

Section 9(1) creates a trust for the benefit of the contractor where an owner's interest in a premises is sold by the owner, subject to the deduction of the reasonable expenses arising in respect of the sale and the amount paid by the vendor to discharge any existing mortgage indebtedness.⁶⁰²

There are only three ways to properly manage statutory trust funds:

- a) Discharge: section 10 allows a statutory trustee to "discharge" the trust obligation. In particular, section 10 "allows a trustee to discharge, on a dollar for dollar basis, its obligations to 'all beneficiaries of the trust by paying 'a person' who the trustee is liable to pay for services or materials supplied to the improvement".⁶⁰³ This section is to be read in conjunction with section 85 which "requires a rateable distribution in the case of an insolvent payer". The sections, read together, make it clear that "a trustee's obligation is, in its simplest terms, to pay to the person it owes the amount owing on the improvement, and that if that is done without any actual notice of a possible breach of trust by the payee, the trustee will have discharged its duties".⁶⁰⁴
- b) Reduction by substitution: Section 11 allows a statutory trustee to "reduce" the trust fund. Specifically, subsection 11(1) allows a trustee to "'retain' out of trust funds an amount equal to any non-trust monies that the trustee has borrowed or otherwise used to pay for services or materials supplied to the improvement." Further, subsection 11(2) allows a trustee "not only to 'retain' but also to 'apply' trust funds to repay borrowed money

⁶⁰¹ *Ontario Act*, s 8(1).

⁶⁰² *Ontario Act*, s 9(1).

⁶⁰³ Annotated Act, *supra* at 126.

⁶⁰⁴ *Ibid.*

otherwise used to pay beneficiaries”.⁶⁰⁵ Such loans must be specific to the project and must be repaid by the statutory trustee not the creditor.⁶⁰⁶

- c) Retainage for set off: section 12 allows a statutory trustee to “retain” trust monies. Set-off by a trustee is provided for under section 12, which states as follows:

12. Subject to Part IV, a trustee may, without being in breach of trust, retain from trust funds an amount that, as between the trustee and the person the trustee is liable to pay under a contract or subcontract related to the improvement, is equal to the balance in the trustee’s favour of all outstanding debts, claims or damages, whether or not related to the improvement. R.S.O. 1990, c. C.30, s. 12.

The effect of this section is that “the value of any trust claim by a payee will be limited to the net amount owing by the payer after all set-offs have been exercised”.⁶⁰⁷

The court considered the right of set-off in the decision of *Datasphere Sales Ltd. v Universal Light & Power Corp* (1991)⁶⁰⁸ and held that there is “no right in [a trustee] put some or all of the [trust] funds to general use because in its view, in the light of claims it has or proposes to assert against the beneficiary-contractor, the ultimate arithmetical calculations will demonstrate that the trust moneys owing net out at a balance less than the gross total of the funds retained. The word used in section 12 is ‘retain’ not ‘spend’”.⁶⁰⁹ Therefore, a trustee is obligated to retain the funds in relation to which a right of set-off is claimed.

Similarly, in *Arborform Countertops Inc. v Stellato* (1996)⁶¹⁰ the Court held that that the intent of section 12 is to “is to allow the trustee to retain moneys alleged to be for set-off, but not to expend them”.⁶¹¹ On the facts of the case, the defendants had spent the trust funds, the Court held that they were precluded from advancing the defence of set off given that the *Act* “prohibit[ed] them from doing so”.⁶¹²

As noted above, there is a remarkably powerful statutory remedy for breach of trust found in section 13(1) which states as follows:

13. (1) In addition to the persons who are otherwise liable in an action for breach of trust under this Part,
- (a) every director or officer of a corporation; and
 - (b) any person, including an employee or agent of the corporation, who has effective control of a corporation or its relevant activities,

⁶⁰⁵ Annotated Act, *supra* at 126.

⁶⁰⁶ *Ibid* citing *Ontario Electrical Construction Co. v S.I. Guttman Ltd.* (1996), 29 CLR (2d) 146 (Ont Gen Div).

⁶⁰⁷ Annotated Act, *supra* at 132.

⁶⁰⁸ 48 CLR 25 (Ont Gen Div).

⁶⁰⁹ *Ibid* at para 14; See also Annotated Act, *supra* at 133.

⁶¹⁰ 29 OR (3d) 129 (Gen Div).

⁶¹¹ *Ibid* at para 43.

⁶¹² *Ibid*; see also Annotated Act, *supra* at 133.

who assents to, or acquiesces in, conduct that he or she knows or reasonably ought to know amounts to breach of trust by the corporation is liable for the breach of trust. R.S.O. 1990, c. C.30, s. 13 (1).⁶¹³

Section 13(2) allows the court to pierce the corporate veil in that it permits the court to “disregard the form of any transaction and the separate corporate existence of any participant”.⁶¹⁴ Section 13(3) and 13(4) provide for “mandatory joint and severable liability, and for equal contribution between liable parties, unless the court considers equal contribution to be unfair.”⁶¹⁵

Duncan Glaholt in *The 2016 Annotated Construction Lien Act* notes that several basic principles have been established in relation to breach of trust under section 13 of the *Act*. Specifically, no *mens rea* (i.e. proof of intent) is required to establish personal liability under this section. The standard is simply one of reasonableness and whether the defendant knew or ought to have reasonably known of a breach of trust.⁶¹⁶

*Opec Acoustics & Drywall Ltd v Kascop Corp (1997)*⁶¹⁷ is instructive in this regard:

An allegation of malfeasance such as fraud, misrepresentation, malice or malicious intent is not a prerequisite to establishing a “breach of trust” under the Construction Lien Act. **A mere failure to account for funds to all subcontractors and other persons who supplies services or materials to the improvement for funds received prior to any appropriation or conversion of any part of the funds to the contractor's or subcontractor's own use or to any use inconsistent with that trust, is in itself a “breach of trust”.** The allegation of such failure to account is sufficient to validate pleadings in relation to a “breach of trust” created by the Construction Lien Act without anything else. [Emphasis added]

Therefore, while the current provisions of the *Act* do not explicitly require the creation of a separate bank account for trust funds, a failure to “account for” such funds will be found to be a breach of trust.

2.2.1.2 Ontario’s Rejection of Holdback Trust Accounts in 1983

The creation of separate holdback trust accounts was explicitly considered by the Ministry of the Attorney General in 1980 and, in fact, was recommended in the Discussion Paper on the Draft Construction Lien Act prepared by the Ministry of the Attorney General in November 1980.⁶¹⁸ The proposed provision provided that the owner was to pay the holdback into a joint trust account on projects where the contract price was \$150,000 or more. The draft provision stated that this proposed joint trust account:

- (a) shall be opened and held in the joint names of the owner and the contractor as trustees;
- (b) may be maintained at any chartered bank, trust company or other financial institution;

⁶¹³ *Ontario Act*, s 13.

⁶¹⁴ Annotated Act, *supra* at 135.

⁶¹⁵ *Ibid.*

⁶¹⁶ *Ibid* citing *Heritage Masonry Ltd. v Building Team Ltd.*, [1995] OJ No 2263 (Gen Div).

⁶¹⁷ *Opec Acoustics & Drywall Ltd v Kascop Corp (1997)*, 34 CLR (2d) 75 (Ont Gen Div) at paras 11-12.

⁶¹⁸ Ministry of the Attorney General, *Discussion Paper on the Draft Construction Lien Act*, November, 1980 at 53.

- (c) shall be an interest bearing account;
- (d) shall be held in trust for those who have a charge upon the holdback;
- (e) shall require the signatures of both trustees for payment out of the account unless otherwise ordered by the court.⁶¹⁹

The Ministry of the Attorney General identified the policy considerations behind the proposed holdback trust account provisions as follows:

Since before the turn of the century, owners have been required to maintain a holdback. However, the experience of the construction industry has been that the holdback is usually more notional than real. Only rarely is an actual holdback fund set aside by the owner. In most cases, the owner will deduct the holdback percentage from his payment, but he will not put this money aside to satisfy any lien claims. When such claims are made, it is often discovered that there is no money available to satisfy the claims. Although the property can be sold, this process is lengthy and cumbersome. The interest on prior mortgages will usually eat away any extra value in the project, depriving the suppliers of services and materials of the amount that should have been set aside to satisfy their claims.

(...)

The holdback does not belong to the owner, but rather, belongs to those who have contributed services and materials to the improvement. Its purpose is to provide security to subcontractors and labourers, not to assist the owner in the financing of his endeavours. It has become clear that for the holdback to provide the protection which it was intended to achieve in large projects, provision must be made for the security of these funds.⁶²⁰

Subsequently, the Attorney General's Advisory Committee on the Draft Construction Lien Act "strongly recommend[ed] the rejection" of the proposal to mandate holdback trust accounts which it had identified, at the time, as "**the most controversial proposal** contained in the Discussion Draft"⁶²¹ [emphasis added]:

In the opinion of the Committee, **the costs of the joint trust account proposal would far exceed its benefits**. The scheme would have provided no practical protection on contracts for less than \$150,000, yet it is often on these contracts that the holdback is least secure. **The scheme would have imposed a very high cost on the industry**. The owner would often have to borrow the money to put into the joint trust account and in many cases, this money would have been borrowed from the same bank or trust company in which it was deposited. (...) In addition, the scheme would have imposed significant administrative costs. A separate joint trust account would have been required for each contract. In the case of many large owners they would have been required to open hundreds of such accounts every year. **The cost of opening, controlling and closing these accounts would have been very high**. But ironically, these are precisely the same owners who are the least likely to default in maintaining the holdback. As a result, the total cost of this proposal would have greatly exceeded the cost which the risk of default on the holdback

⁶¹⁹ *Ibid.*

⁶²⁰ *Ibid.*

⁶²¹ Report of the Attorney General's Advisory Committee on the Draft Construction Lien Act, Letter of Transmittal to the Honourable R. Roy McMurtry, Q.C. Attorney General for Ontario, April 8, 1982 in Annotated Act, *supra* at 653-654.

forces on the industry. **Finally, the scheme was incompatible with some common forms of project organization, such as construction and project management.** Thus it would have severely restricted the ability to use these systems of organization.⁶²² [Emphasis added]

As can be seen from the above bolded references, it was primarily the costs and administrative burden that motivated the recommendation to reject the joint trust account.

Although the Advisory Committee did not recommend the introduction of mandatory holdback trust accounts, it recognized the importance of somehow protecting the holdback. To protect the holdback, changes were made to the statutory scheme regarding relative priorities between the interests of mortgagees and lien claimants.

2.2.2 Trust Regimes in Other Provinces

There are no trust provisions in Quebec, Newfoundland and Labrador, the Northwest Territories and Nunavut, P.E.I. and the Yukon. Below, we address specifically those provinces where separate holdback trust accounts have been put in place.

2.2.2.1 British Columbia

The *B.C. Act* requires that the owner establish a separate holdback account.⁶²³ The features of the British Columbia holdback account regime are as follows:

- a) The regime applies to private owners (**not** public owners) and to construction contracts where the value of the work and materials is more than \$100,000.⁶²⁴
- b) The owner must open a separate account at a savings institution for each contract under which a lien may arise and deposit in that account all holdback amounts retained by the owner pursuant to section 4(1) of the *B.C. Act*.⁶²⁵ It has been noted that the adoption of multiple accounts regime was intended to facilitate the owner's administrative obligations.⁶²⁶
- c) The amounts to be deposited into the holdback account are held in trust for the contractor from whom the holdback was retained and cannot be paid out without the agreement of all of the persons who administer the account (i.e. the owner and the contractor).⁶²⁷

⁶²² *Ibid* at 654.

⁶²³ *B.C. Act*, s 5.

⁶²⁴ *B.C. Act*, s 5(8).

⁶²⁵ *B.C. Act*, s 5(1)(b).

⁶²⁶ British Columbia Law Institute, "Introducing British Columbia's New *Builders Lien Act*, 1997: Chapter 6 'Holdbacks by the Owner'", online: <<http://www.bcli.org/law-reform-resources/builders-lien-act/chapter-6>>.

⁶²⁷ *B.C. Act*, s 5(2).

- d) Unless the parties otherwise agree, the interest on the holdback account accrues to the owner during the holdback period, and after the expiration of lien rights it accrues to the credit of the contractor from whom the holdback was retained.⁶²⁸
- e) An owner's failure to pay the holdback into the account as required constitutes an act of default, and the contractor, upon 10 days written notice, is entitled to suspend the work for the duration of the default.⁶²⁹
- f) The administrator of a holdback account can apply to the court for directions on the administration of the account, and the court is empowered to make orders including those for payment into court for the removal of claims of lien, or those for payment to a lien holder.⁶³⁰

Construction law practitioners in British Columbia have noted that section 5 of the *B.C. Act* was enacted as a result of a large number of owner foreclosures in insolvency proceedings, which left contractors and trades with no chance of recovery. Section 5 was therefore intended to provide the additional protection and better opportunities for recovery afforded by a holdback fund as opposed to a notional fund. Some commentators have noted, however, that in practice holdback accounts are, in some cases, not being established.⁶³¹ These commentators have noted that in order to “avoid administrative complications and sometimes simply because of a reluctance to advance and relinquish sole control over holdback funds, some owners decline to establish holdback accounts.”⁶³²

One of the reasons for such non-compliance is that the only remedy available to a contractor in the event that an owner fails to open the required holdback account is the suspension of the work, after providing notice. Generally, contractors are adverse to suspending their work even when they are not being paid, and are even more reluctant to do so if they are being paid and the only remedy being sought is to enforce the owner's obligation to pay funds into a holdback account.

2.2.2.2 Saskatchewan

The *Saskatchewan Act* provides that every owner shall establish a holdback trust account to be administered jointly with the contractor, as trustees in relation to which:

⁶²⁸ *B.C. Act*, s 5(6).

⁶²⁹ *B.C. Act*, section 5(7).

⁶³⁰ *B.C. Act*, s 5(3).

⁶³¹ See for example, J. Marc MacEwing, “The Builders Lien Holdback Account” (December 15, 2012), online: <http://www.shk.ca/wp/wp-content/uploads/pdf/No23_JMM_01.pdf> [MacEwing]; See also Russell Hixson, “B.C. Builders Lien Act reform getting underway” (May 26, 2015), online: <<http://journalofcommerce.com/Government/News/2015/5/BC-Builders-Lien-Act-reform-getting-underway-1007897W/>>.

⁶³² MacEwing, *supra*.

- a) All amounts deposited into the holdback trust account must be held in trust for all those persons who have a lien.⁶³³
- b) Where there is more than one contract for the same improvement, the owner has to maintain a single holdback trust account administered jointly by the owner and one other trustee.
- c) The other trustee must be one of the contractor, a lawyer, an architect or engineer (who is not the payment certifier), a member of the accounting profession, a person with experience in the construction industry, or a trust or loan corporation.⁶³⁴
- d) All payments out of the holdback trust account require the signatures of both trustees.⁶³⁵
- e) A trustee may apply to the court for directions respecting the administration of the trust.⁶³⁶
- f) Interest on holdback trust accounts accrues in accordance with the agreement between the owner and contractor, and in the absence of an agreement, to the owner.⁶³⁷

The provisions in relation to holdback trust accounts do not apply to the Crown where the Crown is an owner; to a contract for services or materials provided to a house, to repairs or renovations to a four-plex or condominium unit; or to a contract with an architect or engineer.⁶³⁸

We have been advised by practitioners in Saskatchewan that, as is the case in British Columbia, in practice the requirement to maintain joint holdback accounts is sometimes not observed. Reasons cited for the failure to comply with this requirement were the limited mechanisms for enforcement under the legislation and the cumbersome administrative burden associated with operating such accounts.

2.2.3 Trust Regimes in Other Countries.

2.2.3.1 The United States

A number of U.S. states have enacted statutory construction trust regimes.⁶³⁹ The scope of these statutes varies broadly. In some states, trust fund legislation only applies to private projects,⁶⁴⁰

⁶³³ *Saskatchewan Act*, ss 38(2) and 38(3).

⁶³⁴ *Saskatchewan Act*, s 38(4).

⁶³⁵ *Saskatchewan Act*, s 38(5).

⁶³⁶ *Saskatchewan Act*, s 38(6).

⁶³⁷ *Saskatchewan Act*, s 39.

⁶³⁸ *Saskatchewan Act*, s 38(11).

⁶³⁹ See Robert F. Charney and Adam Cizek's article, "Payment Provisions in Construction Contracts and Construction Trust Fund Statutes: A Fifty-State Survey" (2004) 24 *Constr Law* 5. The seventeen states are Arizona, Colorado, Delaware, Florida, Illinois, Maryland, Michigan, Minnesota, New Jersey, New York, Oklahoma, South Carolina, South Dakota, Texas, Vermont, Washington and Wisconsin.

some exclude residential projects,⁶⁴¹ some only apply to public works⁶⁴², and some apply to both public and private projects⁶⁴³ (or separate statutory regimes are created for public and private projects)⁶⁴⁴.

In some states, violation of the statutory trust requirements amounts to theft and/or may give rise to civil and criminal liability with criminal penalties ranging from fines to imprisonment.⁶⁴⁵ By way of example, in Michigan any contractor or subcontractor engaged in the building construction business, who, with an intent to defraud, retains or uses the proceeds of any payment made to him, for any other purpose than to first pay laborers, subcontractors and materialmen, engaged by him to perform labor or furnish material for the specific improvement, is guilty of a felony.⁶⁴⁶

In New York, the legislative trust regime is particularly interesting and merits more detailed examination.

(a) The New York Model

The New York Lien Law⁶⁴⁷ applies to all projects for improvements to real property and to the construction of public improvements. It applies to owners, contractors, and subcontractors as trustees of funds received and, as well, to contractors, subcontractors and vendors as beneficiaries of trust funds.⁶⁴⁸ Article 3-A of the New York Lien Law creates a statutory trust over certain funds (i.e. funds that have been received for or in connection with an improvement to real property). If the trustee (i.e. an owner, contractor or subcontractor, depending on the circumstances) diverts assets from a trust, then that trustee incurs liability to any parties that hold liens or had contracted directly with that trustee.⁶⁴⁹ In extreme cases, diversion of trust assets can constitute larceny under § 79-a(1).⁶⁵⁰

⁶⁴⁰ Oklahoma, OK Stat § 42-152.

⁶⁴¹ Md Code Ann Real Prop § 9-204.

⁶⁴² Washington, Wash Rev Code Title 60 § 28-011(1).

⁶⁴³ Maryland, Md Code Ann Real Prop § 9-201 (but federal projects and single-home residential projects are excluded); Texas, Tex Prop Code § 162.001; Vermont, Vt Stat Ann Title 9 § 4003;

⁶⁴⁴ New Jersey, Stat Ann § 2A:44-148.

⁶⁴⁵ Colorado, Col Rev Stat Title 33 § 22-127; Michigan, Mich Comp Laws Ann § 570.151; Minnesota, Minn Stat Ann § 514.02; New Jersey, NJ Stat Ann §§ 2A:29A-1, 2A:29A-4; New York NY Lien Law §79(a); South Dakota, SD Code Title 44 § 9-13; and Wisconsin, Wis Stat § 779.02(5), 779.16.

⁶⁴⁶ Michigan, Mich Comp Laws Ann § 570.152.

⁶⁴⁷ New York Lien Law, online: <<http://codes.findlaw.com/ny/lien-law/>>.

⁶⁴⁸ New York Lien Law, Article 3-A: Definition and Enforcement of Trusts.

⁶⁴⁹ Joshua Stein and Colin Bumby, "Introduction to the New York Lien Law for Counsel to Owners of Troubled Construction Projects" (2012) 40:1 R Prop L J, online: <http://real-estate-law.com/PDF/NY_Lien_Law_-_Owner_of_Troubled_Project_234.pdf>.

⁶⁵⁰ New York Lien Law at § 79-a(1).

The trust regime under the New York Lien Law includes the following:

- 1) Funds received by an owner (and associated rights of action) in connection with each improvement are each a separate trust with the owner as trustee. The same applies to funds received by a contractor or subcontractor in connection with each contract or subcontract;
- 2) Funds received by a trustee (for or in connection with an improvement of real property or in relation to a public improvement) constitute the assets of the trust;
- 3) The trust arises whether or not a covenant declaring or acknowledging the trust has been executed;⁶⁵¹
- 4) Persons having claims for payment of amounts held in trust are beneficiaries to the trust whether or not they have filed or had the right to file a lien;⁶⁵² and
- 5) Any transaction by which a trust asset is paid, transferred or applied for any other purpose other than a purpose of the trust is a diversion of trust assets regardless of the existence of trust claims. If the diversion occurs by a voluntary act of the trustee or by his consent, then such act or consent constitutes a breach of trust.⁶⁵³

The statute also provides for standard bookkeeping practices that, if followed, are a *prima facie* defence to the breach of trust action that may result from a diversion of trust assets.⁶⁵⁴ The key elements of these standard bookkeeping practices are as follows:

1. All trust funds are deposited in the trustee's name (i.e. as trustee);
2. The trustee is **not** required to keep the funds in separate bank accounts for each trust provided that the trustee's books and records of account clearly allocate the funds deposited in the general account to each individual trust;
3. The trustee is required to 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
4. 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.⁶⁵⁵

⁶⁵¹ New York Lien Law at § 70.

⁶⁵² New York Lien Law at § 71(4).

⁶⁵³ New York Lien Law at § 72(1).

⁶⁵⁴ New York Lien Law at § 75.

Case law has established that a trustee under the New York Lien Law Article 3-A has the same basic fiduciary duties and loyalties as a trustee of any trust, including:

A duty of loyalty to the beneficiaries, a duty to keep and render accounts for the beneficiaries, and keep trust funds separate from his own; a duty to furnish beneficiaries information⁶⁵⁶ and to permit them to examine the trust accounts; a duty to take proof of the trust assets and to enforce claims on behalf of the trust.⁶⁵⁷

It has been recommended by some stakeholders that Ontario adopt a regime similar to that in place in New York, as will be discussed in the analysis and recommendations section below.

2.2.3.2 The U.K.

In the U.K., a concept currently being explored is that of “project bank accounts”. These accounts are either in place or being tested as part of pilot projects throughout the U.K. They are currently only applicable to public construction contracts.

Because there has not yet been any judicial consideration of the relationship between project bank accounts and bankruptcy proceedings, Richard Davis has outlined how existing bankruptcy and trust concepts might apply to a project bank account, stating as follows:⁶⁵⁸

If the trust account has not been funded at the date of the contractor’s administration or liquidation, then the certified sum will remain due to the contractor [...]. It would be payable in full to the relevant insolvency practitioner for distribution to creditors subject to the employer’s contractual set-off rights on termination and any conditions imposed by the court.

If the account has been funded at that time and proportions in the fund have been identified by the authorization [i.e. the agreement between the Owner and the general contractor for the disbursement of funds from the account] but the process of paying out has not yet started or is not yet completed, then the amount standing to the credit of the account is held in trust and is not included in the contractor’s property. The trustees can administer the trust without reference to the insolvency practitioner. [...]

If the contractor’s insolvency intervenes after the payment in, but before the authorization has finally identified the proportions owned by the beneficiaries, there are various possibilities. The first is that the trust fails and the money standing to the credit of the account is returnable to the employer [...] by resulting trust. Second, the fund would be distributed equally, but this seems inequitable as the trust was intended as the means of payment for work done, and equality would give some beneficiaries a windfall at the expense of others. Third, the court could order a distribution on the basis of the breakdown attached to the certificate or an authorization prepared

⁶⁵⁵ *McKinney’s Lien Law* Ch 33, Art 3-A, Refs & Annos; New York Lien Law at § 75.

⁶⁵⁶ New York Lien Law § 76 provides for an informal accounting by permitting trust beneficiaries to examine trust books and records or to demand verified statements as to trust activities from the trustee. See Robert F. Cushman and Stephen D. Butler, *Fifty State Construction Lien and Bond Law* (New York: Aspen Publishers, 2000) at 712. [Cushman and Butler]

⁶⁵⁷ Cushman and Butler, *supra* at 702 citing *Frontier Excavating, Inc. v Sovereign Constr. Co.*, 30 AD2d 487.

⁶⁵⁸ Richard Davis, “Project Bank Accounts” (Paper delivered at the Society of Construction Law, London, 6 March 2012).

in draft [...]. Of these options, the third is most likely. The trustees would be under a duty to do the best they could to identify the beneficiaries' respective interests.

Should the trust fail, the named suppliers might argue that the PBA ought to continue as an escrow agreement on the same terms.⁶⁵⁹

The U.K. Government Construction Board decided that central government departments, their agencies, and non-departmental public bodies would adopt project bank accounts unless there were compelling reasons not to do so.⁶⁶⁰ In July 2012, the Cabinet Office published a PBA Briefing Note⁶⁶¹ and a PBA Guide.⁶⁶²

According to the PBA Briefing Note, by utilizing project bank accounts payments to small and medium sized enterprises working on government projects were to be paid within five days or less from the due date of payment (from the delivery of a payment claim under the applicable prompt payment legislation).⁶⁶³

Project Bank Accounts were intended to “revolutionize the way the construction supply chain gets paid, in an industry where around 99 per cent of businesses are SMEs (small and medium sized enterprises)”. It was suggested that “[s]upply chain members in PBA projects [would] no longer have to wait for higher tier contractors to process their payment; instead they [would] receive it directly through a bank account specific to the project they are working on.”⁶⁶⁴

The PBA Guide explains that there are two approaches to the implementation of project bank accounts - the “dual authority” approach and the “single authority” approach. Respectively, these approaches refer to whether or not both the owner and the general contractor, or only the general contractor, can instruct the bank to distribute the authorized amounts to the supply chain from the project bank account.⁶⁶⁵

The PBA Guide also explains that the Government Construction Board’s Fair Payment User Group has agreed to minimum PBA requirements, which include linking the trust account to a Trust Deed, a dual agreement between the parties before a payment can be made out of the account, informing the bank of the existence of the Trust Deed, making transactions easily available to the client for review no more than one day after a payment is made, having no overdraft facility on the account, only making payments to the contractor and other named

⁶⁵⁹ *Ibid* at 17-18.

⁶⁶⁰ UK, Cabinet Office, “A Guide to the implementation of Project Bank Accounts (PBAs) in construction for government clients” (3 July 2012) at 3, online:

<https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/62118/A-guide-to-Project-Bank-Accounts-in-construction-for-government-clients-July-2012.pdf> [PBA Guide].

⁶⁶¹ UK, Cabinet Office, “Project Bank Accounts – Briefing document” (10 February 2012), online at:

<https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/62117/Project-Bank-Accounts-briefing.pdf> [PBA Briefing Note].

⁶⁶² PBA Guide, *supra*.

⁶⁶³ PBA Briefing Note, *supra* at 2.

⁶⁶⁴ *Ibid*.

⁶⁶⁵ PBA Guide, *supra* at 3.

beneficiaries, and informing all trust beneficiaries and trustees by the contractor of any changes to the PBA terms and/or payment authorisations.⁶⁶⁶

The use of project bank accounts for construction projects has increased since their introduction in 2007. By way of example, Highways England has used the PBAs model and delivered over £4.5 billion of government contracts through PBAs in 2013-14. As of April 2015 there are some 35+ Project Bank Accounts in operation across a suite of Highways England major schemes and maintenance contracts.⁶⁶⁷

2.2.3.3 Northern Ireland

In Northern Ireland, project bank account trials are underway for selected public projects. A *Procurement Guidance Note*⁶⁶⁸ published by the Department of Finance and Personnel in 2014 (and reissued in 2016) explains that project bank accounts are to be implemented in government construction contracts that have an estimated value in excess of £2 million, and contain a significant contracting element.⁶⁶⁹

The Procurement Guidance Note explains that there are three key decisions that have to be made with respect to the operation of the PBA:

5.2 Who will be the trustees of the PBA?

The trustees control the money within the PBA and may direct its use as they wish. To protect the funds in the PBA from inappropriate use, there will be a trustee from the Contracting Authority and a trustee from the Main Contractor.

5.3 Who will authorize payments?

To protect the funds in the PBA, payments made from the PBA will require authorisation from both the Contracting Authority's representatives and the Main Contractor's representatives.

5.4 Who will set up the PBA?

Opening a PBA can require additional time if the agreement for a facility has not already been arranged. To avoid delays, the PBA facility provision should be agreed by the Contracting Authority prior to completion of the tender process.⁶⁷⁰

⁶⁶⁶ *Ibid* at 7.

⁶⁶⁷ Highways England, *Implementation of Project Bank Accounts across Highways England* (2015) at 9, online: <<http://www.secgroup.org.uk/pdfs/2015/Implementation%20of%20Project%20Bank%20Accounts%20across%20Highways%20England.pdf>>.

⁶⁶⁸ UK, Department of Finance and Personnel, *Procurement Guidance Note PGN 03/14: Construction Works Procurement: Project Bank Accounts (Pilot)* (18 January 2016) online: <<https://www.dfpni.gov.uk/sites/default/files/publications/dfp/PGN-03-14-Project-Bank-Accounts-18-Jan2016.pdf>>.

⁶⁶⁹ *Ibid* at 5. For example, first tier subcontractors having a subcontract in excess of 1% of the main contract value.

⁶⁷⁰ *Ibid* at 9.

The Procurement Guidance Note explains that project bank accounts only apply to first tier subcontracts. However, the head contractor and first tier subcontractors may agree to the voluntary use of project bank accounts for subsequent tiers of subcontractors if they wish.⁶⁷¹

The Procurement Guidance Note provides a list of what the PBA does and does not do. In citing what a PBA can do, it was noted as follows:

A PBA:

- is simple and cost effective to set up for all parties;
- is linked to a Trust Deed, and provides insolvency protection for the supply chain payments held within the PBA;
- provides visibility for supply chain over timing/amounts of payment;
- is easily auditable by Contracting Authorities; and
- supports the principle of collaborative working and allows suppliers to focus on delivery.⁶⁷²

The Trust Deed that aids in insolvency protection noted above is a document that a contractor is required to fill out in setting up a PBA. In essence, the Trust Deed is an agreement between owner and contractor (and potentially suppliers) that the sums held in the PBA are held “in trust” for the contractor and the named suppliers.⁶⁷³

Notably under the Procurement Guidance Note, a PBA does not:

- a) involve Contracting Authority prefunding;
- b) cut across contractual provisions governing the preparation and submission of interim applications or the valuation, authorization or certification of interim payments;
- c) take away the Main Contractor’s responsibility for managing and selecting the supply chain so that the work is performed in accordance with the contract. The Contracting Authority’s role, as a trustee of the PBA, is merely to authorize payment transfers from the account;
- d) remove statutory obligations for VAT, taxation accounting liabilities, etc. from the Main Contractor, Subcontractors or Contracting authority; or
- e) add significant cost to the project, as interest can be used to offset banking fees where such fees are charged.

⁶⁷¹ *Ibid* at 18-19.

⁶⁷² *Ibid* at 6.

⁶⁷³ *Ibid* at 12 - Project Bank Account - Trust Deed (Form NCG2).

The Procurement Guidance Note further explains that, in the event of the insolvency of the head contractor, an administrator, receiver or liquidator of a head contractor may be able to delay payment of monies within the project bank account to subcontractors, but will not be able to remove such monies.⁶⁷⁴

2.2.3.4 Scotland

In Scotland, trials of project bank accounts have also been underway for public sector projects since 2013.⁶⁷⁵ These trials arose out of the recommendations of the Scottish Government in their *Review of Scottish Public Sector Procurement in Construction*, published in October 2013.⁶⁷⁶

The Scottish Review noted that PBAs remove the “incentive for main contractors to withhold or delay payment, and thus there is potential to unlock the flow of cash throughout the supply chain and assist the solvency of sub-contractors and suppliers”.⁶⁷⁷

Accordingly, the Scottish Review recommended a trial of PBAs to be monitored and assessed for suitability and future wider application.

2.2.3.5 Australia

An inquiry into construction insolvency in Australia was conducted by the Australian Senate. In December 2015, The Economics Reference Committee (the “Senate Committee”) published a report entitled *Insolvency in the Australian Construction Industry*⁶⁷⁸ noting strong support for a statutory construction trust⁶⁷⁹ and that such a model was explicitly recommended by the Collins Inquiry, described below.⁶⁸⁰

The Senate Committee explained that a “retention trust would operate over only the small amount of money held back at each progress payment and the money held until the end of the defects liability period” whereas “a trust applying to the entire contract would include the entirety of each progress payment within its ambit.”⁶⁸¹

⁶⁷⁴ *Ibid* at 21.

⁶⁷⁵ The Scottish Government, “Project Bank Accounts – Frequently Asked Questions,” online: <<http://www.gov.scot/Topics/Government/Procurement/policy/ReviewProcConst/projectbankaccounts/FAQs/trials>>

⁶⁷⁶ The Scottish Government, *Review of Public Sector Procurement in Construction* (October 2013), online at: <<http://www.gov.scot/resource/0043/00436662.pdf>>.

⁶⁷⁷ *Ibid* at 66.

⁶⁷⁸ Australian Senate – Economics References Committee, *Insolvency in the Australian Construction Industry* (December 3, 2015), online: <[http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Insolvency_construction/~media/Committees/economics_ctte/Insolvency_construction/report.pdf](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Insolvency_construction/~/media/Committees/economics_ctte/Insolvency_construction/report.pdf)>.

⁶⁷⁹ *Ibid* at 159.

⁶⁸⁰ *Ibid* citing *Final Report of the Independent Inquiry into Construction Industry Insolvency in NSW* (2012), at 355, Recommendation 6 (for all building projects worth more than \$1 million).

⁶⁸¹ *Ibid* at 10.11 at 161.

Construction trust fund statutes have been implemented in Western Australia and the Northern Territory, New South Wales, and are being contemplated in Queensland.

(a) Western Australia and the Northern Territory

Both Western Australia and the Northern Territory have construction trust fund statutes.⁶⁸² These statutes provide that where a contract does not have a written provision concerning the status of money retained by the principal (the owner) for the performance by the contractor of his or her obligations, the principal is to hold these monies in trust for the contractor until the monies are paid to the contractor, the contractor gives up any claim to the monies, the monies ceases to be payable to the contractor by operation of the contract, or a court determines that the monies cease to be payable to the contractor.⁶⁸³

In Western Australia, project bank account trials are underway for 7 public projects. In an overview presentation of the trials, the Department of Building Management and Works explains that the following parties are paid through the project bank account:

- The head contractor;
- Subcontractors directly appointed by the head contractor to undertake works valued in total greater than \$20,000;
- Subcontractors directly appointed by the head contractor to undertake works valued in total less than \$20,000 who choose to opt in to the project bank account; and
- Suppliers who choose to opt in to the project bank account.⁶⁸⁴

The payment process is described as follows:

- Once the monthly payment amount is determined, the head contractor determines how the amount should be distributed.
- The principal deposits funds into the account, which are distributed to the head contractor/subcontractors simultaneously.
- Retention funds are deposited into a dedicated account, which are retained then later released in accordance with subcontract agreements.
- The principal has “view rights” into the bank account.⁶⁸⁵

Some of the benefits of project bank accounts, according to the Department of Building Management and Works, include:

- a) the fact that they afford better protection to subcontractors against the insolvency of a prime contractor;

⁶⁸² *Construction Contracts Act 2004* (WA); *Construction Contracts (Security of Payments) Act* (NT).

⁶⁸³ *Construction Contracts Act 2004* (WA) sch 1, div 9, s 11; *Construction Contracts (Security of Payments) Act* (NT), sch 1, div 9, s 10.

⁶⁸⁴ Government of Western Australia – Department of Finance, *Overview of the BMW Project Bank Accounts trial* (2014), online:

<https://www.finance.wa.gov.au/cms/uploadedFiles/Building_Management_and_Works/New_Buildings/Overview%20of%20the%20BMW%20Project%20Bank%20Account%20trial.ppt>.

⁶⁸⁵ *Ibid.*

- b) they speed up the payment process for parties lower down the supply chain; and
- c) they increase transparency and accountability.⁶⁸⁶

Responding to some of the concerns raised by contractors, the Department of Building Management and Works noted that project bank accounts do not prevent general contractors from monitoring the performance of subcontractors, withholding payments, or seeking adjudication when a dispute arises.⁶⁸⁷

(b) New South Wales

In 2012 and 2013, the government of New South Wales (“NSW”) conducted an Inquiry into Construction Insolvency in NSW, or as it is more commonly known, the Collins Inquiry. The Inquiry’s final report was published on January 28, 2013, and it made two major recommendations:

- a) the introduction of construction trusts; and
- b) the use of project bank accounts.⁶⁸⁸

In response to the Collins Report, the NSW Government committed to establishing a statutory retention trust under the *New South Wales Act*.⁶⁸⁹

Three potential methods of creating a trust were examined: (1) a deemed trust, (2) a statutory construction trust, and (3) a statutory trustee.

After stakeholder consultations, amendments were made to the regulations under the *New South Wales Act*, and the statutory construction trust model was adopted.

The *Building and Construction Industry Security of Payment Regulation 2008*, as revised in 2015, only applies to retention money held by the head contractor when the construction project has a value of at least \$20 million.⁶⁹⁰ The regulation requires that retention amounts be held in separate trust accounts with an approved deposit-taking institution. Details of the account must be given to the chief executive of the Office of Finance and Services.⁶⁹¹

With respect to bankruptcy, the regulation states that retention money is “not available to pay [the] head contractor’s debts,”⁶⁹² and requires the head contractor to keep records in relation to

⁶⁸⁶ *Ibid.*

⁶⁸⁷ *Ibid.*

⁶⁸⁸ Bruce Collins, *Final Report of the Independent Inquiry into Construction Insolvency in NSW* (2012).

⁶⁸⁹ New South Wales – Department of Finance & Services, *Consultation Paper: A Statutory Retention Trust Fund for the Building and Construction Industry* (November 2013), online: <http://www.parliament.nz/resource/en-nz/51SCCO_EVI_50DBHOH_PET56582_1_A403945/6e55fc4d6be094dbf2d88c0aa63a7caf253ffd69>.

⁶⁹⁰ *Ibid.*, s 5.

⁶⁹¹ *Ibid.*, ss 6, 7.

⁶⁹² *Ibid.*, s 10.

the trust account showing deposits and withdrawals from the account.⁶⁹³ Accounts must also be audited annually, with the audit reports forwarded to the government.⁶⁹⁴

Project bank account trials are underway in New South Wales for select government projects. The purpose of project bank accounts is to “protect, as far as possible, the money paid by the principal to the head contractor for the payment of subcontractors, from being used for other purposes by the head contractor or from any claims made by a voluntary administrator or liquidator in the event of the insolvency of the head contractor”.⁶⁹⁵

(c) Queensland

In December 2015, the Queensland Government published a paper entitled *Security of Payment: Discussion Paper*,⁶⁹⁶ which sets out five potential options to address key problems in the security of payment system of the Queensland construction industry including: insolvency in the contractual chain (that leave subcontractors unpaid for work already completed), the use of retention money as cash flow by contractors and head contractors (instead of being kept aside for defects), a lack of financial management skill in the industry, and the protracted/unjustified delays in payment for work done.⁶⁹⁷

Project bank accounts were considered as an option to address these issues. It was noted that the project bank account model would involve everyone getting paid from the project bank account at the same time rather than a chain of payments vulnerable to insolvency.⁶⁹⁸ It was proposed that project bank account trials would initially be conducted for government projects, and, pending the outcome of the trials, project bank accounts could become applicable to private sector projects. Subcontractors would submit payment claims for work done to the head contractor, who would then submit a progress payment claim to the principal. After the principal verified the work for which payment is claimed, both the principal and the contractor would agree to payment into the project bank account. The signatures of the principal and the head contractor would give the bank authority to disperse the funds. A key feature of the project bank account was noted to be its trust character, so that in the event of insolvency, the money is held safely for the subcontractor as a secured creditor.⁶⁹⁹

The Discussion Paper also notes the disadvantages of project bank accounts, including the following:

⁶⁹³ *Ibid*, s 14.

⁶⁹⁴ *Ibid*, s 16.

⁶⁹⁵ New South Wales – NSW Procurement Board, *Construction Procurement: Direction C2013 – 02* (13 November 2013).

⁶⁹⁶ Queensland Government, *Security of Payment: Discussion Paper* (December 2015), online: <<http://www.hpw.qld.gov.au/SiteCollectionDocuments/SecurityOfPaymentDiscussionPaper.pdf>>.

⁶⁹⁷ *Ibid* at 5.

⁶⁹⁸ *Ibid* at 11.

⁶⁹⁹ *Ibid* at 10.

- Some companies may struggle to understand and adapt to the concept.
- Project bank accounts may be perceived as only suitable for larger construction contracts given the requirement to set up a separate project bank account for each project.
- Project bank accounts may be perceived as increasing red tape in the building and construction industry as well as affecting prices due to the perceived extra administration required.
- Banks may be unwilling to offer project bank accounts because that type of account necessitates an undertaking by the bank not to use the bank's right to set off.
- Legislative changes may be necessary if project bank accounts are to be used on non-government projects. It will take time to develop the appropriate legislative framework.
- Project bank accounts will not eliminate payment disputes and the associated delays in payment.

All of the above considerations apply in the Canadian context, as will be explained further below following a discussion of relevant legal principles.

3. Summary of Stakeholder Views

3.1 Stakeholder views on the Effectiveness of Current Trust Provisions

Many responding stakeholders expressed concern about the clarity of the trust provisions in the *Act*.⁷⁰⁰

- a) The Surety Association of Canada submitted that it supported amendments to clarify the priority of contractors to construction funds over other creditors whose claims are not directly related to construction work and services performed. It was submitted that such amendments should be directed at ensuring that “construction funds constitute a common law trust” by promoting certainty and predictability for everyone in the construction payment chain as well as reducing credit risk and strengthening the industry.⁷⁰¹
- b) The Metropolitan Plumbing & Heating Contractors Association suggested strengthening the trust provisions of the *Act*.⁷⁰²

⁷⁰⁰ City of Toronto Submissions to the CLA Review at 6; TTC Submission to the CLA Review at 27; OPWA Submissions to the CLA Review at 2; and ORBA Submissions to the CLA Review at 9.

⁷⁰¹ SAC Submissions to the CLA Review at 14.

⁷⁰² MPHCA Submissions to the CLA Review at 4.

- c) Similarly, the Ontario Public Works Association and the Ontario Road Builders Association supported strengthening the trust provisions and bringing clarity to how trust funds can be used.⁷⁰³
- d) Prompt Payment Ontario suggested that, in a prompt payment regime, “the obligations of trustees should include a duty of prompt remittance...with failure to remit promptly being deemed a breach of trust and liability for the trustee and those identified in the current section 13” of the *Act*. Prompt Payment Ontario also suggested that “prospective purchasers of newly constructed low-rise housing units should be entitled” to have their money to be held in trust.⁷⁰⁴
- e) The Council of Ontario Construction Associations submitted that section 12 of the *Act* should be amended to require anyone exercising a claim of set-off for deficiencies or delay in a trust action “to provide full particulars in their Statement of Defence” to “discourage the practice of raising a vague set-off defence” to delay the proceedings.⁷⁰⁵ The Council of Ontario Construction Associations further submitted that section 13 of the *Act* be amended to “put the onus upon an officer or director to prove that they are not liable for a breach of trust by the corporation” as they are in a better position than trust beneficiaries to assess the finances of the corporation.⁷⁰⁶
- f) The OBA CLA Reform Committee provided detailed submissions on trust provisions that canvassed the relevant cases. The OBA CLA Reform Committee suggested that the decisions in *Atlas Block* and *Iona* raise an issue of great importance to construction law, namely, the “enforceability of the trusteeship provisions of the provincial lien legislation in the face of federal bankruptcy legislation”.⁷⁰⁷ In this regard, the OBA CLA Reform Committee suggested that the Review consider the requirements imposed on trustees in New York, discussed above, where trustees are “required to act as ‘fiduciary managers of the fixed amounts provided for the operation’” as described in Glaholt and Rotterdam’s paper *Managing Trust Funds: The New York Model*.⁷⁰⁸

3.2 Stakeholder Views on Mandatory Mechanisms for Sequestering Trust Funds

Several stakeholders opposed the concept of a mandatory holdback trust account or project bank account.

⁷⁰³ OPWA Submissions to the CLA Review at 2; ORBA Submissions to the CLA Review at 9.

⁷⁰⁴ PPO Submissions to the CLA Review at 38.

⁷⁰⁵ *Ibid.*

⁷⁰⁶ *Ibid.*

⁷⁰⁷ OBA CLA Reform Committee Submission to the CLA Review at 21.

⁷⁰⁸ *Ibid.* at 21; see also Glaholt New York Model, *infra*.

- a) The City of Toronto, the Council of Ontario Universities, Metrolinx, York Region, the Toronto Community Housing Corporation, and the Ministry of Transportation as they noted it would be administratively burdensome and cause increased costs.⁷⁰⁹
- b) The Toronto Transit Commission was also strongly opposed to the mandatory holdback trust account and project bank account as it advised that such accounts would “impede the management of municipal and Crown funds”.⁷¹⁰
- c) During the Consultation Process, it was clear that many municipal and public entities were largely opposed to the mandatory holdback trust account and mandatory project bank account. In addition to their concerns about the increased administrative costs,⁷¹¹ they pointed out that, in a contentious situation, getting money out of a trust account for set-off would be difficult.
- d) Infrastructure Ontario was opposed to mandatory holdback trust accounts for the Project Agreement “as the Authority should not be construed as the “owner””, but as an alternative, suggested that “Project Co be subject to a mandatory holdback trust account”.⁷¹²

The following stakeholders favoured some mechanism for sequestering funds:

- a) The Council of Ontario Construction Associations suggested that the *Act* require trust funds to be deposited into a bank account; acknowledging that while this can be administratively burdensome, trusts can be breached when commingled with other funds.
- b) The Council of Ontario Construction Associations suggested a balance be struck by requiring mixed trust accounts for contracts under \$5,000,000 and separate trust accounts for contracts over \$5 million.⁷¹³
- c) The Metropolitan Plumbing & Heating Contractors Association was also in favour of separate trust accounts (i.e. not mixed with other projects, non-trust monies, etc) and of a provision that stipulates that “trust funds should be held by a bank or lending institution” so that a third neutral party is the holder of the trust in order to ensure its integrity.⁷¹⁴ As part of the submission, it was suggested that to enforce this provision, “owners, as part of the normal course of business, would be required to provide to general contractors,

⁷⁰⁹ City of Toronto Submissions to the CLA Review at 6; MTO Submissions to the CLA Review at 3; COU Submissions to the CLA Review at 3; Metrolinx Submissions to the CLA Review at 4; TCHC Submissions to the CLA Review at 3; York Region Submissions to the CLA Review at 4.

⁷¹⁰ TTC Submissions to the CLA Review at 27.

⁷¹¹ See OASBO and OPSBA Submissions to the CLA Review at 4.

⁷¹² IO Supp. (Attachment) to the CLA Review at 13.

⁷¹³ COCA Submissions to the CLA Review at 16.

⁷¹⁴ MPHCA Submissions to the CLA Review at 4.

subcontractors or suppliers an official ‘proof of trust’ document from the bank or lending institution.”⁷¹⁵

- d) The Ontario Road Builders Association expressed support for a mandatory holdback trust account or a mandatory project bank account, but was “cautious about the financing burden and cost of this initiative if applied to contractors and subcontractors” because “the Act is not clear which uses can be made of trust funds” and they depend on trust funds to pay certain “project-specific and general office overhead expenses”.⁷¹⁶
- e) The International Union of Operating Engineers, Local 793, expressed support for mandatory project trust accounts at the builder, owner, and general contractor level, but expressed concern with regards to the regime actually being followed by contractors lower in the contractual chain.⁷¹⁷
- f) Prompt Payment Ontario expressed support for the proposition that trust funds should not be commingled with other funds. Prompt Payment Ontario suggested that 90% of the invoiced amount should be paid “within the time period specified by the new statute” and “the remaining 10% should be remitted at the same time to a segregated holdback trust account”, with the sole beneficiary being the contractor who is owed the 10%.⁷¹⁸ Prompt Payment Ontario also expressed support for a separate project trust account for projects “with a permit or tender value” of over \$250,000.⁷¹⁹
- g) The Surety Association of Canada expressed general support for strengthening the *Act*’s trust provisions, specifically to “clarify the priority of construction trust funds over other creditors whose claims are not directly related to the construction work and services performed”. The Surety Association of Canada suggested strengthening the trust to meet the requirements of a common law trust while considering the administrative costs on contractors, owners, and lenders to maintain segregated funds.⁷²⁰
- h) The Greater Toronto Sewer & Watermain Contractors Association suggested that the benefits of a mandatory project holdback account would outweigh administrative costs.⁷²¹ The Canadian Institute of Quantity Surveyors expressed support for a mandatory joint bank account to secure funds, with an additional benefit being that lenders would advance 100% of the progress payment.⁷²²

⁷¹⁵ *Ibid.*

⁷¹⁶ ORBA Submissions to the CLA Review at 9-10.

⁷¹⁷ Local 793 and PBCTCO Submissions to the CLA Review at 10.

⁷¹⁸ PPO Submissions to the CLA Review at 37.

⁷¹⁹ *Ibid* at 38.

⁷²⁰ SAC Submissions to the CLA Review at 13-14.

⁷²¹ GTSWCA Submissions to the CLA Review at 5-6.

⁷²² CIQS Submissions to the CLA Review at 7.

- i) The OBA CLA Reform Committee also expressed support for the mandatory project bank account and mandatory holdback trust account to strengthen the trust provisions “so as to protect the holdback fund from other creditors”.⁷²³
- j) General support for a mandatory project trust account or mandatory holdback account was also expressed by the Labourers’ International Union of North America, Local 183, the Ontario Association of Architects (where “substantial fees are involved”), the Ontario General Contractors Association, and the Thunder Bay Law Association.⁷²⁴

4. Analysis and Recommendations

4.1 Effectiveness of Current Trust Provisions

Duncan Glaholt 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.⁷²⁵

He further notes that “[a]s it is now, our trust legislation is unbalanced and can lead to what appears to be unfair outcomes”.⁷²⁶ Given the state of jurisprudence as of the date of this Report (e.g. *Iona*, *Kel-Greg*, and *Atlas Block*), this observation remains as true as it was when this article was published over a decade ago. *Glaholt New York Model* states that we have lost sight of business practice while “single mindedly pursuing the enforcement of the remedial trust provisions” and suggests that, in addition to enforcement, prevention should also be addressed.⁷²⁷ In this regard, Mr. Glaholt recommends, as did several stakeholders in the Consultation Process, that we consider the laws of other jurisdictions and specifically those of New York.

As discussed above in section 2.2.3.1, the New York Lien Law provides a clear set of rules as to how a trust is formed and methods of bookkeeping to avoid unintended breaches of trust.

The most noteworthy distinguishing feature of the New York model (i.e. as compared to the *Act*) is the bookkeeping mechanisms described in section 2.2.3.1. According to Glaholt, this mechanism “arms a defendant with at least a *prima facie* defence to a breach of trust action” and

⁷²³ OBA CLA Reform Committee Submissions to the CLA Review at 21.

⁷²⁴ LUINA 183 Submissions to the CLA Review at 8-9; OAA Submissions to the CLA Review at 4; OGCA Submissions to the CLA Review at 4; Thunder Bay Law Association Submissions to the CLA Review at 1.

⁷²⁵ Duncan W. Glaholt & Markus Rotterdam, “Managing Trust Funds: The New York Model” (2002) 21 CLR (3d) at 2 [Glaholt New York Model].

⁷²⁶ *Ibid* at 4.

⁷²⁷ *Ibid* at 13.

it is observed that if these bookkeeping practices are followed, “summary judgment ... would be impossible”.⁷²⁸

A further benefit of the New York model is that proof of diversion of trust funds is not a condition precedent to an action for an accounting and other relief under the New York Lien Law.⁷²⁹ Therefore, a presumption of diversion does not place the burden of proof on the debtor but rather, raises it as a permissible inference (i.e. that failing to keep the statutorily prescribed records, the trustee used the funds in breach of trust).⁷³⁰ The intent of the record keeping requirements in New York is that they are in place to ensure that the trustee uses the trust only to fund a particular project.⁷³¹

Through the course of the Consultation Process and the Advisory Group meetings, consideration has been given to multiple avenues aimed at resolving priority issues between the *Act* and bankruptcy/insolvency legislation. In this regard, the New York model described above has achieved the best traction as it does not impose the same administrative burdens as would be required to maintain separate trust accounts, nor does it ignore the issue by maintaining the status quo; however, it maintains traceability.

In our view, prescribing record keeping requirements similar to those adopted under the New York Lien Law would not only assist in clarifying matters where defalcation is alleged, but would assist in addressing concerns that trust funds in Ontario fail to meet the three certainties required of a common law trust as discussed above. Having said this, however, the New York accounting requirements alone will not guarantee the existence of a trust under Ontario law.⁷³²

⁷²⁸ Glaholt New York Model at 18.

⁷²⁹ Glaholt New York Model at 20 citing *Wildman & Bernhardt Construction, Inc. v BPM Associates, LP*, 708 NYS2d 400 (US NYAD 1 Dept, 2000).

⁷³⁰ *Ibid* citing *Raisler Corp. v Uris 55 Water St. Co.*, 397 NYS2d 668 (US NY Sup, 1977).

⁷³¹ *Ibid* at 21.

⁷³² *GMAC, supra*.

Recommendation

- 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.⁷³³

4.2 Mechanisms for Sequestering Trust Funds

As discussed above, some jurisdictions have implemented statutory obligations to segregate holdback funds for each project in a separate bank accounts called “project trust accounts” or “project bank accounts”.

The criticisms of the holdback trust account and the project bank account that were articulated in 1980 to the Attorney General's Advisory Committee on the Draft Construction Lien Act remain a concern. Implementing such mechanisms could be administratively burdensome and costly. As well, the experience in other jurisdictions demonstrates that because of the practical difficulties of implementing such accounts, they may be largely ignored by the industry. If a solution is implemented which is impractical and ignored as a result, we will not have solved the problem of how to deal with trust funds in Ontario. Furthermore, and as noted above, the creation of such accounts would not guarantee the end of the paramountcy debate.

A third type of trust account approach was suggested by some stakeholders as a potential new solution, which is to require contractors and subcontractors to operate a single mixed trust account, similar to a lawyer's trust account, into which all trust funds from all projects would be required to be deposited. Importantly however, co-mingled trust accounts can present some issues as described in our summary of the relevant case law above and given the case law

⁷³³ *McKinney's Lien Law* Ch 33, Art 3-A, Refs & Annos; New York Lien Law at § 75.

addressing lawyer's trust accounts. For example, in the decision of *The Law Society of Upper Canada v The Toronto Dominion Bank*,⁷³⁴ the Ontario Court of Appeal held that co-mingled trust funds in a mixed trust account (i.e. a law firm trust account) lose their earmarked identity with respect to a particular client.⁷³⁵

If a single trust account were to be utilized, it would save on administrative costs as it would not require opening separate bank accounts for each project. In such accounts, trust funds would not be co-mingled with the trustee's own funds, e.g. those used to operate the company, and traceability could be maintained. As held by the Ontario Court of Appeal in *Graphicshoppe* (discussed above) a shortfall in such a mixed trust account can be addressed without defeating the trusts involved. However, this solution would still involve an increased administrative burden and mechanisms for enforcement would have to be adopted to motivate participants in the construction industry to use these accounts.

Recommendation

- We recommend the initiation of a pilot project for project trust accounts utilizing a representative number of projects in the public sector. Over a period of two years, the selected pilot projects should be evaluated based on appropriate metrics in relation to their effectiveness and cost. After two years, the performance of project trust accounts on the pilot projects should be published and industry consultation conducted regarding their general adoption in the private and public sectors.

4.3 Mandatory Surety Bonds

Currently, as discussed in Chapter 10 – Surety Bonds, statutory mandatory bond regimes for public projects only exist in the U.S. but the use of payment bonds for the protection of subcontractors and suppliers is common in Canada. Payment bonds are currently a North American phenomenon and are mandatory in the U.S. on government projects, as described below.

As discussed in Chapter 10, mandatory surety bonding has been in place in the U.S. 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.”⁷³⁶ The purpose of the payment bond required under the *Miller Act* has been noted to be “to shift the ultimate risk of nonpayment from workers and suppliers to the surety”.⁷³⁷

⁷³⁴ *The Law Society of Upper Canada v The Toronto Dominion Bank* (1998), 169 DLR (4th) 353.

⁷³⁵ *Ibid.* Although importantly in this case, all of the funds in the account were trust funds which can be distinguished from cases where co-mingled accounts have both trust and non-trust funds.

⁷³⁶ Kevin L. Lybeck & H. Bruce Shreves, eds, *The Law of Payment Bonds* (Chicago: American Bar Association, 1998) at 65 [Lybeck and Shreves].

⁷³⁷ *Ibid.*

The *Miller Act*, by imposing payment bonds, provides claimants with a different form of recourse if they have not been paid for labour and materials supplied to a federal project. Imposing mandatory payment bonds has meant that there is no right to lien a federal project.⁷³⁸ All federal public construction projects valued over \$100,000, with few exceptions, are subject to the provisions of the *Miller Act*⁷³⁹ which requires that “a payment bond must be provided by the principal or general contractor on every federal contract to protect the right of payment for those supplying materials or services to the federal project”.⁷⁴⁰

Commentators explain that after the “success” of the *Miller Act* on federal projects, each one of the 50 states enacted a “Little Miller Act”,⁷⁴¹ each modeled after the federal *Miller Act*.⁷⁴² The Little Miller Acts fulfill the same purpose as the *Miller Act* and provide security to trade contractors on state, county, municipal and other local projects,⁷⁴³ as they require a contractor to post a payment bond as a pre-condition to contract award.⁷⁴⁴

When a Labour and Material Payment Bond is in place, claimants that supply labour and/or material to an insolvent contractor are protected for the total debt owing by the contractor, subject to the penal limit of the bond.

One certain way to provide protection to subcontractors and suppliers involved in all forms of construction projects for the public sector, regardless of the project delivery model that is adopted on each project, is to adopt a statutory regime similar to the *Miller Act*, and the “Little Miller Acts”, in the U.S. Given the current uncertain economy, including recent indications from the Federal Reserve Bank that interest rates will gradually increase, and given the major infrastructure initiatives underway in Ontario, we are of the view that the fundamental objective of the *Act*, to protect subcontractors and suppliers, are best served by making surety bonds mandatory for public projects. Regarding the implementation of our recommendation, we propose that the Province enter into a dialogue with the Surety Association of Canada to agree on standard form surety bonds to be incorporated into the *Act* by regulation.

⁷³⁸ 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> [Fullerton].

⁷³⁹ *Ibid.*

⁷⁴⁰ *Ibid.* See also Lybeck and Shreves, *supra* at 65.

⁷⁴¹ *Ibid.*; Lawrence R. Moelmann & John T. Harris, eds, *The Law of Performance Bonds* (Chicago: American Bar Association, 1999) at 8.

⁷⁴² *Ibid.*

⁷⁴³ *Ibid.*

⁷⁴⁴ Gregory Paonessa, “The Mechanic’s Lien – Are You Protected?” (2013-2014) 48 New Eng L Rev 579 at 609 (HeinOnline).

Recommendations

- We recommend that, in order to adequately protect suppliers of labour and materials from the risk of contractor insolvency on public projects, all public sector projects be required by the *Act* to be surety bonded, adopting the *Miller Act* and *Little Miller Act* approach to the protection of subcontractors and suppliers from the risk of contractor insolvency on public projects.
- Accordingly, the Province should enter into a dialogue with the Surety Association of Canada to agree on standard form surety bonds to be incorporated into the *Act* by regulation. As well, such regulations should include a protocol for investigation and payment, as discussed in Chapter 10 – Surety Bonds.

1. Overview

As discussed with the stakeholders during the Consultation Process, two aspects of promptness of payment require consideration in relation to payment issues encountered on both public and private sector projects, namely:

- The “ordinary course” aspect of promptness of payment, which relates to the payment of monthly progress draws and holdbacks in the ordinary course of a project, with respect to which payment periods have become elongated in relation to the period of time from the submission of a payment application to the receipt of payment; and
- The “gridlock” aspect of promptness of payment, which occurs when there is a significant dispute resulting in delays and damages incurred at all levels of the construction pyramid, a cessation of payment, and potentially protracted litigation.

In considering the promptness of payment issue, we have considered existing prompt payment legislation in the U.S., the U.K. and Ireland, Australia, New Zealand, Singapore, and Malaysia, to determine how these jurisdictions have addressed timeliness of payment in the construction industry. In the course of developing prompt payment legislation, each of these jurisdictions has wrestled with the need to balance conflicting interests, most significantly the balance between statutory intervention and freedom of contract. There are significant lessons to be learned from the experiences of these other jurisdictions.

In the Information Package distributed to the stakeholders and over the course of the Consultation Process, we have carefully considered the private members Bill 69 – *Prompt Payment Act, 2013* (“Bill 69”) and the global prompt payment movement. The global prompt payment movement originated in the U.S. Based on its structure and content, the U.S. example inspired the Ontario initiative that resulted in Bill 69. Generally, prompt payment legislation in the U.S. (which at the state level operates alongside established lien legislation⁷⁴⁵) addresses what we have characterized above as the “ordinary course” issue by imposing time limits and deadlines for processing payment applications and by imposing mandatory interest for breach of the statutorily-imposed payment periods. U.S. prompt payment legislation does not address the gridlock scenario and does not provide for a bespoke dispute resolution process. Instead, unresolved disputes are litigated.⁷⁴⁶

This Chapter considers the context of promptness of payment, including Bill 69, as well as relevant legislation from other jurisdictions, followed by a summary of stakeholders’ submissions, and concludes with our analysis and recommendations.

⁷⁴⁵ Jay M. Mann & Matthew W. Harrison, “How Prompt Payment Laws Affect the Surety” (Paper delivered at the Surety and Fidelity Claims Institute, 23-24 June 2011) at 4.

⁷⁴⁶ Thomas S. Macey, “Show me the Money, Now – Disputes under the *Prompt Payment Act*” (June 2012) *Construction Briefings* No 2012-6 [Marcey].

2. Context

Two important and related concerns that were identified by a number of stakeholder groups are: (1) timeliness of payment, and (2) the efficiency of the mechanisms for the enforcement of payment for work performed. Some commentators are of the view that the *Act* does not sufficiently protect contractors, subcontractors or suppliers from payment delays, and that proceeding to litigation to secure payment is too protracted and too costly. As a result, many have indicated that there is a need for a more practical solution.⁷⁴⁷ Importantly, over the course of the Review, there has been virtually unanimous support for the general principle that participants on a construction project should be paid promptly for work performed. Differing points of view became apparent, however, in respect of the extent of late payment, the causes of late payment, and the appropriate methodology to ameliorate the lack of prompt payment.

While late payment is not unique to the construction industry, it has also been argued that the nature of the construction industry requires greater protection of vulnerable parties. Commentators point out that late payment practices affect employment, cause the reduction of investment in apprenticeships, and force contractors and subcontractors to bid strategically so as to limit the number of projects they take on, resulting in reduced bidding pools. In addition, the direct costs of late payment and associated risks are said to be incorporated into contract and subcontract prices.⁷⁴⁸

Proponents of prompt payment legislation point out that the purpose of such legislation is to level the playing field in the industry, increase investment in the industry and its future, reduce construction costs, and limit conflict and litigation within the construction pyramid.⁷⁴⁹

Based on the Consultation Process, and the written submissions of stakeholders, it is clear that, for a number of reasons, the payment cycle has become elongated (as discussed at section 3.1 below) and that whereas general contractors are able to manage the repercussions of elongation through the use of pay-when-paid provisions the financing cost of the elongation of the payment cycle is borne at the subcontractor level, in that subcontractors must pay for labour and supplies on much shorter payment cycles and without holdback.

2.1 Bill 69 – *Prompt Payment Act, 2013*

In Ontario, the prompt payment initiative gained significant public attention following the introduction of Bill 69 in 2013. Bill 69 was introduced to the legislature as a private member's

⁷⁴⁷ Howard Krupat, "Proposed Prompt Payment Legislation in Ontario: The Cure for Payment Problems on Construction Projects?" *Mondaq* (2013), online: <<http://www.mondaq.com/canada/x/302604/Building+Construction/Proposed+Prompt+Payment+Legislation+In+Ontario+The+Cure+For+Payment+Problems+On+Construction+Projects>>.

⁷⁴⁸ Prism Economics and Analysis, "The Need for Prompt Payment Legislation in the Construction Industry" (Markham: Reed Business Information, 2013) at 3 [Prism Economics].

⁷⁴⁹ *Ibid.*

bill and sought to address perceived payment delays within the construction industry.⁷⁵⁰ The Bill was referred to the Standing Committee on Regulations and Private Bills which heard submissions from a number of stakeholders in public hearings on March 19 and 26, 2014. On April 2, 2014, the Standing Committee on Regulations and Private Bills voted to set aside Bill 69 to permit a broader review of the *Act* and to consider a potential new statutory regime addressing payment issues.⁷⁵¹ As explained in Chapter 2 – Conduct of the Review, this Review was constituted in February 2015. It was commissioned “in response to stakeholder concerns related to prompt payment and effective dispute resolution in Ontario’s construction industry, such as encouraging timely payment for services and materials, and making sure payment risk is distributed fairly”.⁷⁵² At the outset of the Review, the Ministry of the Attorney General provided us with materials gathered in relation to stakeholder comments on Bill 69. We have reviewed and considered these materials.

Two of the most significant aspects of the proposed prompt payment regime described in Bill 69 were: (1) the mandatory minimum time periods within which payment was required to be made; and (2) the right to suspend or terminate the work if progress payments were not made on time. According to some stakeholders, Bill 69, if enacted, would have had the effect of eliminating owners’ and contractors’ freedom to negotiate contract terms, such as milestone based payment mechanisms, as well as certain payment mechanisms used in conjunction with the private sector financing necessary for AFP projects.

The key elements of Bill 69 included the following:

- The Bill had broad application to contracts on a go-forward basis,⁷⁵³ with no explicit carve-outs for any types of Projects,⁷⁵⁴ such that both private and public contracts were covered and every contract and subcontract related to an improvement would be deemed to be amended insofar as is necessary to be in conformity with the *Act*.⁷⁵⁵
- No holdbacks were permitted, other than those permitted under the *Act* or under Bill 69.⁷⁵⁶
- A duty to pay holdback was imposed such that there was an obligation on a payer to pay the value of the holdback **one day** after the payer was no longer required to retain the holdback under the *Act*.⁷⁵⁷

⁷⁵⁰ Bill 69, Prompt Payment Act, 2014, 2nd Sess, 40th Leg, Ontario, 2013; see also “The Need for Prompt Payment in Ontario”, Council of Ontario Construction Associations, online: <<http://www.coca.on.ca/Page.asp?PageID=1226&SiteNodeID=436>>.

⁷⁵¹ *Official Report of Debates (Hansard)*, Legislative Assembly of Ontario, Second Session, 40th Parliament, Standing Committee on Regulations and Private Bills, Wednesday 19 March 2014 and Wednesday 26 March, 2014.

⁷⁵² February 11, 2015 announcement, see <www.constructionlienactreview.com>.

⁷⁵³ Bill 69, Prompt Payment Act, 2014, 2nd Sess, 40th Leg, Ontario, 2013, s 2(1).

⁷⁵⁴ Subject to regulations which were not drafted, Bill 69, s 2(2).

⁷⁵⁵ Bill 69, Prompt Payment Act, 2014, 2nd Sess, 40th Leg, Ontario, 2013, s 3.

⁷⁵⁶ *Ibid*, s 4(3).

- A right to receive progress payments was imposed, based on a prescribed schedule (as described in further detail below).⁷⁵⁸
- A right to pay when paid was provided for but only where a payee is not paid and takes steps to suspend work, terminate the contract or subcontract, or enforce its lien rights.⁷⁵⁹
- A right to suspend work and/or terminate the contract was included if a payee was not paid a progress payment within **seven days** of providing notice.⁷⁶⁰
- A payment application would be deemed to be approved within **ten days** after submission of a payment application unless the payer provided written notice that all or part of the application was being disapproved or amended.⁷⁶¹
- Interest would be paid on late payments at a rate of the greater of the pre-judgment interest rate in the *Court of Justice Act* or the contractual rate of interest.
- A right to information was included that provided for certain financial information to be disclosed by contractors and subcontractors which information was to be specified in regulations.

2.2 Opposition to Bill 69

Stakeholders who made submissions to the Standing Committee on Regulations and Private Bills in March 2014 generally expressed support for fair and prompt payment for work performed by contractors and subcontractors, but many expressed serious concerns about the proposed legislation, which was characterized by some stakeholders as “poorly conceived and drafted” and “unacceptable”.⁷⁶² It was seen by some as too blunt a tool to achieve its policy objective of motivating payers to make payments promptly on construction projects. Concerns over the risks associated with the enactment of the *Prompt Payment Act, 2013* were identified to the Standing Committee on Regulations and Private Bills and included the following⁷⁶³:

- (a) The inability to conduct proper due diligence before making payments

A concern about the ability to have the time necessary to conduct the necessary due diligence arose, in part, from the provisions in the Bill in relation to the payment schedule. In this regard, sections 5 and 6 of Bill 69 provided as follows:

⁷⁵⁷ *Ibid.*, s 4(2).

⁷⁵⁸ *Ibid.*, ss 5-6.

⁷⁵⁹ *Ibid.*, s 9(1).

⁷⁶⁰ *Ibid.*, ss 7-8.

⁷⁶¹ *Ibid.*, s 12.

⁷⁶² *Official Report of Debates (Hansard)*, Legislative Assembly of Ontario, Second Session, 40th Parliament, Standing Committee on Regulations and Private Bills, Wednesday 19 March 2014 and Wednesday 26 March, 2014.

⁷⁶³ *Ibid.*

Right to receive progress payments

5. Every contractor and subcontractor is entitled to be paid progress payments in accordance with the following:
 1. If a contract or subcontract provides for progress payments that **become payable at least every 31 days after the first day that services or materials are supplied to the improvement** under the contract or subcontract, the payments shall be made in accordance with the contract or subcontract.
 2. If a contract or subcontract does not provide for progress payments as described in paragraph 1, the payments shall be made in accordance with section 6.

Progress payments, default rules**Application**

6. (1) This section applies where a contract or subcontract does not provide for progress payments that become payable at least every 31 days after the first day that services or materials are supplied to the improvement under the contract or subcontract.

Payment period

- (2) A payment period referred to in this section means the period of time that begins on the first day of every month and ends on the last day of that month.

Progress payment application

- (3) A contractor or subcontractor shall prepare, in respect of every payment period, a progress payment application that sets out the value of the services and materials that have been or will be supplied to the improvement under the contract or subcontract during the payment period.

Estimates

- (4) **A progress payment application may rely on reasonable estimates.**

Submission of application

- (5) Progress payment applications shall be submitted in accordance with the following schedule:
 1. A contractor shall submit a progress payment application to an owner on or after the last day of the payment period.
 2. A subcontractor shall submit a progress payment application to a contractor before the last day of the payment period.
 3. A subcontractor shall submit a progress payment application to another subcontractor within the time period prescribed by the regulations or, if no such time period is prescribed, within a reasonable period of time that would enable the other subcontractor to comply with this subsection.

Payments, timing

- (6) A payer shall make a progress payment in accordance with the following schedule:
1. **In the case of a payment to a contractor, within 20 days after the day the payee submits the progress payment application.**
 2. **In the case of a payment to a subcontractor, by the day that is the later of,**
 - i. **10 days after the day a certificate is issued by a payment certifier in respect of the payment, if applicable, and**
 - ii. **30 days after the day the payee submits the progress payment application.**

[Emphasis added]

Many stakeholders objected to the payment schedule elements of Bill 69 and much criticism was focused on the fact that under section 6(4) a progress payment application could rely on “reasonable estimates”. Concern was expressed that this provision could result in payment being made for work not yet performed.⁷⁶⁴

One stakeholder distinguished Bill 69 from other existing prompt payment legislation, noting as follows:

One important feature that is unique to Bill 69 is that it mandates monthly payments based on an undefined notion of value. Under Bill 69, parties are not free to agree on the criteria for determining when work is complete, whether in part or in whole, and they’re not even allowed to agree on what documentation needs to be provided with an invoice, such as monthly work reports, which owners and general contractors need to manage the project. Quite simply, no other country prevents parties from mutually agreeing on the timing, value and conditions for payment.⁷⁶⁵

Many commentators expressed the view that the schedule described in section 6 of Bill 69 would not provide sufficient time for those reviewing the payment application to conduct necessary due diligence.

⁷⁶⁴ Council of Ontario Universities letter to Premier Wynne dated March 3, 2014

⁷⁶⁵ *Official Report of Debates (Hansard)*, Legislative Assembly of Ontario, Second Session, 40th Parliament, Standing Committee on Regulations and Private Bills, Wednesday 26 March, 2014, Submissions of Dragados Canada, Inc., T-159.

(b) Administrative burden imposed on owners and contractors

Some commentators viewed the payment schedule of Bill 69, set out in section 6 above, as impractical. Others suggested that a prompt payment regime would impose an overly cumbersome administrative burden on an already strained industry.

The “notice of payment” requirements of section 14(5) of the Bill also raised a concern about additional administrative costs to implement these requirements.⁷⁶⁶

(c) Requirements to release sensitive financial information.

As noted above, Bill 69 also obligated owners and contractors release to financial information prior to entering into a contract.⁷⁶⁷ Section 14 of Bill 69 provided *inter alia* as follows:

Right to financial information

14. (1) Before entering into a contract related to an improvement, an owner shall provide the contractor with the financial information prescribed by the regulations for the purpose of demonstrating the financial ability of the owner to make the payments provided for under the contract.

Same

(2) For the purpose described in subsection (1), a contractor may at any time request in writing that the owner provide updated financial information, and the owner shall promptly provide the information.

Right of subcontractor

(3) If a subcontractor who supplies services or materials to the improvement requests in writing that the contractor provide a copy of the information provided under subsection (1) or (2), the contractor shall promptly provide the information. . . .

Owners and contractors expressed concern about such disclosure obligations, considering the potential commercial sensitivity of such information. Some argued that requiring such disclosure was outside the ambit of a prompt payment statute as it related to the procurement phase of a project.

⁷⁶⁶ *Official Report of Debates (Hansard)*, Legislative Assembly of Ontario, Second Session, 40th Parliament, Standing Committee on Regulations and Private Bills, Wednesday 19 March 2014 at T-148.

⁷⁶⁷ *Official Report of Debates (Hansard)*, Legislative Assembly of Ontario, Second Session, 40th Parliament, Standing Committee on Regulations and Private Bills, Wednesday 19 March 2014 at T-146.

(d) Additional construction risk

Stakeholders also expressed concern about additional construction risk associated with the rigidity of the payment mechanisms of Bill 69. Many pointed out that Bill 69 did not accommodate certain types of contracts such as large infrastructure projects and AFP projects where payment is tied to the completion of milestones or the completion of the entire project. In this regard, one stakeholder submitted as follows:

Milestone payments allow the owner to mitigate risk by tying payment to completion of a measurable part of the work, such as the power plant turning on when the switch is flipped or a road opening to traffic. Prohibiting the freedom of sophisticated parties to enter into payment arrangements that are tailored to the risk profile of the project will make projects riskier and therefore more expensive, reduce the abilities of governments to revitalize their infrastructure, squeeze small businesses out of the market and costs jobs.⁷⁶⁸

(e) Additional construction costs

A concern about additional construction costs was raised in the context of the perceived risk of increased financing costs for funds to be paid to subcontractors when the corresponding funds had not yet been paid by the owner.

(f) Risk of an increase in litigation

A concern about litigation risk was raised by some given that “the act is vague on many points and is not aligned with existing legislation like the Construction Lien Act”, which would give rise to disputes, an increase in litigation and the associated costs.⁷⁶⁹

2.3 Support for Bill 69

On the other hand, proponents of prompt payment legislation who, although they may have raised concerns about the drafting of Bill 69 as it was introduced in the Legislature, pointed out that this type of legislation is needed to ensure the ongoing health of Ontario’s construction industry because:

a) Late Payments are Endemic

Proponents of Bill 69 noted that the construction industry is structured like a pyramid, where the owner, at the very top of the pyramid, holds the funds that are vital to the project and the trade

⁷⁶⁸ *Official Report of Debates (Hansard)*, Legislative Assembly of Ontario, Second Session, 40th Parliament, Standing Committee on Regulations and Private Bills, Wednesday 19 March 2014 at T-148.

⁷⁶⁹ *Ibid.*

contractors and their labourers form the base, and asserted that there is a documented culture of late payments in the industry.⁷⁷⁰

b) Inequality of Bargaining Power

It was emphasized by some stakeholders that, within the confines of the construction pyramid, the entities at the bottom of the pyramid do not have the bargaining strength to negotiate for better payment terms, enforceable interest payments on late payments, or access to financial information that would allow them to evaluate the financial viability of the entities undertaking a project.

c) Financial Burden on Subcontractors

According to proponents of Bill 69, the structure of the industry and its culture of late payment frequently lead to financial difficulties for numerous Ontario workers who earn their living from construction. Some stakeholders pointed out that projects were being financed on the backs of the subcontractors and trades. Insolvency risk was also identified as a concern for subcontractors.

d) Effect on Pension and Benefit Schemes

It was submitted that late payment to trade contractors leads to late payment of contributions to the workers benefits and pension plans, which has a direct effect on the lives of Ontario workers and their families.⁷⁷¹

Importantly, Bill 69 was identified to be the local manifestation of a global prompt payment movement. Stakeholders referenced the existence of prompt payment legislation in other jurisdictions.⁷⁷² As will be discussed in the next section, there are valuable lessons to be learned from these other jurisdictions in considering whether or not some form of prompt payment regime makes sense for Ontario's construction industry.

2.4 The Prompt Payment Movement

Security of payment legislation has been introduced in various jurisdictions world-wide.⁷⁷³ A common objective of this type of legislation is to increase cash-flow down the tiered contractual

⁷⁷⁰ *Official Report of Debates (Hansard)*, Legislative Assembly of Ontario, Second Session, 40th Parliament, Standing Committee on Regulations and Private Bills, Wednesday 19 March 2014 and Wednesday 26 March, 2014. See in particular the submissions made March 19, 2014 on behalf of the Electrical Contractors Association of Ontario.

⁷⁷¹ *Official Report of Debates (Hansard)*, Legislative Assembly of Ontario, Second Session, 40th Parliament, Standing Committee on Regulations and Private Bills, Wednesday 19 March 2014 and Wednesday 26 March, 2014.

⁷⁷² *Ibid.*

⁷⁷³ Including England and Wales, Scotland, Northern Ireland, New South Wales, Victoria, New Zealand, Queensland, Isle of Man, Western Australia, Singapore, Northern Territory and Malaysia.

structure in a fair and reasonable manner.⁷⁷⁴ Such legislation often includes provisions that establish a right to progress payments, whether or not this right is included in a construction contract.⁷⁷⁵ In some jurisdictions, legislation addressing promptness of payment also establishes a right to refer a dispute arising under the contract to adjudication. The topic of adjudication is addressed separately in this report in Chapter 9 - Adjudication. Adjudication can expedite the resolution of payment disputes.

In every jurisdiction where prompt payment has been enacted (or where it is being considered), concern had been raised about the financial health of businesses in the construction industry, particularly trade contractors (i.e. subcontractors). Stakeholders lobbied their governments to take legislative action to protect subcontractors from cash-flow difficulties.

Those who have studied the reasons behind the global prompt payment initiative refer to an industry-wide culture of late payment. By their nature, construction contracts require that contractors supply materials and services for a given period of time (generally stipulated in the contract) before they are entitled to make a claim for payment. In order to apply for payment, contractors must often include many documents to support their progress payment applications, as stipulated in the contract (e.g. invoices, monthly schedule update, schedule of values, proof of payment to subcontractors and suppliers, WSIB certificate and statutory declarations). Once an application for payment is submitted to the owner, the process of certification and approval begins, which often involves a consultant's review, followed by the owner's review and approval (sometimes by more than one department within an owner organization), and then the "cheque run" process. This application, certification, approval and payment process frequently contributes to payment delays. Such systemic delays occur in the ordinary course. Meanwhile, in order to manage its own cash flow, the general contractor operates on a pay-when-paid basis and does not release payments to subcontractors until after receipt of a progress payment from the owner. Yet, subcontractors depend on timely and full payment of their invoices to operate their businesses, meet their payroll obligations and purchase materials for the project on a continuous basis.

On the other hand, in some instances, delays in payment may be attributable to flawed applications for payment which may not accurately reflect the work performed during the payment period, missing information and supporting documents, etc.⁷⁷⁶ In addition, it is pointed out by public owners that multiple reasons are necessary to satisfy auditability and anti-corruption concerns. Also, the argument in favor of the introduction of prompt payment

⁷⁷⁴ Jeremy Coggins & Steve Donohoe, "A Comparative Review of International Construction Industry Payment Legislation, and Observations from the Australian Experience" (2012) *International Construction Law Review* 29(2) at 198 [Coggins and Donohoe].

⁷⁷⁵ See, e.g. s 109(1) *Housing Grants, Construction and Regeneration Act 1996* (UK); s 8 *Building and Construction Industry Security of Payment Act 1999* (NSW).

⁷⁷⁶ Some U.S. state prompt payment acts specifically list the types of "bona fide" disputes that may give rise to delayed or partially withheld payments, such as "unsatisfactory job progress", "defective construction not remedied", "disputed work", "third party claims", "failure to make timely payments to subcontractors" etc.

legislation is met by some with the argument that contractors and subcontractors should simply refuse to enter into contracts that contain onerous payment provisions. However, in Ontario, tender documents generally include the General Conditions of “Contract B”, the construction contract, including the payment provisions, such that some stakeholders take the position that, except for those construction contracts that are negotiated one-on-one between the owner and the contractor, in reality there is little freedom of contract in the marketplace, as owners unilaterally impose their chosen payment conditions through the tendering process, and general contractors impose their standard form subcontracts on subcontractors.

2.4.1 American Prompt Payment Legislation

U.S. commentators have described the practice of late payment down the construction pyramid as follows:

The speed of the flow of money from lender to owner to contractor becomes slower as the ability to borrow tightens. Profit margins shrink as contractors and subcontractors cut their bids in order to compete for what work is available. Everyone in the payment chain wants to hold on to cash for as long as possible, with the result that many smaller contractors and subcontractors complain that they are being forced to wait longer and longer for payments that should have been made more promptly.⁷⁷⁷

One commentator has summarized the common reasons for failure to pay promptly or at all in the United States as follows:

Obviously, various reasons exist (...), including, among others, that (1) a prime contractor has not received payment from the owner for the work completed by a subcontractor, (2) the prime contractor perceives deficiencies in the subcontractor’s work for which he anticipates a future claim from the owner, (3) the owner disputes that certain work has been completed or that the work meets contract specifications; or (4) the prime contractor (or the owner) is a “bad actor” who knows that he ought to pay, but refuses.⁷⁷⁸

There are numerous state forms of prompt payment regimes in the U.S. For example, some states may have separate prompt payment statutory schemes applicable to public and private sector contracts. Even within the category of public sector contracts, there may be separate regimes. In some instances, one statutory scheme will apply to state contracts; another one will apply to local government contracts (i.e. counties, municipalities, school boards); and a separate scheme may be applied to state Department of Transportation contracts. In respect of private sector contracts, prompt payment legislation may “limit certain industry procedures and practices [and] place parameters on parties’ actions, from invoicing and notice procedures [to] parties’

⁷⁷⁷ Barbara Reeves Neal & Kenneth C. Gibbs, “Past Due – Appellate Courts Appear to be Limiting the Reach of Construction Prompt Payment Laws” (2011) 33 LA Lawyer 24 [Neal and Gibbs].

⁷⁷⁸ 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 4 [Tricker, George, and Ebeler].

ability to override PPA [*Prompt Payment Act*] legislation provisions by contract”.⁷⁷⁹ We examine below the key characteristics of the various regimes adopted in the United States.

2.4.1.1 U.S. Federal Legislation

In 1982, Congress enacted U.S. Code Chapter 39 or the *Prompt Payment Act*⁷⁸⁰ to attempt to ensure that federal agencies would pay their suppliers and service providers on time, failing which they would be liable for interest on the overdue balance.⁷⁸¹

(a) What Types of Contracts does it apply to?

The federal *Prompt Payment Act* is not limited to construction contracts but applies to all suppliers and service providers to federal agencies. The original statute was amended in 1988 to include provisions specifically applicable to construction contracts.⁷⁸²

(b) In the Construction Pyramid, what Level of Contract does it apply to?

The Federal Acquisition Regulation also imposes obligations on contractors with respect to their subcontractors. For example, the contractor’s subcontracts must include a prompt payment provision, stipulating that the contractor is to pay the subcontractor within 7 days from the contractor’s receipt of payment for work performed by the subcontractor and that interest will apply to late payments.⁷⁸³

(c) What is the Trigger for Payment?

The trigger for payment is the delivery of a proper invoice.

(d) What is the Payment Period?

Interest penalties accrue starting 14 days after receipt of an invoice for a progress payment or 30 days after receipt of an invoice for final payment, unless otherwise agreed.⁷⁸⁴

(e) When is a contractor entitled to render an invoice?

A contractor is entitled to issue an invoice when all relevant contractual requirements have been met.

⁷⁷⁹ 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].

⁷⁸⁰ 1 USCA §§ 3901 to 3907 (West Supp. 2001). See also Federal Acquisition Regulations, 48 CFR § 2.232-27 (2001).

⁷⁸¹ John Hays, “Prompt Payment Acts: Recent Developments and Trends”, *The Construction Lawyer* (Summer 2002) at 29.

⁷⁸² Miller and Hobbes, *supra* referring to 31 USC § 3905.

⁷⁸³ *Ibid.*

⁷⁸⁴ *Ibid.*

(f) On What Basis Can a Payment be Withheld and When?

The *Prompt Payment Act* provides that (except in the case of certain specified types of contracts, for which a different maximum period is set) “each invoice be reviewed as soon as practicable after receipt” and “any invoice determined not to be such a proper invoice suitable for payment shall be returned as soon as practicable, but not later than 7 days after receipt, specifying the reasons that the invoice is not a proper invoice.”⁷⁸⁵

(g) What remedies are available in the event of non-payment?

The federal statute entitles contractors to interest penalties for late payment of progress payments, retainage and final payment.

2.4.1.2 State Legislation

By the early 2000s, 49 of the 50 states had enacted prompt payment legislation for public sector projects, generally with the specific purpose of providing protection to subcontractors.⁷⁸⁶ Since the early 2000s, prompt payment legislation applicable to private sector projects has been progressively adopted by individual states as a result of active lobbying by subcontractor groups.⁷⁸⁷

(a) What Types of Contracts does it apply to?

To date, 34 states have enacted statutes applicable to both private and public projects (in the same statute⁷⁸⁸ or in separate statutes⁷⁸⁹), which generally apply to contractors and, in most instances, also apply to subcontractors.⁷⁹⁰ Another 15 states have enacted statutes applicable to public sector projects but have not enacted corresponding statutes for private sector projects.⁷⁹¹ Of all the states in the United States, only the state of New Hampshire has still not enacted any prompt payment legislation.

The individual state statutes were enacted with the common objective of improving cash-flow given the “basic and popular notion that someone who provides goods and services is entitled to be paid for those goods and services promptly”.⁷⁹² Commentators have noted that, although the

⁷⁸⁵ *Prompt Payment*, 5 CFR 1315.4; *Final rule on, and codification of, Prompt Payment Act regulations*, Federal Register Vol 64, No 188, September 29, 1999 [Prompt Payment Regulations].

⁷⁸⁶ Tricker, George, and Ebeler, *supra* at 2.

⁷⁸⁷ Miller and Hobbes, *supra*.

⁷⁸⁸ In Georgia, Kentucky, Maine, Montana, New Jersey, New Mexico, South Carolina, and Vermont, the same statutory provisions apply to both public and private sector projects. See Appendix B.

⁷⁸⁹ See Appendix B.

⁷⁹⁰ See Appendix B.

⁷⁹¹ Alaska, Arkansas, Colorado (proposed legislation [HB 13-1090, 69th Leg., 1st Sess., at § 8-10.5-110] was defeated on February 28, 2013 and was postponed indefinitely), Indiana, Iowa, Michigan, North Dakota, Rhode Island, South Dakota, Virginia, Washington, West Virginia, Wisconsin and Wyoming.

⁷⁹² *Ibid.*

state statutes have similar objectives, they are often inconsistent from state to state and even within the same state (when comparing public and private contract regimes).⁷⁹³

Often, there is much greater freedom of contract in the private sector regime than in the public sector.

A review of the prompt payment legislation in the U.S. on a state by state basis is summarized at Appendix B. Most states have enacted separate legislation for public and private projects, but fifteen of them have no prompt payment legislation with respect to private projects, seven states have prompt payment legislation but it does not apply to either owners (with respect to general contractors) or to general contractors (with respect to subcontractors)⁷⁹⁴, and eight have enacted a single regime applicable to both public and private projects.

(b) In the Construction Pyramid, what Level of Contract does it apply to?

State legislation may involve different regimes for payments from owners to contractors as opposed to payments from contractors to subcontractors. In effect, such regimes can be said to function as a statutory pay-when-paid clause because the obligation to pay a lower tier payee only arises within in a prescribed number of days (anywhere between 7 to 30 days depending on the legislation) following the contractor's receipt of funds from the owner or upper tier payer.

(c) What is the Trigger for Payment?

In analyzing the regimes in place in the various states in relation to the triggering event for payment, they can be categorized into the seven models described in the chart below. The applicable model may vary depending upon whether it is a public or private project.

⁷⁹³ Tricker, George, and Ebeler, *supra*.

⁷⁹⁴ Hawaii, Idaho, North Carolina and Ohio (not applicable to owners with respect to contractors all on private projects); and Arkansas (public – no regime at all on private projects), Idaho (private) and Michigan (public) (not applicable to contractors with respect to subcontractors).

EIGHT PROMPTNESS OF PAYMENT

	Model	Public Projects Only	Public and Private Projects	Private Projects Only
1.	Receipt of invoice Under this model, the triggering event is the owner's receipt of the contractor's invoice. The statutes generally provide that "receipt of invoice" means receipt of a proper invoice.	Alabama, Alaska, Arkansas, California, Hawaii, Indiana, New York, Nevada, Oklahoma, Virginia, Washington, West Virginia, Wyoming	Florida, Georgia, Illinois, Kentucky, Nebraska, New Jersey, New Mexico, Pennsylvania, Tennessee, Texas, Vermont	Delaware, Kansas
2.	Contract terms Under this model, the contract terms agreed to by the parties govern as the statute does not specify the triggering event.	Louisiana, Ohio		Mississippi, Missouri, Utah
3.	Approval Under this model, the triggering event is the approval or certification of a payment claim.	Arizona	Montana	
4.	Contract terms and/or approval The parties may negotiate the triggering event in the contract, failing which the statute provides that the triggering event is the approval or certification of the payment claim.	North Carolina (where the regime for progress payments is based on the contract terms but the triggering event for final payment is the approval of the final invoice or the final acceptance of the work), South Dakota		

EIGHT PROMPTNESS OF PAYMENT

	Model	Public Projects Only	Public and Private Projects	Private Projects Only
5.	Receipt of invoice and/or approval Under this model, the triggering event for progress payment is the receipt of the contractor's invoice and the triggering event for final payment is the earlier of completion and receipt of final invoice or certification.	Missouri, Wisconsin		
6.	Contract terms and/or monthly payments	Colorado, Delaware, Michigan, Iowa, Maine	Oregon, Minnesota	Massachusetts, New York

As this chart reveals, almost half of the states have adopted the receipt of “a proper invoice” approach for both public and private sector contracts. The invoice must generally be a proper invoice in order to start the clock ticking, as noted in the above chart.

(d) What is the Payment Period?

The length of the period allowed before payment must be made varies from state to state, depending on a number of factors such as whether the project is a public or a private project, whether the applicable payment is a progress payment or a final payment and, on public projects, whether the project is funded in whole or in part by grant or federal funds.

With respect to final payments, the length of the pay period is not always tied to the same triggering event as progress payments and instead, the triggering event may become any of the following: possession, occupancy permit, substantial completion, certification by contracting authority or inspection for final payment.

The range of pay periods (in number of days) can therefore be summarized as follows:

EIGHT PROMPTNESS OF PAYMENT

Triggering event	Progress payments : range in number of days	Progress payments outliers	Final payment: range in number of days	Final payment outliers
Receipt of invoice	14 - 30 (with 30 days being by far the most common pay period)	5 (Arkansas – public) 40 (Illinois – private) 45 (Connecticut, Nebraska, Pennsylvania, Tennessee, Wyoming – public) 60 (Idaho, Illinois, Utah, West Virginia – public) 75 (New York – highway only) Up to 90 (Arkansas – highway only)	10-30 (with 30 days being by far the most common pay period)	45 (Connecticut, North Dakota, Tennessee, Wyoming – public) Up to 60 days (Texas – private) 60 days (Colorado, Idaho, New York, Utah, West Virginia – public) 61 days from substantial completion: (Indiana – public) 65 days from substantial completion (Massachusetts – public)
Approval	7 - 45		30-60	
Contract		30 days maximum or earlier under the Contract (Connecticut – private)		

(e) When is the contractor entitled to render an invoice?

When a contractor is entitled to render an invoice will be determined by the contract.

(f) On What Basis Can a Payment be Withheld and When?

Owners’ and contractors’ rights to withhold payment are subject to a variety of restrictions depending upon the state. For example, some statutes impose a limit on the amount of payment

that may be withheld.⁷⁹⁵ In respect of set-offs/withheld payments, there is a lack of clarity about the nature of the notice to be provided in some states. One Illinois commentator raised the following questions: “[m]ust it identify work that does not comply with the plans or specifications? Or must it identify work that violates code? Can it withhold payment based on a suspicion that work is non-compliant (...)?”⁷⁹⁶

(g) What remedies are available in the event of non-payment?

Often, the state legislation provides for recovery of costs/legal fees to the prevailing party in a civil action (given that, under the U.S. model, the “English rule” of costs does not exist.)

Interest penalties are frequently applied in relation to late payments and the state legislation will often contain specific rules on the calculation of interest.

In respect of the right of suspension, generally, if a subcontractor wants to exercise a right to suspend work because of delays in payment, it must comply with specified notice requirements and cannot suspend in the event the payment in question is legitimately disputed.

In the U.S. the impetus for prompt payment may be somewhat different than in Ontario, given that some states permit waivers of lien rights whereas in Ontario such waivers are not possible given section 4 of the *Act*.

2.4.1.3 The Effectiveness of U.S. Prompt Payment Legislation

The efficacy of prompt payment legislation has been questioned in the U.S. Among other criticisms, American prompt payment legislation has been criticized for its failure to include provisions that provide an environment for the expeditious resolution of disputes during the life of the project. There is no dispute resolution mechanism provided for in the U.S. prompt payment legislation, therefore payment disputes are resolved through litigation, which is costly and time consuming.

In the context of such litigated disputes, some courts have found that the breach of prompt payment legislation does not form the basis of a private right of action. In the D.C. federal district court case of *U.S. ex rel. IES Commercial, Inc. v Continental Ins. Co., Inc.*⁷⁹⁷, the court addressed the issue of whether or not a subcontractor can enforce a prompt payment statute by means of a private right of action against the prime contractor. The prime contractor had moved for summary dismissal, noting, among other arguments, that the statute made no provision for a

⁷⁹⁵ See Appendix B and for example Alabama (“up to two times the disputed amount”), California (“up to 150% of the disputed amount”), Illinois (“reasonable value of the portion of the work performed”), Nebraska (“a reasonable amount”).

⁷⁹⁶ Jeffrey L. Hamera, “Illinois Gets Into the Act – Enacts Prompt Payment Act for Private Construction Projects in Illinois” (2008) *Duane Morris LLP*, online: <<http://www.lexology.com/library/detail.aspx?g=0fe3763a-4002-4fe5-a13b-2916414cc542>>.

⁷⁹⁷ 814 F Supp 2d 1 (DDC 2011).

private right of action. The court agreed, stating that no other jurisdiction had adopted the view that such private right existed under the state statutes. The motion to dismiss was therefore granted.

Commentators have also noted that disputes arising under prompt payment statutes “have been fruitful sources of litigation” in relation to the issue of whether or not the work claimed was performed or whether it was performed satisfactorily.⁷⁹⁸ For example, Thomas Marcey, in an article entitled “Show Me the Money, Now – Disputes under the Prompt Payment Act” discusses the Vermont case of *Trombley Plumbing & Heating v Quinn*.⁷⁹⁹ The case dealt with certain heating and hot water services to be completed at a vacation home. The homeowner alleged that it had not paid the unpaid balance owing to the contractor because the work had not been performed in accordance with the contract, causing pipes to freeze and the furnace to shut down and leak. The trial court denied the contractor’s claim for payment noting that “the work was not well done”.⁸⁰⁰ On appeal, the court rejected the contractor’s argument that it had made a *prima facie* case on its claim for payment. The court noted that the prompt payment legislation provided the homeowner with a defence because, under the statute, an owner is entitled to withhold payment in an amount “equaling the value of any good faith claims against an invoicing contractor...including claims arising from unsatisfactory job progress, defective construction, [or] disputed work...”⁸⁰¹

Similarly, in the California case of *FEI Enterprises, Inc. v Kee Man Yoon*⁸⁰², the court concluded that if, after applying an objective test, it was determined that there was a “good faith dispute” over the degree of completion of the work, that a general contractor could withhold 150 per cent of the disputed amount, in accordance with the applicable prompt payment legislation.

The case of *White Buffalo Construction, Inc. v U.S.*⁸⁰³ addressed the right to recover interest under the federal Prompt Payment Act. In this case, the contractor, White Buffalo, sought recovery for unpaid invoices and interest on those invoices in relation to a contract for the repair of damaged roads. The court found that White Buffalo was not entitled to interest given that there was a “disagreement over quantity, quality, Contractor compliance with [a] contract term or condition, or requested payment amount”. In other words, given that there was a good faith dispute, no interest was payable.

⁷⁹⁸ Marcey, *supra*.

⁷⁹⁹ 2011 VT 70, 25 A.3d 565 (Vt 2011)

⁸⁰⁰ *Ibid* at 568.

⁸⁰¹ *Ibid* at 569.

⁸⁰² 194 Cal App. 4th 790, 124 Cal.Rptr. 3d 64 (2d Dist. 2011).

⁸⁰³ 101 Fed Cl 1 (2011).

Similarly, in the Texas case of *City of San Antonio v KGME*⁸⁰⁴ the court stated that interest is unavailable in circumstances where there is a *bona fide* dispute as to whether or not the underlying principal amount is due and owing.

In California, commentators have noted that courts have rendered decisions which have “restrict[ed] the applicability” of the provisions of the prompt payment legislation under consideration, contrary to the original objectives of the legislation.⁸⁰⁵ For example, in *Martin Brothers Construction, Inc. v Thompson Pacific Construction, Inc.* the Third District Court of Appeal held that a contractor was entitled to withhold payment given a *bona fide* dispute regarding change orders under the subcontract, in circumstances where there was no dispute regarding the work performed by the subcontractor under the subcontract.⁸⁰⁶

One solution proposed by a commentator in relation to the potential erosion of the protections and remedies intended by prompt payment legislation in California, was the creation of a uniform statutory scheme rather than “the current disparate and inconsistent statutes which would also directly address the issues presented by the recent appellate opinions”.⁸⁰⁷

Generally, the case law in the United States indicates that prompt payment legislation is of limited utility where there is a *bona fide* disagreement about whether or not funds are owing to a contractor or subcontractor. The lack of an effective dispute resolution mechanism within these statutes means that such disputes are litigated and the remedies afforded by the legislation, including payment of interest, are not enforceable if there is a dispute over whether or not funds are owing.

Finally, there is limited information about the cost savings to the industry since the introduction of prompt payment legislation in the United States. One commentator refers to a study performed by the United States Department of Transportation that shows that “the provisions [of Prompt Payment legislation] reduced a contractor’s profits by 4.35% and increased project costs by 0.14%”.⁸⁰⁸

2.4.2 U.K.

As noted by one commentator in the U.K., the purpose of prompt payment legislation is not to compel owners and general contractors to pay all certified amounts “uncritically” but to avoid payment delays and to resolve disputes in a timely manner while the project is ongoing.⁸⁰⁹

The *Housing Grants, Construction and Regeneration Act 1996* (the “U.K. Construction Act”), came into force in May 1998. It was intended to strike a balance between the principle of

⁸⁰⁴ 340 SW 3d 870 (Tex App San Antonio 2011).

⁸⁰⁵ Neal and Gibbs, *supra*.

⁸⁰⁶ *Martin Bros. Constr.*, 179 Cal. App. 4th at 1414 cited by Neal and Gibbs, *supra*.

⁸⁰⁷ Neal and Gibbs, *supra*.

⁸⁰⁸ Tricker, George, and Ebeler, *supra* at 4.

⁸⁰⁹ *Ibid* at 3-4. See also Sir Anthony May, ‘Set Back to Set Off’ (SCL (UK) Paper 184, September 2013) at 7-9.

freedom of contract and statutory intervention by allowing parties to a construction contract a certain amount of flexibility with respect to the negotiation of payment terms, “provided that certain minimum standards set out in that *Act* are observed, failing which, terms contained in secondary legislation, known as schemes for construction contracts, would be implied by law into the contract of the parties”.⁸¹⁰

In 1993, Sir Michael Latham was commissioned to prepare a joint government/industry report on aspects of the construction industry in the U.K. This resulted in two reports: *Trust and Money* (December 1993) and *Constructing the Team* (July 1994).⁸¹¹

Following Sir Michael’s reports, the *U.K. Construction Act* came into force in May 1998. It was intended to strike a balance between the principle of freedom of contract and statutory intervention by allowing parties to a construction contract a certain amount of flexibility with respect to the negotiation of payment terms, “provided that certain minimum standards set out in that *Act* are observed, failing which, terms contained in secondary legislation, known as schemes for construction contracts, would be implied by law into the contract of the parties”.⁸¹²

Previously, in *Constructing the Team*, Sir Michael had considered the use of pay-when-paid provisions and recommended that such clauses be rendered unenforceable by statute. Pay-when-paid clauses were perceived to be a potential cause of bankruptcy among small and medium-sized businesses.⁸¹³ As a result, section 113 of the *U.K. Construction Act* prohibited “conditional payment provisions” such as clauses where payment is conditional on the payer receiving payment from a third party, except in cases of insolvency. Section 113 provides as follows:

113 Prohibition of conditional payment provisions.

(1) A provision making payment under a construction contract conditional on the payer receiving payment from a third person is ineffective, **unless that third person, or any other person payment by whom is under the contract (directly or indirectly) a condition of payment by that third person, is insolvent.** [Emphasis added]

In 2007, after further consultations with the industry, the U.K. Government determined that, although the *U.K. Construction Act* had successfully improved cash-flow, it was still ineffective in certain key regards”.⁸¹⁴ Specifically, the Government’s policies and objectives were to:

⁸¹⁰ Richard N.M. Anderson & John T. Aycock, “The Introduction of Payment and Adjudication Provisions into the Construction Laws of the Isle of Man” (2007) 73:3 *Arbitration: Int’l J Arb Med Disp Man* 320 at 322.

⁸¹¹ Sir Michael Latham, “Constructing the Team - Final Report of the Government/Industry Review of Procurement and Contractual Arrangements in the UK Construction Industry” (July 1994), online: <<http://constructingexcellence.org.uk/wp-content/uploads/2014/10/Constructing-the-team-The-Latham-Report.pdf>>.

⁸¹² Richard N.M. Anderson & John T. Aycock, “The Introduction of Payment and Adjudication Provisions into the Construction Laws of the Isle of Man” (2007) 73:3 *Arbitration: Int’l J Arb Med Disp Man* 320 at 322.

⁸¹³ *Ibid.*

⁸¹⁴ Jeremy Glover, “The new draft Construction Contracts Bill: changes to the HGCRAs finally announced” (2008), online: <<http://www.fenwickelliott.co.uk/files/>>.

- (i) Increase transparency and clarity in the exchange of information relating to payment to enable the better management of cash flow;
- (ii) Encourage the parties to resolve disputes by adjudication (...); and
- (iii) Improve the right to suspend performance under the contract.⁸¹⁵

In 2009, the *U.K. Construction Act* was amended by the *Local Democracy, Economic Development and Construction Act 2009* (the “2009 U.K. Act”), which came into force in 2011 and introduced the following changes to the *U.K. Construction Act* prompt payment provisions:

- The application of the *U.K. Construction Act* was extended to all qualifying construction contracts from contracts whether or not they are “in writing”,⁸¹⁶
- The prohibition of “pay when paid” provisions was extended to “pay-when-certified” provisions used to circumvent the prohibition on pay-when-paid provisions to elongate periods for payment;⁸¹⁷
- A payment notice under the *U.K. Construction Act* must be delivered within the period specified by the contract or the Scheme (5 days after the expiry of the payment due date) and must set-out the amount due and how that amount is calculated. The amendment provided that a contract may specify who gives the first notice (i.e. the payer, or the payee, or a contract administrator) within a defined number of days after the payment due date has expired. In the event the payee is to deliver the first notice and the payer determines that it will withhold all or a portion of the amount set out in the notice, the payer may deliver a second notice or “pay less notice”. In the event that a payer does not challenge the payee’s notice but still fails to make full payment, the contractor may suspend (but not terminate) the work;⁸¹⁸ and
- Section 112 of the *U.K. Construction Act* previously did not entitle the suspending party to compensation but the new section 112(3A) provided that the defaulting payer will be “liable to pay to the party exercising the right a reasonable amount in respect of costs and expenses reasonably incurred”.⁸¹⁹

The above modifications to the *U.K. Construction Act* are reflected in our discussion below.

- (a) What Types of Contracts does it apply to?

The *U.K. Construction Act* broadly applies to every “construction contract” for carrying out “construction operations” (or arranging for the carrying out of construction operations / providing labour for the carrying out of construction operations), including for example, architectural or engineering work, surveying work, design, landscaping or decoration work,

⁸¹⁵ *Ibid.*

⁸¹⁶ 2009 U.K. Act, s 139(1) amending the *U.K. Construction Act*, s 107(1).

⁸¹⁷ 2009 U.K. Act, s 142(2) amending the *U.K. Construction Act*, s 110.

⁸¹⁸ 2009 U.K. Act, ss 143, 144 and 145 amending the *U.K. Construction Act* ss 109, 111-112.

⁸¹⁹ 2009 U.K. Act, s 145, amending the *U.K. Construction Act* s 112.

whether written, oral, or partly written and partly oral, with limited exceptions for both construction contracts and construction operations.⁸²⁰ The *U.K. Construction Act Part II* only applies to the carrying out of construction operations in England, Wales and Scotland.⁸²¹

The *U.K. Construction Act* does not apply to contracts for drilling for oil/natural gas; extraction; assembly, installation or demolition of plant or machinery, or erection or demolition of steelwork for the purposes of supporting or providing access to plant or machinery on certain sites; manufacture or delivery to certain sites; or the making, installation and repair of artistic works.⁸²² Nor does it apply in relation to contracts of employment and contracts with residential occupiers.⁸²³ Private finance initiatives (i.e. AFP projects) and certain insurance contracts related to construction projects are also excluded, albeit by specific order.⁸²⁴

(b) In the Construction Pyramid, what Level of Contract does it apply to?

As the *U.K. Construction Act* applies to all parties to a construction contract (as broadly defined), the legislation applies to all levels of the construction pyramid.

(c) What is the Trigger for Payment?

Payees under a construction contract subject to the *U.K. Construction Act* are entitled to payment by way of instalment, stage payments or other periodic payment for work under the contract unless such work is: a) specified to occur over less than 45 days; or b) agreed between the parties that the work is estimated to be less than 45 days.⁸²⁵

The parties are otherwise free to agree on amounts of payments and intervals at which they become due.⁸²⁶ Should the parties fail to agree, the default provisions of the *Scheme for Construction Contracts (England and Wales) Regulations 1998* (the “Scheme”) will apply.⁸²⁷

Every construction contract is required to stipulate a notice requirement in relation to payment such that a party is required to give notice no later than 5 days from the date on which a payment becomes due or would have become due if: a) the other party carried out contractual obligations; and b) there is no set-off or abatement permitted by reference to a sum claimed under one or

⁸²⁰ *U.K. Construction Act* at s 104.

⁸²¹ *U.K. Construction Act* at s 104 (6).

⁸²² *U.K. Construction Act* at s 105(2).

⁸²³ *U.K. Construction Act* at s 104(3), 106.

⁸²⁴ *Construction Contracts (England and Wales) Exclusion Order 1998* (SI 1998/648) as modified by SI 2004/696, at ss 4, 5.

⁸²⁵ *U.K. Construction Act*, s 109.

⁸²⁶ *U.K. Construction Act*, ss 109-110.

⁸²⁷ Scheme for Construction Contracts (England and Wales) Regulations 1998, 1998 No 649, online: <<http://www.legislation.gov.uk/ukxi/1998/649/schedule/made>>.

more other contracts.⁸²⁸ Again, if such provision is not provided in the contract the parties will default to the provisions of the *Scheme*.⁸²⁹

As noted above, the 2009 *U.K. Act* provided that a contract may specify who gives the first notice (i.e. the payer, or the payee, or a contract administrator) within a defined number of days after the payment due date has expired. In the event the payee is to deliver the first notice and the payer determines that it will withhold all or a portion of the amount set out in the notice, the payer may deliver a second notice or “pay less notice”. In the event that a payer does not challenge the payee’s notice but still fails to make full payment, the contractor may suspend (but not terminate) the work.⁸³⁰

If the *Scheme* applies, the payment will become due on the later of two dates being: a) 7 days following the end of the payment period; or b) the date of a claim made by a payee.

(d) What is the Payment Period?

As noted above, the parties to a construction contract in the U.K. are free to agree on their own terms for payment and related payment periods.⁸³¹ Failure to agree results in the application of the *Scheme* default provisions. Under the *Scheme*, the following payment periods are applicable:

- A final payment on a relevant construction contract⁸³² (i.e. a payment of an amount equal to the difference (if any) between the contract price and the aggregate of any instalment/stage/periodic payments) is due on the expiry of: a) 30 days following completion of the work; or b) the making of a claim by a payee;
- Payment of the contract price under a construction contract (not being a relevant construction contract) is due on the expiry of: a) 30 days following completion of the work; or b) the making of a claim by a payee;
- Any other payment under a construction contract is due on the expiry of: a) 30 days following completion of the work; or b) the making of a claim by a payee.

(e) When is the contractor entitled to render an invoice?

Subject to an agreement that provides otherwise, the *Scheme* entitles a payee to submit a payment claim

⁸²⁸ *U.K. Construction Act*, s 110.

⁸²⁹ *U.K. Construction Act*, s 110 and the *Scheme* at Part II s 9.

⁸³⁰ 2009 *U.K. Act*, sections 143, 144 and 145 amending the *Housing Grants Act* sections 109, 111-112.

⁸³¹ *U.K. Construction Act*, ss 109-110.

⁸³² The *U.K. Construction Act* defines a relevant construction contract as a construction contract which is over 45 days as specified in the contract or as agreed by the parties.

(f) On What Basis Can a Payment be Withheld and When?

Parties to construction contracts in the U.K. may not withhold payment after the final date for payment of a sum due unless effective notice has been given in the form of a notice of intention to withhold payment. To be effective, this notice must specify: the amount proposed to be withheld, the ground for withholding (and if there is more than one ground, each ground and the amount attributable to it).⁸³³

Importantly, the *U.K. Construction Act* prohibits the use of pay-when-paid, and more recently paid-when-certified, clauses that could potentially inhibit cash flow.⁸³⁴

(g) What remedies are available in the event of non-payment?

When a sum under a construction contract is not paid in full by the final date for payment and no notice to withhold has been given, the person owed the sum is entitled to suspend performance of his obligations under the contract.⁸³⁵ The right to suspend must not be exercised without first giving the party in default 7 days of notice of intention to suspend and the right to suspend ceases when the defaulting party makes payment in full.⁸³⁶

The *2009 U.K. Act* added a new section 112(3A) that provides that the defaulting payer will be “liable to pay to the party exercising the right a reasonable amount in respect of costs and expenses reasonably incurred”.⁸³⁷

In addition, any party to a construction contract has the right to refer a dispute (i.e. in relation to a payment) to adjudication.⁸³⁸

2.4.3 Other International Jurisdictions

The U.S. and U.K. provide the origins for prompt payment legislation, however we also considered numerous other jurisdictions including: Ireland, Australia, New Zealand, Singapore, Malaysia and Hong Kong. Our research for each of these jurisdictions allowed us to gain insight into how prompt payment has been internationally and enabled us to answer each of the questions posed above in relation to the U.S. and U.K. For a detailed analysis of these jurisdictions please see Appendix B.

⁸³³ *U.K. Construction Act*, s 111.

⁸³⁴ *U.K. Construction Act*, s 113.

⁸³⁵ *U.K. Construction Act*, s 112.

⁸³⁶ *U.K. Construction Act*, s 112(2)-(3).

⁸³⁷ *2009 U.K. Act*, s 145, amending the *U.K. Construction Act*, s 112.

⁸³⁸ *U.K. Construction Act*, s 108.

2.5 Lessons Learned from the Prompt Payment Movement

To some extent, every existing prompt payment statute necessarily affects the parties' freedom of contract. Freedom of contract is, of course, a foundational principle of contract law in common law jurisdictions, sometimes described as the "sanctity of contracts".⁸³⁹

However, in attempting to develop legislation that effectively encourages prompt payment, it is necessary to attempt to find the right balance between the legitimate interests of the stakeholders, being the payers and the payees, which is essential to the practical success of legislation and necessary to justify the infringement on freedom of contract that it will represent.

A review of the prompt payment or security for payment legislation enacted in the U.S, the U.K. and Ireland, and Australia, New Zealand, Singapore, and Malaysia,⁸⁴⁰ reveals recurring features, which may be present to varying degrees, depending on the jurisdiction. The features include the following:

- The right of a contractor or subcontractor to make claims for progress payments;
- An owner or a general contractor's obligation to evaluate a claim for payment within a reasonable period of time;
- The right to give written notice of a disputed claim for payment (and the reasons for the dispute);
- The imposition of penalties on late payments such as interest payments (set by statute or by contract);
- The right of a contractor or subcontractor to suspend performance for non-payment; and
- The prohibition of conditional payment provisions.

These elements of prompt payment regimes have been considered by stakeholders in their submissions to the Review and widely divergent views have been expressed as to which, if any, of the above concepts should be adopted for a made-in-Ontario solution.

⁸³⁹ S.M. Waddams, *The Law of Contracts*, 6th ed. (Toronto: Canada Law Book, 2010) at 3. To highlight the historically deep rooted and fundamental principle of freedom of contracts, the author quotes Jessel M.R. in *Printing & Numerical Registering Co. v Sampson* (1875), LR 19 Eq 462, at 465 as follows: "if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of Justice".

⁸⁴⁰ Jurisdictions having adopted prompt payment legislation to date are as follows: the U.K., Ireland, the Isle of Man, Malaysia, New Zealand, all Australian provinces, Singapore and 49 of the 50 American states.

3. Summary of Stakeholder Views

3.1 Proponents of Prompt Payment

A number of stakeholders galvanized around the issue of prompt payment around the time that Bill 69 was introduced have maintained their focus on advocating for the adoption of a prompt payment regime in Ontario. Perhaps most prominent among these organizations is Prompt Payment Ontario, a sole-purpose alliance or coalition of contractor associations, unions, suppliers, general contractors, and pension trust funds created for the purpose of persuading the Ontario government that prompt payment legislation is required in Ontario.⁸⁴¹

In preparation for its stakeholder consultation meeting with the Review, Prompt Payment Ontario commissioned Ipsos Reid to conduct a survey of Ontario trade contractors on payment security and late payment in the industry, which survey was conducted between August and October 2015 and elicited 535 responses.

Among the participants, the average age of current receivables was 61.3 days.⁸⁴² About 84.7% of the participants reported that the average age of their current receivables was more than 30 days while one participant in five (18%) was carrying current receivables of an average age of 90 days or more. Prompt Payment Ontario noted that receivables over 90 days are not eligible for receivable bank financing (also called “tail risk” due to the high degree of uncertainty they represent).⁸⁴³

Participants in the survey indicated that over the previous three years, 67.6% or two thirds of their overdue invoices that were outstanding for 30 days were outstanding for over 45 days. Unless these participants had preserved their lien rights prior to the expiry of the 45 day period, such rights had expired.⁸⁴⁴

Late payment was revealed to be a common occurrence in all sectors of the construction industry. For the purpose of the survey, the industry was divided into a number of sectors including residential builders or developers, private individuals in residential, commercial owners, industrial owners, AFPs, public owners (federal, provincial, municipal), boards of education, colleges and universities, hospitals and not-for profits. The data gathered by Ipsos Reid in relation to these sectors indicates that late payment is a common problem in various sectors of the industry, given the high percentage reported in relation to payments being delayed more than 30 days.⁸⁴⁵

Based on national data from Statistics Canada, Prompt Payment Ontario compared the average age of receivables in the construction industry with all other industries (excluding financial

⁸⁴¹ See <<http://ontariopromptpayment.com/>>.

⁸⁴² Prompt Payment Ontario, *Trade Contractor Survey Results*, Ipsos Reid, November 2015 at 21.

⁸⁴³ *Ibid.*

⁸⁴⁴ *Ibid* at 22.

⁸⁴⁵ See figure number 14, *Trade Contractor Survey Results*, Ipsos Reid, November 2015 at 21.

businesses) and found that between 2002 and 2013, the average collection period in construction increased from 57.3 days to 71.1 days. By contrast, the collection period in the other industries considered remained stable at about 47 days.⁸⁴⁶

The Ipsos Reid survey also highlighted the fact that the economic damage resulting from late payments affects trade contractors on many levels, both directly and indirectly. Participants indicated that they were forced to lay off workers (23.9%), decline to take on additional work they cannot finance (39.1%), avoid or delay investing in machinery and equipment (57.4%) and sometimes adopt the practice of accounting for a contingency in their bids submitted to a payer's reputation for making late payments (61.1%).⁸⁴⁷

The Ipsos Reid survey results also indicated 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 for leases on equipment (27.9%).⁸⁴⁸

Finally, the Ipsos Reid survey results revealed that, from the perspective of payees, the perceived causes of payment delays on public sector projects ranged from bureaucratic delays in approving payments to the general contractor's unexplained delays, disputes over alleged deficiencies, payment certifier delays, and insolvency of the general contractor.⁸⁴⁹ On private sector projects, the perceived causes of payment delays were, similar: the general contractor's unexplained delays, the owner's financing problems, the insolvency of the owner, disputes over alleged deficiencies, and payment certifier delays.⁸⁵⁰

Prompt Payment Ontario's core position is that a legislative framework for the promptness of payment must be established in Ontario. Prompt Payment Ontario and the National Trade Contractors Coalition of Canada (NTCCC) negotiated a *Consensus Draft for a Prompt Payment Act in Ontario*, which, according to Prompt Payment Ontario, reflects "an industry consensus among the general and trade contracting communities".⁸⁵¹ This draft was prepared prior to the introduction of Bill 69 and attached as part of the PRISM Economics and Analysis April 2013 report on the *Need for Prompt Payment Legislation in the Construction Industry*.⁸⁵² Prompt Payment Ontario summarized the essential elements of its *Consensus Draft for a Prompt Payment Act in Ontario* as including the following:

1. a monthly payment cycle which would apply to all contracts, except those that provide for payment based on milestones,

⁸⁴⁶ PPO Submissions to the CLA Review at 22.

⁸⁴⁷ Prompt Payment Ontario, *Trade Contractor Survey Results*, Ipsos Reid, November 2015 at 23.

⁸⁴⁸ *Ibid* at 21.

⁸⁴⁹ *Ibid* at 24-25.

⁸⁵⁰ *Ibid* at 24-25.

⁸⁵¹ PPO Submissions to the CLA Review at 6.

⁸⁵² Prism Economics, *supra*.

2. regulation of milestone contracts consistent with the principles of prompt payment,
3. limiting the right to withhold payment to the portion of the work that is in dispute,
4. disclosure obligations on the part of payers,
5. mandatory interest on delayed payments,
6. the right of a contractor to stop work or terminate the contract if payment is delayed beyond a stipulated time period,
7. an obligation on the part of a payer to pursue collection [...],
8. voiding of pay-when-paid clauses and explicit specification of the circumstances in which pay-when-paid clauses can apply.⁸⁵³

Prompt Payment Ontario submitted that a payment cycle must be stipulated by the statutory scheme (30 days) and cannot be left to be negotiated between the owner and the contractor, when the outcome of such negotiations, to which the subcontractors were not privy, will affect them directly throughout the life of the project.⁸⁵⁴ Prompt Payment Ontario submitted as follows:

The absence of a statutory standard for payment terms has led to conditions where there are serious and socially unacceptable third party effects, where there is intrinsic unfairness in the distribution of risk as a result of unequal bargaining power [...].⁸⁵⁵

The monthly payment cycle proposed by Prompt Payment Ontario provides that a payer may object to an invoice within a stipulated period, and in the absence of an objection, the invoice is deemed accepted by the payer and becomes payable. Prompt Payment Ontario states that a regime providing that the statutory payment period begins on the day the work for which payment is claimed has been certified by the payment certifier would “create a legal sanction for payment delay” and ultimately would “exacerbate the existing problem rather than contribute to its rectification”.⁸⁵⁶ Prompt Payment Ontario expressed a concern that payment certifiers are not neutral as they depend on the owner for payment, which in practice may affect the length of the certification process to the detriment of prompt payment.⁸⁵⁷ Prompt Payment Ontario supports its position by reference to the provisions of prompt payment legislation in other jurisdictions, which stipulate that the pay period begins on the date of submission of the invoice or application for payment.⁸⁵⁸

Unlike Bill 69, the regime proposed by Prompt Payment Ontario recognizes milestone contracts, but it provides for defined conditions and permissible thresholds. For example, a project must be

⁸⁵³ PPO Submissions to the CLA Review at 30.

⁸⁵⁴ Section 6 of the Consensus Draft for a Prompt Payment Act in Ontario at 68.

⁸⁵⁵ PPO Submissions to the CLA Review at 29.

⁸⁵⁶ PPO Supplemental Submissions to the CLA Review at 1.

⁸⁵⁷ *Ibid.*

⁸⁵⁸ *Ibid* at 2.

clearly identified as a milestone project during the tendering process and cannot be subsequently subject to amendments without the consent of the payee; the milestones between payer and payee should be based solely on work that is within the control of the payee; a subcontractor can only be subjected to milestones if the general contractor itself is subjected to milestones under the prime contract; no milestone under any contract may be expected to last more than three months; a maximum number of days for verification of the achievement of milestones should be stipulated and payment should be due within 30 days following verification.⁸⁵⁹

In the event that the payer disputes an invoice, a specific procedure applies, according to which the payer must give the payee notice of the objection, with full particulars including the amount to be withheld, which cannot exceed the portion in dispute.⁸⁶⁰ Payees should be entitled to object and refer the dispute to the statute's dispute resolution process. Payers should be prohibited from withholding the entire amount that is due when only a portion of it is in dispute.⁸⁶¹

With respect to the payer's disclosure obligations, Prompt Payment Ontario submitted that a payer should be required to disclose to its payees the payment schedule it negotiated with its own payer, it should be required to notify payees upon receipt of project funds intended to be paid to the payees, and owners should be required to demonstrate that they have the appropriate financing or financial capabilities to meet their payment obligations throughout the life of the project.⁸⁶²

With respect to mandatory interest payments on late payments, Prompt Payment Ontario submitted that the rate of interest should be publicly posted. Prompt Payment Ontario also submitted, however, that prescribing penalty interest in lieu of suspension of performance or contract termination would be ineffective, because entitlement to interest already exists in Ontario under the *Courts of Justice Act* but has not prevented payment delays.⁸⁶³

Finally, with respect to conditional payment clauses, Prompt Payment Ontario draws a distinction between pay-when-paid and pay-if-paid clauses. Pay-when-paid clauses only speak to the timing of payment, not to entitlement to payment as pay-if-paid clauses do. In that respect, Prompt Payment Ontario recognizes the value of pay-when-paid clauses for payers who expect delays in payments they are due to receive. The right to rely on such a clause should be subject to the payer's obligation to "take commercially reasonable actions to pursue collection and/or

⁸⁵⁹ PPO Submissions to the CLA Review at 30 (see also pp 7 and 31). See also section 8 of the Consensus Draft for a Prompt Payment Act in Ontario at 68-69.

⁸⁶⁰ PPO Submissions to the CLA Review at 30. See also section 8 of the Consensus Draft for a Prompt Payment Act in Ontario at 68-69.

⁸⁶¹ PPO Submissions to the CLA Review at 31.

⁸⁶² *Ibid* at 32.

⁸⁶³ PPO Supplemental (New Issues) Submissions to the CLA Review at 4.

prevent further harm to those supplying labour, services and materials”.⁸⁶⁴ Pay-if-paid provisions, however, should be prohibited.⁸⁶⁵

Generally, with respect to prompt payment legislation, Prompt Payment Ontario submitted as follows:

PPO has advocated that Ontario apply the same broad framework that has been successfully introduced in most other jurisdictions in the OECD, including virtually all common law jurisdictions. The essence of that framework is a legislated payment cycle, interest payments on overdue accounts, requirements for reasonable financial disclosure, a right to suspend work when payment is not received, and a mandated process for expeditious resolution of disputes over payments. Ontario’s construction industry badly needs such a framework. [...] A new ‘Construction Act’ would also add the essential elements of a more complete framework, namely a legislated payment cycle [...].⁸⁶⁶

A number of stakeholders either expressed their support for prompt payment legislation generally and/or expressly endorsed Prompt Payment Ontario’s position and proposed framework.

The Council of Ontario Construction Associations remarked in their submission that prompt payment was its “overwhelming priority for reform”.⁸⁶⁷ The Council of Ontario Construction Associations advised that it deferred to Prompt Payment Ontario as the “primary advocate for prompt payment”⁸⁶⁸ but made its own submissions as well in relation to suggestions about the regulation of pay-when-paid clauses and compulsory financial disclosure.⁸⁶⁹ In a supplemental submission, the Council of Ontario Construction Associations noted that the Act should be amended to compel the payment of interest when payments are delayed and that the rate of interest “should be sufficiently high to meaningfully deter the now prevailing incidence of late payment”.⁸⁷⁰

The Ontario Architect’s Association advised that it supported the principle of prompt payment but proposed that it be addressed through stand-alone legislation.⁸⁷¹ The Ontario Association of Landscape Architects noted that “prompt payment provisions would allow contractors to have continuous and seamless money flow to allow payments to suppliers, subcontractors, and financial stability to bid on other projects and not be spread thin with monies held up in litigation and payment delays”.⁸⁷²

⁸⁶⁴ PPO Submissions to the CLA Review at 32-33.

⁸⁶⁵ *Ibid* at 33.

⁸⁶⁶ *Ibid* at 60.

⁸⁶⁷ COCA Submissions to the CLA Review at 2.

⁸⁶⁸ *Ibid*.

⁸⁶⁹ *Ibid* at 2-3.

⁸⁷⁰ COCA Supplemental (New Issues) Submissions to the CLA Review at 2.

⁸⁷¹ OAA Submissions to the CLA Review at 3-4.

⁸⁷² OALA Submissions to the CLA Review at 3.

The Ontario Electrical League did not respond directly to prompt payment proposals, but did note that they favoured mandatory owner and general contractor financial disclosure requirements.⁸⁷³

The International Brotherhood of Electrical Workers Local 353 submitted that the Act is costly, cumbersome and inaccessible to 80% of the construction industry (i.e. small and medium-sized companies consisting of 20 or fewer employees). It noted that non-payment was a significant concern (as opposed to delinquent payment). The IBEW Local 353 stated that lien rights often expire long before the trade contractors realize they will not get paid. Accordingly, IBEW Local 353 supported Prompt Payment Ontario's recommendations for a new "Construction Act" to govern payments in the construction industry, comprised of four key features: security for payment; obligations for prompt payment and fair dealing; expeditious dispute resolution; and special provisions for AFP projects.⁸⁷⁴ The IBEW Local 353 noted that delinquent payment in the construction industry is "rampant" and referred to the detrimental effects including:

The detrimental effects of delinquent payment are many and include driving up the cost of construction as contractors factor the risk of delinquent payment into their bids; strains on cash flow, especially for small businesses that have to meet payroll, pay bills, taxes, WSIB premiums and other costs, forcing some into insolvency; lower employment figures as contractors must limit their payroll commitments to meet cash flow expectations; less investment in apprenticeships; less investment in new machinery, equipment and technology; and construction costs are driven up by a shrinking pool of qualified, reputable contractors who are able to bid on projects. On an industry wide basis, delinquent payment practices erode the level playing field as those who maintain honourable practices are put at a disadvantage.⁸⁷⁵

The Labourers International Union of North America, Local 183, included in its submission some comments on prompt payment noting that it generally supported prompt payment but did not want any reduction in holdback. Local 183 also noted that it was opposed to the implementation of any pay-when-paid and/or pay-if-paid clauses and submitted that such clauses should be unenforceable because they force tradespeople to bear the burden of payment defaults higher up in the construction pyramid.⁸⁷⁶

The Provincial Building and Construction Trades Council of Ontario and I.U.O.E. Local 793 ("Local 793") also indicated its strong support for a legislative scheme which would prevent parties from delaying payments that are due and owing and added that such a legislative scheme should include "language which will allow parties to aggressively enforce any breaches of such prompt payment provisions and to provide severe penalties for such breaches".⁸⁷⁷

⁸⁷³ OEL Submissions to the CLA Review at 1.

⁸⁷⁴ TEIBAS Submissions to the CLA Review at 1-2.

⁸⁷⁵ *Ibid* at 2.

⁸⁷⁶ LIUNA 183 Submissions to the CLA Review at 5-6.

⁸⁷⁷ Local 793 and PBCTCO Submissions to the CLA Review at 3.

Other stakeholders, such as the Ontario General Contractors, supported certain types of penalties, such as accruing interest at a given rate.⁸⁷⁸ Some of the proposals made included payment of interest in accordance with the contract, at a rate set out in a new provision in the *Act*, or at the rate set out in the *Courts of Justice Act*.⁸⁷⁹

Stakeholders commented on the need to distribute the financial risks of construction fairly among participants based on their ability to know, control, and absorb these risks. Stakeholders expressed concern about exempting certain types of contracts or categories of owners from prompt payment regimes as a fairness concern.⁸⁸⁰ The Ontario Society of Professional Engineers submitted that prompt payment legislation should create several mandatory and enforceable payment terms, applicable to all projects.⁸⁸¹

Some stakeholders commented on the mandatory interest requirements that could form a part of a prompt payment regime. For example, the Ontario Road Builders' Association, in a supplemental submission, noted that "the requirement of a project owner to pay mandatory interest would encourage timely process in a contractor payments" and noted that it could serve as a remedy to address the shifting of the financing costs down the chain by stretching payments.⁸⁸²

The Ontario Association of Architects noted that it is prepared to accept the continued use of pay-when-paid provisions, as long as prompt payment can be guaranteed.⁸⁸³ The Ontario Association of Landscape Architects suggested that pay-when-paid and pay-if-paid clauses could be defined by way of legislation and restricted.⁸⁸⁴

The Association of Registered Interior Designers of Ontario advised that they "supported the principles of Bill 69 and prompt payment where it is a solution that is encompassing of all applicable professions and stakeholders".⁸⁸⁵

3.2 Stakeholder Concerns About Prompt Payment

As noted above, stakeholders agreed with the general principle that contractors and subcontractors should be paid in a timely way for work performed. Not surprisingly, no stakeholder identified itself as a payer who pays late. However, a number of stakeholders

⁸⁷⁸ OGCA Submissions to the CLA Review at 6.

⁸⁷⁹ OSPE Submissions to the CLA Review at 5.

⁸⁸⁰ COCA Supp. Submissions to the CLA Review at 2.

⁸⁸¹ OSPE Submissions to the CLA Review at 5.

⁸⁸² ORBA Submissions to the CLA Review at 1.

⁸⁸³ OAA Supp. (1) Submission to the CLA Review at 9.

⁸⁸⁴ OALA Submission to the CLA Review at 3.

⁸⁸⁵ ARIDO Submissions to the CLA Review at 1.

expressed concern about the imposition of prompt payment legislation because they advised that it would place an unacceptable restraint on their freedom of contract.⁸⁸⁶

For example, the City of Toronto advised that it is not opposed to promptness of payment, but suggested that any prompt payment legislation should maintain the parties' freedom to agree on payment terms rather than impose statutory pay periods.⁸⁸⁷ The City of Toronto noted that any legislation should take into consideration existing legislation and policies such as the City of Toronto's Fair Wage Policy and that the right of set-off should not be restricted.⁸⁸⁸

The Ontario Road Builders' Association recommended that in any legislation it should be clear that the parties "maintain the ability to retain or set-off amounts where permitted under the contract, such as for incomplete or defective work, indemnified claims, liquidated damages, etc. provided that written notice for the reason for the retention or set-off is given in a timely manner and before the payment would otherwise become due".⁸⁸⁹

The Association of Municipalities Ontario also emphasised the primacy of contracts entered into between the parties.⁸⁹⁰

The Residential Construction Council of Ontario and the Ontario Home Builder's Association noted that freedom of contract is "paramount" and should be preserved in the *Act*. They submitted that "the parties to building contracts are the ones best able to determine what works best for their particular project, from payment terms, to how best to settle a dispute, to fundamental project delivery models".⁸⁹¹ The Residential Construction Council of Ontario and the Ontario Home Builder's Association noted that the *Act* already provides significant protections specific to the construction industry (i.e. construction liens) and that, in light of these protections, specific provisions regarding payment, settlement, bonding, and other matters are "better left to the parties themselves" as "to do otherwise may restrict the industry from evolving and create complicated questions when the industry inevitably does grow".⁸⁹² The Residential Construction Council of Ontario and Ontario Home Builder's Association reiterated their criticisms of Bill 69, noting that Bill 69 would have established an "arbitrary payment structure

⁸⁸⁶ TTC Submissions to the CLA Review at 23, COU Submissions to the CLA Review at 2, RESCON OHBA Submissions to the CLA Review at 3, OASBO and OPSBA Submissions to the CLA Review at 3, York Region Submissions to the CLA Review at 3.

⁸⁸⁷ City of Toronto Submissions to the CLA Review at 4. The Ontario Public Buyers Association in their letter of November 20, 2015 advised that they supported and endorsed the November 19, 2015 Submission by the City of Toronto. See also Colleges Ontario Submissions to the CLA Review at 1, ORBA Submissions to the CLA Review at 7, OASBO and OPSBA Submissions to the CLA Review at 3. Similarly, the Ontario Public Works Association advised that it would support consideration of the applicability and adaptability of any prompt payment provisions for different types of contracts (OPWA Submissions to the CLA Review at 2).

⁸⁸⁸ City of Toronto Submissions to the CLA Review at 5, and TTC Submissions to the CLA Review at 2.

⁸⁸⁹ ORBA Submissions to the CLA Review at 7.

⁸⁹⁰ AMO Submissions to the CLA Review.

⁸⁹¹ RESCON OHBA Submissions to the CLA Review at 3.

⁸⁹² *Ibid.*

with onerous timetables and significant administrative and reporting requirements”.⁸⁹³ The Residential Construction Council of Ontario also opposed the financial disclosure requirements of Bill 69 as representing “an intrusive level of disclosure that [they] are not aware exists in North America”. The concern expressed was that this information could be abused considering the number of subcontractors on a project that would have access to the information.⁸⁹⁴ The Residential Construction Council of Ontario and Ontario Home Builder’s Association further noted that Tarion requires a builder to post security and a risk assessment to demonstrate that the builder has the financial capability to complete the project.⁸⁹⁵ They strongly emphasized the important role that Tarion plays in the residential construction sector in protecting purchasers of homes.

A number of stakeholders reiterated the concerns that they had expressed at the time Bill 69 was introduced.⁸⁹⁶ These stakeholders had opposed the specific legislative framework set-out in Bill 69.⁸⁹⁷

For example, the Council of Canadian Universities provided us with a copy of the letter they had written to Premier Wynne on March 3, 2014. In that letter, they noted that their primary concern with Bill 69 was that it would restrict their freedom of contract “in ways that would have a significant impact on the ability of universities to negotiate payment terms and conditions with contractors”.⁸⁹⁸ They noted that Bill 69 mandated that payments be made according to a schedule of dates as opposed to project milestones which they asserted could lead to overpayments.⁸⁹⁹ Further, they expressed concern about the fact that, under Bill 69, contractors could demand payment on the basis of “reasonable” estimates by the contractor including “services and materials yet to be supplied”.⁹⁰⁰ Further, the Council of Canadian Universities referred to “certain levers” that they would not be able to utilize such as the right to hold back payment in relation to identified deficiencies.⁹⁰¹

Colleges Ontario advised that it agreed with the submissions of the Ontario Association of School Board Officials and recommended that the parties be free to agree to their own contract terms.⁹⁰²

⁸⁹³ *Ibid* at 4.

⁸⁹⁴ *Ibid*.

⁸⁹⁵ *Ibid*.

⁸⁹⁶ *Official Report of Debates (Hansard)*, Legislative Assembly of Ontario, Second Session, 40th Parliament, Standing Committee on Regulations and Private Bills, Wednesday 19 March 2014 and Wednesday 26 March, 2014.

⁸⁹⁷ See the comments of SAC, the City of Mississauga, AMO, the City of Toronto, OASBO, AECOM Group Inc., Ellis Don Corp., Dragados Canada Inc. and the Regional Municipality of Waterloo reported in the *Official Report of Debates (Hansard)*, Legislative Assembly of Ontario, Second Session, 40th Parliament, Standing Committee on Regulations and Private Bills, Wednesday 19 March 2014 and Wednesday 26 March, 2014.

⁸⁹⁸ Council of Ontario Universities letter to Premier Wynne dated March 3, 2014.

⁸⁹⁹ Council of Ontario Universities letter to Premier Wynne dated March 3, 2014.

⁹⁰⁰ Council of Ontario Universities letter to Premier Wynne dated March 3, 2014.

⁹⁰¹ Council of Ontario Universities letter to Premier Wynne dated March 3, 2014.

⁹⁰² COU Submissions to the CLA Review at 1.

The Canadian Institute of Quantity Surveyors submitted that prompt payment provisions may impair a contractor's ability to properly manage the trades and noted that most contracts require payment within a certain number of days after certification.⁹⁰³

The Ontario Association of School Board Officials had also prepared submissions at the time Bill 69 was introduced and created a further submission to the Review.⁹⁰⁴ In its submission to the Review, the Ontario Association of School Board Officials expressed the view that legislated terms for construction contract payments should be dealt with in one piece of legislation⁹⁰⁵. In respect of its assessment of prompt payment issues, the Ontario Association of School Board Officials asserted that "the core non-payment problems in the industry are within the construction groups in the pyramid below project owners and general contractors".⁹⁰⁶ Ontario Association of School Board Officials, in its submission analyzed various causes of payment delays including the nature of the payment terms agreed to by the parties given the need for "extensive reviews by the several architectural and engineering consultants, by the owner's project team followed by senior level approvals and then payment processing by accounting staff".⁹⁰⁷ The Ontario Association of School Board Officials also analyzed the issues of deficient work improperly categorized as complete, incomplete progress draws, and unfair payment practices and explored various potential solutions to these problems in its submission including self-policing, introduction of a prompt payment code (on a voluntary basis), and allowing parties to prescribe payment terms in their contracts.⁹⁰⁸

The Ministry of Transportation advised that it had "concerns with legislation that either dictates or attempts to manage commercial payment transactions so as to override the financial controls the Ministry uses to manage and supervise its payment process".⁹⁰⁹ The Ministry of Transportation noted that such mandatory provisions would very likely increase the administration processes of filing claims by the Ministry of Transportation for work that could not be confirmed as acceptable, which would create new risks for the Ministry of Transportation and likely other owners. The Ministry of Transportation noted that payment flexibility was very important as it developed and expanded the use of different contracting models.⁹¹⁰

⁹⁰³ CIQS Submissions to the CLA Review at 5-6.

⁹⁰⁴ OASBO Submissions to the CLA Review dated May 13, 2015 and October 23, 2015. The Ontario Ministry of Education in its submission acknowledged the expertise and insight that had been shared with it by OASBO in its submissions and noted that these submissions included background information, recommendations, and specific comments that responded to the issues flagged for feedback in the information package. The Ministry stated that it was "confident that an amended CLA that reflects OASBO's comments and proposed recommendations would respond to payment problems within the provincial construction industry and mitigate the impact on Ontario's seventy two school boards (letter from Ministry of Education to the Review, undated).

⁹⁰⁵ OASBO Submissions to the CLA Review at 2.

⁹⁰⁶ OASBO Submissions to the CLA Review at 3.

⁹⁰⁷ *Ibid* at 4.

⁹⁰⁸ *Ibid* at 4-5.

⁹⁰⁹ MTO Letter Submissions to the CLA Review at 3-4.

⁹¹⁰ *Ibid* at 4.

In a follow-up submission, the Ministry of Transportation advised that it had examined the last three years of data related to its major capital program and determined that “contractors have been paid within 30 days, approximately 86% of the time. The payment average increases to 97% for a timeline between 31 and 60 days”.⁹¹¹

In relation to AFP projects, Infrastructure Ontario indicated that mandating prompt payment in the AFP context, the circumstances where the authority would not have properly assessed the services and work provided by the contractor would “run counter to the objectives of the AFP model in ensuring adequate risk transfer”.⁹¹² However, Infrastructure Ontario noted that the AFP model “takes no issue with paying promptly upon certification according to the payment schedule to which the sophisticated parties have agreed”. Infrastructure Ontario noted that the principle of freedom of contract should be preserved with respect to AFP projects and the “public interest should be considered paramount given the demonstrable value for money”. Infrastructure Ontario suggested that if the AFP structure is altered based on prompt payment provisions, then such provisions should not be applicable to AFP projects.⁹¹³

The OBA CLA Reform Committee provided us with a copy of its submission related to Bill 69 but also provided a separate submission which highlighted the need to properly identify affected parties and the timing of review of the work. The OBA CLA Reform Committee also provided examples of exceptions to prompt payment, including in relation to set-offs and exclusions from prompt payment regimes for certain types of projects. Finally, the OBA CLA Reform Committee referred to consideration of the appropriate consequences of default in payment, notices of disputed payment requests, the possibility of waiver provisions, the timing of final payment, and overall legislative protections provided in other jurisdictions.⁹¹⁴

One concern raised by a number of stakeholders was with respect to maintaining the freedom to agree on payment terms adapted to the project at hand, as opposed to a “one-size-fits-all” payment statutory scheme.⁹¹⁵ The City of Mississauga, the Toronto Transit Commission and a number of other stakeholders submitted that any prompt payment scheme would have to be flexible enough to allow parties to negotiate the right payment terms for different types of projects.⁹¹⁶ The Regional Municipality of York advised that it would not support prompt payment provisions “without a careful review of their applicability and/or adaptability to different types of contracts”.⁹¹⁷ The Ontario Road Builders’ Association submitted that, while it is not opposed to prompt payment legislation, such legislation should leave the parties free to negotiate or model payment terms to fit each project, both in respect of the timing and the

⁹¹¹ MTO Supplemental (Follow Up) Submissions to the CLA Review.

⁹¹² IO Submissions to the CLA Review at 8.

⁹¹³ *Ibid* at 11.

⁹¹⁴ OBA CLA Reform Committee Submission to the CLA Review at 5-10.

⁹¹⁵ City of Toronto Submissions to the CLA Review at 5.

⁹¹⁶ Mississauga Submissions to the CLA Review at 1; TTC Submissions to the CLA Review at 2; Enbridge Submissions to the CLA Review at 2; MTO Submissions to the CLA Review at 4.

⁹¹⁷ York Region Submissions to the CLA Review at 4.

determination of entitlement.⁹¹⁸ The City of Toronto and other stakeholders submitted that complex and/or time sensitive projects may be better suited for payment terms tied to project milestones or set payment schedules.⁹¹⁹

The Surety Association of Canada submitted as follows:

Prompt payment provisions should accommodate the market realities of reasonable alternative payment processes and provisions (milestone payments, advance and mobilization payments, for example), and not unduly restrict the ability of stakeholders at all levels to pursue innovation in the procurement of construction and related services (for example public-private partnerships and integrated project delivery).⁹²⁰

The Surety Association of Canada also noted that where the terms of the contract conflict with any prompt payment provisions and the contract is deemed amended to comply, the provisions should acknowledge that the surety under a performance and payment bond must have no greater liability under the bond than does its principal under the contract.

The Toronto Transit Commission noted that the goal of prompt payment is to ensure “when in time” amounts owing should be paid, but should not determine “what amounts are payable”. The Toronto Transit Commission emphasized the importance of ensuring the timely completion of public projects and the use of tax payer funds.⁹²¹

Many stakeholders raised concerns about the need to have sufficient time to review progress payment applications and invoices when they are received. For example, the City of Toronto stated that an owner should have no obligation to pay until the payment certifier has had a reasonable amount of time to review and certify the work and that there can be no deemed approval of payment applications.⁹²² The City of Toronto noted that “many payment delays are caused by incomplete or improper payment applications” and stated that “the onus of insuring correct payment applications should remain with the payee”.⁹²³ In this regard, some pointed to the need to protect the interests of owners and payers, especially public sector owners who have obligations to taxpayers such that sufficient protections need to be in place to ensure that monies are paid for work properly performed.⁹²⁴ The Consulting Engineers of Ontario noted that, though they strongly support the premise of timely payment for certified completed work, but that any legislative change must not create an environment that picks “winners and losers”.⁹²⁵

⁹¹⁸ ORBA Submissions to the CLA Review at 7; MTO Submissions to the CLA Review at 6. See also OBA CLA Reform Committee Submission to the CLA Review at 7-8.

⁹¹⁹ City of Toronto Submissions to the CLA Review at 5; Enbridge Submissions to the CLA Review at 2.

⁹²⁰ SAC Submissions to the CLA Review at 11.

⁹²¹ TTC Submissions to the CLA Review at 2.

⁹²² City of Toronto Submissions to the CLA Review at p. 4.

⁹²³ *Ibid.*

⁹²⁴ City of Mississauga Submissions to the CLA Review at p. 3-4 and City of Toronto Submissions to the CLA Review at 4.

⁹²⁵ CEO Submissions to the CLA Review at 7.

The Consulting Engineers of Ontario note that Bill 69 had provided a very short review period in relation to the timeline for the certification of payment, which would be difficult to achieve “particularly on larger or more complex projects where there might be a number of different design professionals involved”.⁹²⁶

The City of Mississauga suggested as follows:

It is recommended that any prompt payment regime that is being imposed should include the following:

- Adequate time for review [of] the work for progress and completion;
- Ability for the payor to set off amounts for deficiencies, and not pay for work that has not been satisfactory completed;
- Remedies for payment dispute should not include immediate termination of contract or cessation of work as imposed in the 2013 Bill – remedies available should allow for flexibility in the process and time for the parties to work out their differences. The parties should also retain the freedom to contract and determine the best dispute resolution process for their contracts.⁹²⁷

Many stakeholders opposed the inclusion of a legislative proof of financing requirement. Some stakeholders noted that such information can be obtained through the prequalification process and/or as a contractual requirement.⁹²⁸

Public owner stakeholders noted that financial information, including budgets for capital projects, is publically available on the internet and that these budgets are subject to a rigorous process of review.⁹²⁹

Enbridge noted that:

...as a reporting issuer under provincial securities legislation, any requirement to disclose financial information in addition to information that is already publically disclosed would be onerous and, in the case of request for updated information that has not been disclosed to the public, potentially problematic.⁹³⁰

4. Analysis and Recommendations

In analyzing the advantages and disadvantages of a prompt payment regime for Ontario, it is important to take into account the experiences of other jurisdictions where such legislation has been introduced. In particular, U.S. prompt payment legislation has not proven to be a panacea; nor would Bill 69 have provided a balanced or effective solution to late payment. However, in

⁹²⁶ *Ibid.*

⁹²⁷ Mississauga Submissions to the CLA Review at 14a-14b.

⁹²⁸ City of Toronto Submission to the CLA Review at 5.

⁹²⁹ *Ibid.*

⁹³⁰ Enbridge Submissions to the CLA Review at 1.

our view, a customized solution that works in concert with an effective dispute resolution system would certainly be an improvement over the current situation.

In examining the constituent elements of an appropriate, balanced prompt payment regime, it is also important to bear in mind that such a regime should impair only to the extent necessary the parties' freedom to contract, and it should be flexible enough to accommodate the different types of actors in the construction industry and their differing reasonable needs.

Below, we assess the key elements of a prompt payment regime and provide our recommendations in respect of each of these elements.

4.1 What Types of Contracts Should Prompt Payment Apply To?

Based on the global models reviewed, prompt payment legislation may be applied just to construction contracts or more broadly to other types of contracts as well. For example, as discussed above, the federal *Prompt Payment Act* in the U.S. is not limited to construction contracts but applies to all suppliers and service providers to federal agencies. Given that our mandate is to focus on the promptness of payment issue as it affects Ontario's construction industry, we have not addressed whether or not such a regime should or should not be applied to other types of goods and service being supplied to other types of projects.

In relation to construction projects, as can be seen from the detailed charts that are found in the Appendix B prompt payment legislation may be applied to one or the other of public and private projects, or both.

As is apparent from the stakeholder positions set out above, we heard a very strong message from contractor and subcontractor stakeholders in Ontario that a lack of prompt payment is a problem in both the public and the private sectors. The Ipsos Reid survey, for example, indicates that receivables are frequently outstanding for lengthy periods of time on both public and private projects.⁹³¹

The reasons for late payment may differ as between public and private owners. Anecdotally, we heard from stakeholders that, in respect of private owners, a lack of adequate financing or funds may impede prompt payment. In respect of public projects, the need for appropriate check and balances to be in place in the payment approval process can slow down that payment process. Concerns about transparency, accountability and the prevention of fraud inform the nature of the procedures adopted by public entities approval processes. By way of example, public owners, in their payment processes, may try to ensure that there are separations between the person commissioning the work, the person reviewing the payment applications, and the person approving the payment application. Public entities have each developed their own internal

⁹³¹ PPO Trade Contractor Survey at 2.

processes and procedures and the efficiency of these processes can be affected by a lack of resources.

Various entities, both private and public, submitted that they paid promptly and therefore should not be subjected to prompt payment legislation. We appreciate that there are entities that have sophisticated payment mechanisms in place developed over decades that operate smoothly, particularly as electronic commerce improves the speed of the movement of funds. However, there does not seem to be a rational or logical methodology for determining what entities would fall into this category, and, as noted above, there is no entity that made submissions to the Review that admitted that it does not pay promptly. In any event, for those entities that pay promptly, they should not have any issue with complying with legislation that requires them to do what they say they are already doing. The point of a prompt payment regime is to incent both public and private actors to keep funds flowing down the construction pyramid in the ordinary course and minimize blockages and delays.

Recommendation

- We recommend that a prompt payment regime be legislated in Ontario and that it be applied to both the public and private sectors. Prompt payment should be implemented by creating a statutory scheme to be implied into all construction contracts that do not contain equivalent terms.

4.2 In the Construction Pyramid, What Level of Contract Should Prompt Payment Apply To?

In the vast majority of the jurisdictions considered, prompt payment is applied both at the owner-general contractor level and at the general contractor-subcontractor level and further down the construction chain.

It makes sense to apply a prompt payment regime down the contractual construction pyramid, so that those at the base of the pyramid have a mechanism to ensure that funds flow down to them.

However, there is a complicating factor when considering the flow of funds down the chain from the general contractor to its sub-contractors and beyond. In certain jurisdictions considered, the legislation provides that when prompt payment is imposed on the general contractor, there may be an ability on that general contractor to advise its subcontractors that it is not paying them if it has not been paid by the owner. Some have referred to such provisions as, in effect, a statutory pay-when-paid clause.

A pay-when-paid clause is a form of contingent payment clause. Such contractual clauses have been the subject of debate within the construction industry internationally.⁹³² In fact, in respect of contractual pay-when-paid clauses, various jurisdictions have prohibited or substantially limited the use of such clauses, including the U.K.,⁹³³ Ireland⁹³⁴, Australia,⁹³⁵ New Zealand and several U.S. states,⁹³⁶ including Massachusetts, Maryland, South Carolina, Illinois, Wisconsin, Missouri and North Carolina.⁹³⁷

It is argued by some that the effect of pay-when-paid clauses is to shift most or all of the risk of an owner's default to subcontractors.⁹³⁸ The ultimate effect of such clauses, the "pay-if-paid" clause, is to potentially absolve the general contractor from having to pay the subcontractor at all if payment is not forthcoming from the owner, despite the subcontractor's performance of the subcontract work.⁹³⁹ A subcontractor may not have the bargaining power to refuse to accept a pay-when-paid clause or to negotiate more favourable wording.⁹⁴⁰

On the other hand, the inability to utilize a pay-when-paid clauses leaves the general contractor liable to pay from its own pocket for work that was performed by a subcontractor for the benefit of an owner who fails to pay, whether as a result of insolvency or otherwise.⁹⁴¹ In a major

⁹³² Gerald B. Kirksey, "Minimum Decencies – A Proposed Resolution of the "Pay-when-Paid"/"Pay-if-Paid" Dichotomy" (1992) *Publication of the Forum on the Construction Industry* Vol 12 Number 1 Jan 92.

⁹³³ *U.K. Construction Act*, s 113.

⁹³⁴ Subsection 3(5) *Construction Contracts Act 2013*; Tristan Conway-Behan & Martin Cooney, "Goodbye to 'Pay-When-Paid'? Improving Cash Flow In Construction" (2012) *Mondaq*, online: <<http://www.mondaq.com/x/174322/Contracts+Deeds/Goodbye+To+Pay+When+Paid+Improving+Cash+Flow+In+Construction>>.

⁹³⁵ Section 13 *Building and Construction Industry Security of Payment Act 2002* (VIC); Subsection 12(1) *Building and Construction Industry Security of Payment Act 1999* (NSW); Section 14 *Building and Construction Industry (Security of Payment) Act 2009* (ACT).

⁹³⁶ The *Massachusetts Prompt Payment Act*, Mass Gen Laws, c 149, § 29E (a) (2010) limits the application of "pay-when-paid" clauses in projects worth over 3 million dollars or those that have more than four residential units; *Real Property Annotated Code of Maryland*, Md Stat Ann, § 9-113(a-c) (1996); *Subcontractors' and Suppliers' Payment Protection Act* (South Carolina) SC Stat Ann § 29-6-230 (1994); *Illinois Mechanic's Lien Act*, 770 Ill Comp Stat 60 § 21(e) (2009); Wis Stat § 779.135(3) (2001) [*Wisconsin*]; 770 Ill . Comp Stat 60/21(e) (1994); NC Gen Stat § 22C-2 (2003).

⁹³⁷ In 1995, the New York Court of Appeals found that pay-when-paid clauses that operate as a true condition precedent to payment hinder a subcontractor's right to enforce a mechanic's lien because the debt must be due and payable before a mechanic's lien can be filed. The New York Court of Appeals concluded that this result conflicts with New York's "Lien Law", which voids any agreement to waive rights granted under the Lien Law and therefore such pay-when-paid provisions violate the public policy of New York. *West-Fair Elec. Contractors*, 87 NY 2d at 159, 638 NYS 2d at 399, 661 NE2d at 972.

⁹³⁸ E. Jane Sidnell, "Pay-When-Paid" Clauses in Construction Contracts" online: <<http://www.rosellp.com/news/2014/9/26/presentation-regarding-pay-when-paid-clauses-in-construction-contracts>>.

⁹³⁹ J. Marc MacEwing, "Navigating the Perils of 'pay-when-paid'" (September 23 2009) *Journal of Commerce*, online: <<http://journalofcommerce.com/Home/News/2009/9/Navigating-the-perils-of-pay-when-paid-JOC035426W/>>.

⁹⁴⁰ Duncan W. Glaholt & John Margie, "Getting Paid: Holdbacks and Other Selected Topics" (1997) (Paper delivered at the Canadian Institute, 6th Annual Construction Superconference, Toronto, 1997) online: <<http://www.glaholt.com/files/047.pdf>>.

⁹⁴¹ Juan Pablo Alvarez, "Alberta Construction Industry Communiqué: Pay When Paid clauses" (2006) *Miller Thompson*, online:

claim/counter-claim situation where an owner deploys the right of set-off to withhold payment for an extended period, the lack of a pay-when-paid clause would leave the contractor in a particularly exposed position.

In Ontario, at present, the case law indicates that a properly drafted pay-when-paid clause will be enforced.⁹⁴²

In our view, the policy reasons for permitting pay-when-paid clauses continue to apply, such that a lack of payment by an owner constitutes a valid reason not to pay a sub-contractor, subject to the observation that the ability of general contractors, and downstream payers, to rely on such clauses should be circumscribed by requiring that appropriately detailed notices be provided to subcontractors in a timely way notifying that payment that has been withheld by an owner, or downstream payer, providing the reasons for non-payment, and undertaking to commence or to continue proceedings necessary to enforce payment.

Recommendation

- We recommend that the prompt payment regime should apply at the level of the owner-general contractor, general contractor-subcontractor, and downwards, and that the legislation provide a mechanism for general contractors to notify subcontractors of non-payment by owners, with reasonable particulars, and to undertake to commence or continue proceedings necessary to enforce payment so as to defer their payment obligations.

4.3 What Should the Trigger for Payment Be?

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 the payment claim by the payment certifier.

In respect of the latter trigger, most proponents of prompt payment do not favour the approval of the payment claim by the payment certifier as a trigger for the commencement of the payment period. They point out that the delays that prompt payment legislation is designed to ameliorate include the payment delays attributable to the slow review of progress payment applications.

<http://www.millerthomson.com/assets/files/newsletter_attachments/issues/AB%20Construction%20Comm%20Pay%20when%20Paid%20Clauses%20Feb06.pdf>.

⁹⁴² See: *Timbro Developments Ltd. v Grimsby Diesel Motors Inc.*, 1988 CarswellOnt 773 (Sup Ct (CA)); *Kor-Ban Inc. v Pigott Construction Ltd.* (1993), 11 CLR (2d) 160 (Ont Ct J (Gen Div)); *Arnoldin Construction & Forms Ltd. v Alta Surety Co.* (1995), 137 NSR (2d) 281 (CA); Thomas Heintzman “Pay-When-Paid: When is the Contractor Not Obligated to Pay the Subcontractor”, (June 2011) online: <<http://www.constructionlawcanada.com/building-contracts/payments/pay-when-paid-when-is-the-contractor-not-obliged-to-pay-the-subcontractor/>>; see also Andrea Beckwith, “Pay when Paid Clauses: Risk Allocation and the Need for Careful Drafting” Miller Thomson LLP (2004) The Canadian Bar Association, online: <<https://www.cba.org/cba/newsletters/con2-2002/c4.aspx>>.

On the other hand, those responsible for certifying payment note that they have a professional obligation to conduct all necessary due diligence to ensure that the work is properly performed and frequently the documentation submitted with a progress payment application is incomplete or contains errors.⁹⁴³

Some proponents of prompt payment advocate the second trigger such that the payment trigger is the delivery of goods and services and that payment is due with 31 days from that delivery, as required under Bill 69. Many opposed this proposal as it did not account for the possibility that a defective invoice would be delivered.

If the first option is adopted such that the trigger utilized is the receipt of an invoice and if a requirement is imposed that the invoice be a “proper invoice”, it would have the advantage of ensuring that the payment period only starts to run from the date that a properly documented claim for payment is submitted. Adding the requirement of a “proper invoice” addresses the concern expressed by some owners, engineers, architects, and general contractors about the quality of paperwork submitted in relation to a request for payment.

What do we mean by a “proper invoice”? Again we can look to other jurisdictions where the receipt of an invoice is used as the trigger for the commencement of the payment period. As noted in the section above summarizing the American prompt payment regimes, **almost half** of the states have adopted the receipt of invoice approach for both public and private sector contracts. The invoice must generally be a proper invoice in order to start the clock ticking. Under the U.S. federal prompt payment legislation an “invoice” is defined as a bill or a written request for payment submitted by a contractor for property delivered or services performed. A proper invoice under this legislation must meet the minimum contractual standards and must contain or be accompanied by:

- The name and address of the contractor;
- The invoice date;
- The contract number, or other authorization for the property delivered or services performed (including the order number and contract line item number);
- The description, quantity, and the price of the property delivered and/or the services performed;
- The shipping and payment terms;

⁹⁴³ CEO Submissions to the CLA Review at 7. The Consulting Engineers of Ontario note that, for example, having invoices deemed to be approved 10 days following submission unless the payor gives written notice of disapproval would be difficult to achieve, particularly on larger or more complex projects where there might be a number of different design professionals involved.

- The name, title, telephone number, and complete mailing address of the responsible official to whom payment is to be sent;
- The name, title, telephone number, and complete mailing address of the responsible official to be notified in the event that the invoice is defective; and
- Any other substantiating documentation or information required by the contract.⁹⁴⁴

Similar criteria could be set out in Ontario prompt payment legislation so as to ensure that there is no lack of clarity about what constitutes a proper invoice but, at the same time, allows the parties the freedom under their contract to specify the supporting documentation or information that is to accompany an invoice, subject to the qualification that it should be made clear that certification cannot be made a contractual precondition to the issuance of a proper invoice. Rather, certification must follow submission.

Recommendation

- We recommend that the trigger for payment should be the delivery of a proper invoice; provided that certification for payment (if there is certification for payment provided in the contract) must follow submission.

4.4 What Should the Payment Period Be?

As noted above, we recommend that the trigger that starts the clock ticking for payment is the submission of a proper invoice. The next question to be answered therefore is what is the appropriate payment period?

An examination of the other jurisdictions considered indicates that 28 days is the most common payment period utilized. We do not see a reason to deviate from this commonly utilized period of time, as it should provide a payment certifier with adequate time to review the invoice and supporting documents and conduct necessary due diligence.

At the same time, public and private owners will need to ensure that their internal processes are structured so as to validate payments expeditiously.

In respect of subcontractors, the amounts they are invoicing for are generally submitted as part of the package being submitted to the owner for payment such that payment should then flow to subcontractors within a relatively short period of time after payment is made by the owner.

⁹⁴⁴ Daniel Rattray, “Calculating Late Payment Interest Penalties Under the Prompt Payment Act: A Primer” (1995) 1995-SEP Army Law 14 at 3.

Recommendation

- We recommend that:
 - As between owner and general contractor a **28 day** payment period be applied, that is triggered by the submission of a proper invoice.
 - As between general contractor and subcontractor, a further **7 days** from receipt of payment from the owner would be required, and so on down the contractual chain.

4.5 When Is the Contractor Entitled to Render an Invoice?

Over the course of the Review, we heard from many stakeholders about the need to have the ability to structure payment terms to suit the needs of the project at issue. By way of example, we heard repeatedly about the importance, in certain contracts, of being able to structure payments based on the achievement of project milestones, as opposed to being based on monthly progress payment applications.

Based on the research conducted in various jurisdictions, it is usual practice in prompt payment regimes to allow parties to set out appropriate terms in their contracts that will describe when the parties are entitled to render an invoice. The legislation then becomes engaged to ensure that payment is in fact made within a specified period of time (often 30 days) after submitting a proper invoice that is submitted in accordance with the terms of the contract.

In some contracts, the payment terms are unclear. We were asked by some stakeholders to consider a default provision if the parties have not set out a payment period in their contract.⁹⁴⁵ Monthly payments were suggested. This suggestion seems to be a reasonable request as, based on the submissions from stakeholders, it is in keeping with good business practice and, on many projects, payments are made on a monthly basis so as to maintain cash flow for project participants.

Recommendations

- We recommend that parties be free to contract in respect of payment terms, but that if they fail to do so, monthly payments should be implied (i.e. every **28 days**).

⁹⁴⁵ See for example: OSPE Submissions to the CLA Review at 5; PPO Submissions to the CLA Review at 30.

4.6 On What Basis Should Payment Be Allowed to Be Withheld and When?

Owner and general contractor stakeholders were strongly of the view that if prompt payment legislation is to be introduced, they need to maintain an ability to withhold payment if there is a disagreement about:

- (a) the amount of the payment;
- (b) the quantity or quality of the services performed and/or the goods delivered; and
- (c) contractor compliance with contract obligations.

Essentially, these owner and contractor stakeholders are concerned about maintaining their contractual and common law rights of set off.

The right of set-off often arises in relation to deficiencies in the work performed by contractors or subcontractors. These deficiencies may become apparent before or after certification of the work.

Where significant problems arise in the performance of a contract or subcontract, the right to withhold payment pursuant to the right of set-off can be essential. However, experience also suggests that when a contractor raises a significant claim, the owner will frequently raise a significant claim for set-off in response and may not provide an adequate basis for its assertion of a right of set-off. 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 the dispute resolution process proceeds, may prove to be an inviting strategy for a payer seeking bargaining leverage. Accordingly, the set-off issue has received significant attention in other jurisdictions, with forms of statutory adjudication having been adopted in some jurisdictions as a method of quickly resolving such “grid-locked” impasses.⁹⁴⁶

The right of set off may be broadly drafted in a Contract so as to encompass any amounts owed to a contractor whether under the contract at issue or under some other contract.

In our discussions with stakeholders, there was general agreement that the right of set off is a significant right. Generally, stakeholders accepted that such a right could be exercised, but that adequate notice must be given if the right is to be exercised in relation to both the quantum of the set-off and particulars of the set-off. Also, stakeholders objected to the notion that owners or general contractors could exercise a right of set-off under one contract in relation to amounts allegedly owing under a completely different contract. Under section 17(3) of the *Act*, an owner

⁹⁴⁶ Commonwealth jurisdictions that legislate construction and payment disputes through adjudications include the U.K., Australia (NSW, Vic, Qld, NT, WA), New Zealand, Isle of Man and Singapore.

may set off any amount owing to the payee in relation to “outstanding debts, claims or damages, whether or not related to the improvement”. We are of the view that the right of set-off should be limited to amounts owing for an improvement under a specific contract and not other contracts.

Recommendation

- We recommend that payers be permitted to deliver a notice of intention to withhold payment within **7 days** following receipt of a purported proper invoice and that the notice of intention to withhold 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. Also, the right to withhold should relate only to the contract at issue.
- We recommend that a payer continue to be able to set off all outstanding debts, claims or damages but that the right of set off not extend to set-offs for debts, claims and damages in relation to other contracts.

4.7 What Remedies Should Be Available in the Event of Non-Payment?

In terms of potential remedies available to a payee who does not receive payment in accordance with the provisions of a prompt payment regime, there were two remedies that stakeholders advocated being:

- (i) mandatory interest payments; and
- (ii) exercising a right of suspension.

In respect of the first remedy, there was widespread support for the notion that interest should be paid if payments are not made promptly. Many stakeholders pointed out that even where there are contractual rates of interest applicable to late payments, it is difficult to enforce these provisions. We note that Bill 69 provided that interest would be paid on late payments at a rate of the greater of the pre-judgment interest rate in the *Court of Justice Act* or the contractual rate of interest.

The more difficult issue to address is the issue of whether a contractor or sub-contractor should be permitted to exercise a right of suspension if it is not paid.

Allowing the early exercise of such a right, would according to some stakeholders, be unfair, particularly where a bona fide dispute exists over whether or not payment should be made, i.e. in the event there is a legitimate set off being asserted.

Under the American model, based on the litigated disputes, it appears that the existence of a dispute that is bona fide in nature, when viewed from an objective perspective, will prevent a payee from being able to rely on prompt payment legislation. As a result, a payee will be forced to pursue its remedies through the court system.

As explained in Chapter 9 - Adjudication, we recommend the adoption of an adjudication model to deal expeditiously with payment disputes. As it relates to the right of suspension, the parties should be required to refer a dispute to adjudication and it would only be after the adjudication decision was rendered and if the payer then refused to comply with that decision that the right of suspension would arise.

Recommendation

- Mandatory non-waivable interest should be required to be paid on late payments at a rate of the greater of the pre-judgment interest rate in the *Court of Justice Act* or the contractual rate of interest.
- A right of suspension should arise after an adjudication determination has been rendered and a payer has refused or failed to comply with the adjudicator's determination.

4.8 Should Financial Disclosure Be Included in a Prompt Payment Regime?

Contractor and subcontractor stakeholder groups have expressed concerns about inadequately financed projects and a lack of transparency during the bid process about project financing. This notion has not been included in prompt payment legislation any of the jurisdictions reviewed.

On the other hand, owner stakeholders raised significant concerns in relation to the nature of the financial disclosure required under Bill 69. Critics assert that this is an intrusive and unwarranted incursion and would require the disclosure of extremely sensitive financial data. Concerns were also raised about the significant increase in administrative burden and that the level and extent of the information to be disclosed would be very difficult to define. Also, stakeholders advised that ongoing obligations of financial disclosure could have a negative market impact on certain owner groups and could conflict with the requirements of other statutes, regulations and codes.

On balance, and keeping in mind that such financial disclosure obligations are not a characteristic of prompt payment in any other jurisdiction, we are of the view that the intrusiveness of such a measure, combined with the consequent administrative burden, and the lack of clarity in respect of what information would be subject to disclosure, does not warrant legislative support. In addition, such a requirement is a requirement primarily directed at the procurement phase of a construction project, not the construction phase, while our mandate relates to construction and not procurement.

Recommendation

- We do not recommend that financial disclosure be included in Ontario's prompt payment regime; provided that the *Act* should require disclosure to all subcontractors that they are bidding on a project with a milestone-based payment mechanism.

1. Overview

On construction projects, if disputes arise, payments may stop due to the owner's perceived need to protect rights of set-off, and sometimes work may stop due to the contractor's need for payment and cash flow. Unresolved disputes of this nature may burden stakeholders for years, withdrawing unrecoverable human and financial resources from the Province's construction economy.

Adjudication is a swift and flexible mechanism of dispute resolution. While there are many variations of adjudication, the essential characteristics involve the determination of a dispute arising under a construction contract by an adjudicator who is a qualified person (not a judge) appointed to conduct an investigation and make a quick determination (in about 40 days, on average). The adjudicator's decision is binding on an interim basis and enforceable. In certain adjudication regimes, parties are free to specify in their contracts the mechanisms for adjudication, as long as those mechanisms comply with the minimum requirements set out in the legislation and/or regulations. If they do not comply, the minimum standards set out in the legislation or regulation will be implied into the contract.

Adjudication is a proven, pragmatic solution for projects gridlocked by disputes, a solution that frees cash flow and resources, while at the same time striking an appropriate balance among competing interests. The task, as we see it, is to adapt the known and proven model of adjudication in a way that suits Ontario, given the existing lien regime and given our recommendations in relation to promptness of payment as described in Chapter 8 – Promptness of Payment and the summary procedures described in Chapter 6 – Summary Procedure.

2. Context

Contractual adjudication originated in the private sector in the U.K. in the early 1970's. As noted in Chapter 9 – Adjudication, Sir Michael Latham was commissioned to prepare a joint government/industry report on aspects of the construction industry in the U.K. This resulted in two reports: *Trust and Money* (December 1993) and *Constructing the Team* (July 1994).⁹⁴⁷ In *Constructing the Team*, Latham noted that while “the best solution is to avoid disputes . . . nevertheless, disputes may arise, despite everyone's best efforts to avoid them”.⁹⁴⁸ It was in this context that he made his recommendations, giving rise to remedial legislation in the form of Part II of the *U.K. Construction Act* which gave parties the right to refer a dispute to adjudication.

The provisions of the *U.K. Construction Act* addressing adjudication are very brief, because it sets out minimum requirements. If a construction contract does not comply with these requirements, the adjudication provisions of the “Scheme” will apply. The *Scheme* is a regulation

⁹⁴⁷ Sir Michael Latham, “Constructing the Team - Final Report of the Government/Industry Review of Procurement and Contractual Arrangements in the UK Construction Industry” (July 1994), online: <<http://constructingexcellence.org.uk/wp-content/uploads/2014/10/Constructing-the-team-The-Latham-Report.pdf>>

⁹⁴⁸ *Ibid* at 9.3.

to the *U.K. Construction Act* which articulates the procedures and timelines for both adjudication and prompt payment.⁹⁴⁹

The *U.K. Construction Act* was considered revolutionary at the time it came into force. It provided for construction disputes to be decided promptly by an “adjudicator” who would reach an interim binding decision within 28 days, after which the parties could litigate or arbitrate. Adjudicators were granted wide discretion to implement just, expeditious and economical results.⁹⁵⁰

As noted by authors Nicholas Gould and Charlene Linneman in their 2008 review of the *U.K. Construction Act* ten years after its inception, statutory adjudication in the U.K. has eight fundamental components:

1. **The right to refer a dispute at “any time”:** A party to a construction contract does not need to wait until the project is finished in order to have a dispute determined by an adjudicator.
2. **Notices:** A party to a construction contract must have the right to give a notice at any time of his intention to refer a particular dispute to the adjudicator.
3. **Appointment:** A method of securing the appointment of an adjudicator and furnishing him with details of the dispute within seven days of the notice is mandatory.
4. **Time scales:** The adjudicator is then required to reach a decision within 28 days of this referral. It will not be possible to agree in advance of any dispute that additional time may be taken for the adjudication. There are only two exceptions to this rule. First the adjudicator may extend the period of 28 days by a further 14 days if the party refereeing the dispute consents. Second, a longer period can be agreed by consent of all the parties. Such agreement can only be reached after the dispute has been referred.
5. **Act impartially:** The adjudicator is required to act impartially.
6. **Act inquisitorially:** The [*U.K. Construction Act*] requires that the adjudicator “takes the initiative in ascertaining facts and the law.” This gives the adjudicator power to investigate the issue in whatever manner he or she deems appropriate in light of the short time scale available.
7. **Binding nature:** The decision of the adjudicator is binding until the dispute is finally determined by legal proceedings, by arbitration or by agreement [...] The [*U.K. Construction Act*] does, however, go on to say that the parties may agree to accept the decision of the adjudicator as finally determining the dispute.

⁹⁴⁹ *The Scheme for Construction Contracts (England and Wales) Regulations 1998*, SI 1998/649 as amended by *The Scheme for Construction Contracts (England and Wales) Regulations 1998 (Amendment) (England) Regulations 2011* [Scheme].

⁹⁵⁰ Edwin H.W. Chan, Charles K.L. Chan & Martyn J. Hills, “Construction Industry Adjudication: A Comparative Study of International Practice” (2005) 22:5 *Journal of International Arbitration* at 367.

8. **Immunity:** The adjudicator cannot be held liable for anything done or omitted in the discharge of his function as an adjudicator unless acting in bad faith. This protection is extended to any employee or agent of the adjudicator.⁹⁵¹

Canadian commentator Duncan Glaholt notes that the *U.K. Construction Act* sought to achieve two objectives:

1. Cash flow efficiency and productivity; and
2. Swift resolution of disputes without wasted profit and time in litigation.⁹⁵²

Adjudication worked, and quickly took root. It is now used internationally in a wide range of contexts, sometimes to resolve interim payment disputes,⁹⁵³ and sometimes to resolve disputes of much broader scope.

2.1 The U.K. Adjudication Experience to Date

The phrase “pay now, argue later” has been used to describe adjudication under the *U.K. Construction Act*.⁹⁵⁴ By design, adjudication is “rough justice”, insofar as “the justice that is meted out is not always as pure and as well prepared for as cases which proceed to a full trial court or to a substantive hearing before an Arbitrator”.⁹⁵⁵

Nevertheless, courts in the U.K. enforce adjudication decisions robustly. Adjudicator’s decisions remain binding and enforceable until the parties legal rights are finally determined.⁹⁵⁶ The specifics of enforcement of adjudicated decisions in the U.K. are discussed below. U.K. courts have held that it is only in rare circumstances that they will interfere with an adjudicator’s decision. Courts actively discourage “simply scrabbling around to find some argument, however tenuous, to resist payment”.⁹⁵⁷ *Hudson’s* states that “if the Adjudicator has answered the right

⁹⁵¹ Nicholas Gould & Charlene Linneman, “Ten Years on: Review of Adjudication in the United Kingdom” (2008) 134:3 J Professional Issues in Engineering Education and Practice [Gould & Linneman]; see also *U.K. Construction Act*, s 108(2).

⁹⁵² Duncan Glaholt, “The Adjudication Option: The Case for Uniform Payment & Performance Legislation in Canada”, (2006) 53 CLR (3d) 8, online:

<http://www.glaholt.com/files/adjudication_-_construction_law_reports.pdf>.

⁹⁵³ For example, Security of Payment legislation in the states of New South Wales, Victoria, and Queensland in Australia provides solely for the recovery of progress payment claims: Brand, M.C & Davenport, P. “A proposal for a ‘Dual Scheme’ of statutory adjudication for the building and construction industry in Australia” (2010) *Proceedings of the Royal Institution of Chartered Surveyors COBRA Conference*, Paris, online: <<http://www.irbnet.de/daten/iconda/CIB20094.pdf>>.

⁹⁵⁴ Nicholas Denny, Mark Raeside & Robert Clay, eds, *Hudson’s Building and Engineering Contracts*, 13th ed (London, UK: Sweet & Maxwell, 2010) at 11-010 [Hudson’s] citing *RJT Consulting Engineers Ltd v DM Engineering (N.I.) Ltd* [2002] EWCA Civ 270; *Thomas-Frederic’s (Construction) Ltd v Wilson* [2003] EWCA Civ 1494; *Pegram Shoplifters Ltd v Tally Weijl (UK) Ltd* [2003] EWCA Civ 1750.

⁹⁵⁵ *Hudson’s*, *supra* at 11-010 citing *Gipping Construction Ltd v Eaves Ltd* [2008] EWHC 3134 (TCC) at para 8.

⁹⁵⁶ *Hudson’s*, *supra* at 11-010.

⁹⁵⁷ *Hudson’s*, *supra* at 11-010 citing *Carillion Construction Ltd v Devonport Royal Dockyard Ltd* [2005] EWCA Civ 1358.

question in the wrong way, their decision will be binding, and if they answered the wrong question, the decision will be a nullity.”⁹⁵⁸

Statutory adjudication has resulted in judicial efficiency as well. In *Ten Years on: Review of Adjudication in the United Kingdom*,⁹⁵⁹ authors Nicholas Gould and Charlene Linneman noted that “[a]djudication has substantially reduced the workload in court” and that the “volume of construction litigation [had] clearly reduced as a result of adjudication.”⁹⁶⁰

2.2 Adjudication Now Adopted in Many Jurisdictions

Adjudication has been adopted by many common law jurisdictions worldwide. While the legislated schemes vary, the general intent remains the same: remove gridlock, and eliminate late payment and non-performance.

The Review has considered adjudication for construction disputes and security for payment legislation in the United Kingdom, various states and territories on the east coast of Australia including New South Wales, Victoria, the Australian Capital Territory, Tasmania and South Australia (referred to collectively as “Australia (East Coast)”⁹⁶¹, the states and territories on the west coast of Australia including Western Australia and the Northern Territory (referred to collectively as “Australia (West Coast)”), Singapore, Malaysia, Ireland⁹⁶², and New Zealand.

We also note that several other countries are considering whether or not to introduce adjudication including Hong Kong⁹⁶³, South Africa⁹⁶⁴, China and Germany.⁹⁶⁵ Adjudication has not been implemented in U.S. legislation.

⁹⁵⁸ Hudson’s, *supra* at 11-010.

⁹⁵⁹ Gould & Linneman, *supra*.

⁹⁶⁰ *Ibid.*

⁹⁶¹ The *New South Wales Act*, the *Victoria Act*, the *Australian Capital Territory Act*, the *South Australian Act* and the *Tasmania Act* (referred to collectively as “Australia (East Coast)”). Where not otherwise specified, citations to the Australia (East Coast) model will be to the *New South Wales Act* as it is the foundational security for payment legislation for the Australia (East Coast) jurisdictions.

⁹⁶² Note: the *Ireland Act* was enacted on July 29, 2013, but has not yet received the Ministerial commencement order required to become operative.

⁹⁶³ Note: there is currently no statutory regime in place in Hong Kong however; the Hong Kong Development Bureau began a public consultation process on its proposed security of payment legislation that could result in legislation being introduced as early as this year (2016). The documents released with the proposed Hong Kong legislation were considered as part of the Review.

⁹⁶⁴ Note: South Africa is in the midst of seeking public comments in relation to Proposed Amendments to the Regulations of the Construction Industry Development Board Act No. 38 of 2000. South Africa is considering introducing mandatory prompt payment and adjudication applicable to construction contracts and related construction works. However, as of the time of the publishing of this Report, the consultation process was not sufficiently advanced and it was not clear what regulations, if any, will be brought into effect. For further detail, please see for example, Clyde & Co, “Adjudication and prompt payment regulations”, South Africa, April 10, 2016, online at: <<https://www.lexology.com/library/detail.aspx?g=c8ddaaa-508f-4142-817b-318c6dd5cfa9>>.

⁹⁶⁵ While Germany and China are considering statutory adjudication, the legislation processes were not sufficiently advanced to provide clarity as to what regulations or legislation would be implemented, if any; See also, James

2.3 Comparative Review

For each jurisdiction reviewed⁹⁶⁶, we have considered the following questions:

- a) Who can require adjudication?
- b) Who can adjudicate a dispute and how is the adjudicator nominated?
- c) What types of disputes can be adjudicated?
- d) What is the adjudication process and how are costs dealt with?
- e) How are adjudicated decisions enforced?

Answers to these questions are summarized briefly below and further details including charts are found in Appendix C.

2.3.1 Who Can Require Adjudication?

The seminal U.K. model of statutory adjudication provides that **any party to a construction contract**⁹⁶⁷ has the right to refer “a dispute arising under the contract” to adjudication.⁹⁶⁸ Other jurisdictions have provided as follows:

- a) Australia (West Coast), New Zealand,⁹⁶⁹ Ireland,⁹⁷⁰ Malaysia⁹⁷¹ and Hong Kong (proposed) have followed the U.K. model such that **any party** to a “construction contract”, however defined, can refer a dispute to adjudication.
- b) Australia (East Coast), and Singapore have enacted more restrictive legislation. In these jurisdictions **only a payee can initiate a statutory adjudication**. A payee in these jurisdictions is usually an unpaid supplier of work, services or materials.⁹⁷² The policy

Pickavance, *A Practical Guide to Construction Adjudication*, (John Wiley and Sons: West Sussex, 2016) [Pickavance] at 21.03.

⁹⁶⁶ With the exception of South Africa, Germany, and mainland China, as noted above.

⁹⁶⁷ A construction contract is defined under Section 104 of the *U.K. Construction Act* as meaning an agreement with a person for any of the following: a) the carrying out of construction operations; b) arranging for the carrying out of construction operations by others, whether under sub-contract to him or otherwise; c) providing his own labour, or the labour of others, for the carrying out of construction operations. This includes agreements for architectural, design, or surveying work, or providing advice on building, engineering, interior or exterior decoration or on the laying-out of landscape, in relation to construction operations. A construction contract does not include a contract of employment or contracts with residential occupiers. The definition of “construction contract” has since been amended to include oral contracts in certain circumstances.

⁹⁶⁸ *U.K. Construction Act*, s 108(1).

⁹⁶⁹ *New Zealand Act*, s 25.

⁹⁷⁰ *Ireland Act*, s 6(1). Despite being enacted in 29 July 2013, the *Ireland Act* still remains dormant as it is subject to a Ministerial commencement Order (from the Minister for Business and Employment), before it becomes operative. It is anticipated that the commencement day will occur in 2016 following a series of steps to be completed (incl. the creation of a code of conduct, code of practice and amendments to the Rules of the Superior Courts).

⁹⁷¹ *Malaysia Act* at s 7.

⁹⁷² Chan, Adrian, Institute of Civil Engineers, “Briefing: Statutory Adjudication for construction disputes: an overview, Management”, *Procurement and Law*, Volume 168 Issue Mp6 (December 2015) [Chan ICE] at 255.

underlying the Australian (East Coast) adjudication model was to “stamp out the practice of not paying contractors for work they undertake on construction”.⁹⁷³ As a result, the Australian (East Coast) approach denies principals to a head contract (i.e. owners) or contractors in the context of a claim under a subcontract access to adjudication as an avenue of redress.⁹⁷⁴

The various approaches as to who can require adjudication are depicted below:⁹⁷⁵

U.K.	New Zealand	Ireland	Singapore	Malaysia	Hong Kong (Proposed)	Australia (East Coast)	Australia (West Coast)
Any party (s.108)	Any party (s.25)	Any party (s.6(1))	Payee only (s.12)	Any party (s.7(1))	Any party	Payee only (s.17(1))	Any party (s.25)

2.3.2 Who Can Adjudicate a Dispute and How is the Adjudicator Nominated?

2.3.2.1 Who Can Adjudicate a Dispute?

The U.K. initially developed a roster of adjudicators drawn from the ranks of quantity surveyors, engineers, architects, and lawyers. Many of the initial adjudicators had their roots in arbitration.⁹⁷⁶ A process was then created for additional adjudicators to be added to the roster. Training was implemented through a variety of institutions, known as Adjudicator Nominating Bodies (“ANBs”). Individuals successfully trained were added to the roster maintained by their specific ANB and were then available for nomination.⁹⁷⁷ In the U.K., “the majority of Adjudicators are not chosen for their expertise as lawyers” but rather for expertise in relevant technical subjects.⁹⁷⁸ Adjudicators in the U.K. are able to rely on expert submissions to assist in

⁹⁷³ Pickavance, *supra* at 22.28 citing M Iemma, *New South Wales Hansard Articles*, Legislative Assembly, 29 June 1999, No 16.

⁹⁷⁴ Pickavance, *supra* at 22.30.

⁹⁷⁵ See also *Pickavance, supra* at Appendix 7.

⁹⁷⁶ John L. Riches & Christopher Dancaster, *Construction Adjudication*, 2d ed (Blackwell Publishing, 2004) at 144 [Riches & Dancaster].

⁹⁷⁷ By way of example, the Chartered Institute of Arbitrators offers a Pathways Programme in Construction Adjudication which covers the law of obligations, the law of adjudication, adjudication practice and procedure and decision writing. Experience then comes through practice, or in some cases, being permitted to observe other adjudications. See online: <<http://www.ciarb.org/training-and-development/construction-adjudication>>.

⁹⁷⁸ See for example - *Balfour Beatty Engineering v Shepherd Construction Limited* [2009] EWHC 2218 at para 28; See also *Balfour Beatty Construction Ltd v London Borough of Lambeth* [2002] EWHC 597 (TCC) (12 April 2002). In this decision, a party to an adjudication challenged the decision for breach of natural justice as the adjudicator had developed his own critical path methodology and analysis and relied on arguments not advanced by the parties. The TCC reasoned that “adjudication under the [U.K. Construction Act] is necessarily crude in its resolution of disputes. Errors of fact or law do not vitiate the decision which has to be complied with unless...made without jurisdiction.” See para 27. In this case, the TCC did not enforce the adjudicator’s decision however, as the adjudicator did not inform the parties where the technical information came from and give them both sufficient opportunity to respond.

interpreting highly technical matters while also being able to take the initiative in ascertaining the facts and the law in the adjudication process, as discussed below.⁹⁷⁹

In relation to who can be an adjudicator in other jurisdictions, we note as follows:

- a) Australia (West Coast) requires that adjudicators have certain credentials, including: a degree in law, architecture, engineering or other construction-related field, or that the adjudicator be a registered builder, or must have five years' experience in administering construction contracts or dispute resolution related thereto and have completed a training course.⁹⁸⁰
- b) In Queensland, adjudicators must be registered under the legislation and hold a certificate of adjudication. While several Australian statutes stipulate that adjudicators are to have "qualifications, expertise and experience" prescribed by regulations, it is reported that most do not.⁹⁸¹ Authorized Nominating Authorities ("ANAs") regulate their own adjudicators.⁹⁸²
- c) In Ireland, adjudicators must be qualified as a barrister or solicitor; Fellowship in the Chartered Institute of Arbitrators; chartered member status in the Institution of Engineers of Ireland; qualification as a registered professional "as defined in section 2 of the Building Control Act 2007"; or be a person with equivalent qualifications "obtained in any other Member State of the European union".⁹⁸³ Qualified adjudicators are selected either by agreement or the parties may seek the appointment of an adjudicator from the Construction Contracts Adjudication Panel appointed by the Minister of Business and Employment. As of January 2016, the Irish Government's official publication published a notification of the first appointments of 30 adjudicators following an assessment conducted by the Minister on a series of applications in late 2015.⁹⁸⁴
- d) The *New Zealand Act* requires only that adjudicators: 1) must not be a party to the disputed construction contract; and 2) have no conflict of interest (or, if they do, obtain a waiver of that conflict).⁹⁸⁵
- e) Regulations under the *Malaysia Act* require an adjudicator to have at least 7 years' experience working in Malaysia's building and construction industry; hold a Certificate

⁹⁷⁹ *U.K. Construction Act*, s 108(2).

⁹⁸⁰ Pickavance, *supra* at 22.25.

⁹⁸¹ Pickavance, *supra* at 22.33 and 22.34.

⁹⁸² ANAs are professional bodies, or private companies authorized to receive and administer adjudication applications.

⁹⁸³ *Ireland Act*, s 8(6).

⁹⁸⁴ See Beale & Company Update on Construction Contracts Act 2013, <http://www.beale-law.com/uploads/files/beale_and_company/publications/506/January_2016_-_Update_on_Construction_Contracts_Act_2013.pdf>.

⁹⁸⁵ *New Zealand Act*, s 34(2),(3).

in Adjudication from a recognized institution; not be an undischarged bankrupt; and not have been convicted of a criminal offence.⁹⁸⁶

- f) Regulations under the *Singapore Act* require that an adjudicator possess a degree or diploma in architecture, building studies, engineering, environmental studies, law, planning, real estate or urban design, or “such other qualification, as may be recognized by the authorised nominating body”; have at least 10 years’ work experience related to the “building and construction industry in Singapore”; and complete the assessment and training course administered by the ANB.⁹⁸⁷

2.3.2.2 How is the Adjudicator Nominated?

The nomination of an adjudicator involves a very specific process with strict timelines that vary from jurisdiction to jurisdiction. For example, the U.K. provides a wide variety of options as to how and when an adjudicator can be nominated, as follows:

- the appointment can be made by prior agreement (i.e. naming the adjudicator(s) in the construction contract) or during the project, prior to a dispute arising;
- the appointment can be made when the dispute arises by agreement; or
- a party may appoint an adjudicator unilaterally by referring the dispute to an adjudicator nominated by an Adjudicator Nominating Body.⁹⁸⁸

The *Scheme* sets out a statutory minimum process for the nomination of an adjudicator (subject to any other agreement by the parties that complies with the *U.K. Construction Act*) as follows:

2.—(1) Following the giving of a notice of adjudication and subject to any agreement between the parties to the dispute as to who shall act as adjudicator—

- (a) the referring party shall request the person (if any) specified in the contract to act as adjudicator, or
- (b) if no person is named in the contract or the person named has already indicated that he is unwilling or unable to act, and the contract provides for a specified nominating body to select a person, the referring party shall request the nominating body named in the contract to select a person to act as adjudicator, or
- (c) where neither paragraph (a) nor (b) above applies, or where the person referred to in (a) has already indicated that he is unwilling or unable to act and (b) does not apply, the referring party shall request an adjudicator nominating body to select a person to act as adjudicator.

(2) A person requested to act as adjudicator in accordance with the provisions of paragraph (1) shall indicate whether or not he is willing to act within **two days** of receiving the request.

⁹⁸⁶ Steve Cannon & Steve Gibson, “Adjudication of construction disputes in Malaysia – a new approach to dispute resolution” at 1, online: <<https://www.eversheds.com/documents/services/construction/adjudication-construction-disputes-malaysia.pdf>>.

⁹⁸⁷ Section 11(1) of the Regulations of the *Singapore Act*.

⁹⁸⁸ Riches & Dancaster, *supra* at 146.

[...]

5.—(1) The nominating body referred to in paragraphs 2(1)(b) and 6(1)(b) or the adjudicator nominating body referred to in paragraphs 2(1)(c), 5(2)(b) and 6(1)(c) must communicate the selection of an adjudicator to the referring party within **five days** of receiving a request to do so. [...] ⁹⁸⁹[Emphasis added]

The *Scheme* also provides specific procedures for circumstances where the ANB fails to name an adjudicator pursuant to section 5(1) above or an adjudicator is unable or unwilling to act.⁹⁹⁰ Parties are free to agree to different procedures for nominating adjudicators or adopt other contractual provisions.

In relation to how an adjudicator is nominated in other jurisdictions, we note as follows:

- a) In New Zealand, an adjudicator can be selected either by the agreement of the parties or by allocation by an ANA.⁹⁹¹ Any agreement made in relation to the choice of an adjudicator or ANB/ANA made prior to the dispute will not be binding on the parties.⁹⁹² The *New Zealand Act* sets out specific timeframes for: a selected adjudicator to indicate whether he or she is willing to act (2 working days); the claimant to request that an ANB chosen by agreement between the parties select an adjudicator (5 working days); the claimant to request an ANA select an adjudicator in situations where no agreement can be reached on an adjudicator or an ANB (2 to 5 working days).⁹⁹³
- b) In Ireland, the parties may agree to appoint an adjudicator of their choice or an adjudicator will be selected from the Construction Contracts Adjudication Panel appointed by the Minister (i.e. the default option).⁹⁹⁴
- c) In Singapore, an adjudicator is selected by the Singapore Mediation Centre as the only ANB authorized to appoint adjudicators.⁹⁹⁵ Within 7 calendar days of receiving an application from the claimant, the ANB must confirm the appointment of the adjudicator.⁹⁹⁶
- d) Malaysia also allows parties to agree on an adjudicator and if not, they are able to seek an adjudicator from the designated ANB (The Kuala Lumpur Regional Centre for Arbitration (KLRC)).⁹⁹⁷ Each of the steps involved is between 5 and 10 working days and the adjudicator is given time to negotiate his or her terms of appointment.⁹⁹⁸
- e) In Hong Kong, an adjudicator may be agreed upon by the parties to the dispute, or may be appointed by an agreed-upon ANB. The Hong Kong International Arbitration Center

⁹⁸⁹ *Scheme*, s 2 and 5.

⁹⁹⁰ *Scheme*, s 5 and 6.

⁹⁹¹ *New Zealand Act*, s 33.

⁹⁹² *New Zealand Act*, s 33(3).

⁹⁹³ *New Zealand Act*, s 33(1),(2) and 35.

⁹⁹⁴ *Ireland Act*, s 6(3)-(4).

⁹⁹⁵ *Singapore Act*, s 13; Pickavance at 508, s 26.4.1.

⁹⁹⁶ *Ibid*, s 14(3).

⁹⁹⁷ *Malaysia Act*, ss 21, 23.

⁹⁹⁸ *Malaysia Act*, ss 21, 22.

(HKIAC) will be the default ANB where no adjudicator or nominating body is agreed upon. The nomination process for an adjudication is expected to result in an adjudicator being nominated within 5 working days from the commencement of the adjudication.⁹⁹⁹

- f) In Australia (East Coast) and Australia (West Coast), parties apply to an ANA to nominate an adjudicator.¹⁰⁰⁰ The nomination periods vary however, many of the Australia (East Coast) jurisdictions require the ANA to appoint the adjudicator “as soon as practicable” and the Australia (West Coast) jurisdictions provide short timeframes (e.g. 5 calendar days).

2.3.3 What Types Of Disputes Can Be Adjudicated?

The U.K. model of adjudication is the broadest of all the jurisdictions examined, given that a dispute (which is defined as including any difference), arising under the construction contract can be adjudicated. There are certain exclusions to this general proposition, namely:

- a) Excluded construction operations: Certain types of construction operations are excluded including drilling or extraction of oil/natural gas, extraction of minerals, manufacture or delivery of certain products (e.g. building components or materials), assembly, installation or demolition of plant or machinery.¹⁰⁰¹
- b) Agreements with Residential Occupiers: Agreements with residential occupiers are excluded, where the agreement principally relates to operations on a dwelling which one of the parties (who must be a natural person) occupies, or intends to occupy, as his or her residence.¹⁰⁰²
- c) Exclusionary orders and Private Finance Initiatives (“PFIs”)¹⁰⁰³: Certain aspects of adjudication and prompt payment in the U.K. do not apply to certain construction contracts excluded by order of the Secretary of State.¹⁰⁰⁴ For example, PFI “head

⁹⁹⁹ Hong Kong Consultation Document at 36.

¹⁰⁰⁰ Pickavance, *supra* at 22.31.

¹⁰⁰¹ *U.K. Construction Act*, s 105(2); According to James Pickavance, in his 2015 text *A Practical Guide to Construction Adjudication* it is now “settled law that the correct approach is not to conduct a minute analysis of the work to see what is excluded and what is not” but rather, to look at the “nature of the work broadly, and conduct a straightforward and common sense analysis as to whether the works fall within or outside the scope” of the U.K. Construction Act. (Pickavance, *supra* at 4.67 citing *Cleveland Bridge (UK) Ltd v Whessoe-Volker Stevin Joint Venture* [2010] EWHC 1076 (TCC) and *North Midland Construction v AE & E Lentjes Ltd* [2009] EWHC 1371 (TCC).)

¹⁰⁰² Pickavance, *supra* at 4.81. Although, author Pickavance notes at 4.87 that the exceptions under Section 106(1) and (2) do not apply in the case of property development companies. Further, nothing prevents a residential occupier from agreeing to adjudicate contractually, notwithstanding the exclusion under Section 106 (see *Pickavance* at 4.88 citing *Lovell Projects Limited v Legg and Carver* [2003] BLR 452).

¹⁰⁰³ A private finance initiative is a mechanism used to create a public private partnership.

¹⁰⁰⁴ *U.K. Construction Act*, s 106(1)(b). In this regard, the Secretary of State passed the *Construction Contracts (England and Wales) Exclusion Order 1998* [1998 Exclusion Order] that excluded agreements relating to certain highway project agreements, certain planning agreements, pfis, externally financed development agreements in relation to national health service legislation, certain water industry agreements, development agreements, certain finance and insurance agreements. [See also Pickavance, *supra* at 4.93.]; Pickavance, *supra* at 4.89; Section 106A of the *Local Democracy, Economic Development and Construction Act 2009* replaced the former Section 106(1)(b) of

contracts” (i.e. Project Agreements) are excluded from adjudication, however “contracts for the works” (i.e. the design build contract and the subcontracts) are not.¹⁰⁰⁵

Examples of types of disputes that have been adjudicated in the U.K. include: final account claims; extension of time/loss and expense claims; value of variations; disputed terminations¹⁰⁰⁶; a claim to enforce post-termination rights¹⁰⁰⁷ (in absence of agreement); and recovery of costs to complete a project following termination.¹⁰⁰⁸ The U.K. also allows adjudications to proceed in relation to disputes of a technical nature.

Other jurisdictions adjudicate the following types of disputes:

- a) The *New Zealand Act* is similar to the *U.K. Construction Act* in that it provides for adjudication in relation to a dispute under a construction contract.¹⁰⁰⁹ Disputes that can be referred to adjudication include claims for amounts owing, disputes as to whether an amount is payable, the reasons for non-payment, or breach of contractual terms.¹⁰¹⁰ Originally residential construction contracts were excluded from adjudication under section 10, however on December 1, 2015, the *Construction Contracts Amendment Act 2015* repealed the residential exclusion.¹⁰¹¹ The amendments also provide that from September 1, 2016, design, engineering and quantity surveying work can be adjudicated,

the *U.K. Construction Act* which provided for exclusions from Part II of the *U.K. Construction Act* by order of the Secretary of State. The Secretary of State then passed *The Construction Contracts (England) Exclusion Order 2011* (SI 2011/2332) which excludes PFI subcontracts from certain prompt payment requirements. The *Construction Contracts (England) Exclusion Order 2011* (SI 2011/2332) excluded PFI subcontracts from the operation of section 110(1A) of the *U.K. Construction Act*. The intention of section 110(1A) was said to be to “prevent a situation where a sub-contractor is unable to obtain payment until sums are certified under the main contract, to which he is not a party (i.e. to prohibit “pay when certified” clauses).” [DWF Law, Reform of the *Housing Grants, Construction & Regeneration Act 1996*, August 11, 2011, online: <<http://www.dwf.law/news-events/legal-updates/2011/08/reform-of-the-housing-grants,-construction-regeneration-act-1996/>>.] The U.K. government released an explanatory memorandum and a regulatory impact statement in conjunction with the exclusion order. The regulatory impact statement identified that “different circumstances exist in contracts between PFI Special Purpose Companies (SPC) and the Construction sub-contractor than those which prevail in traditional construction subcontracts”. Exclusion Order 2011 Regulatory Impact Statement at s 22-23, online: <http://www.legislation.gov.uk/ukia/2011/398/pdfs/ukia_20110398_en.pdf>. The memorandum identifies that PFIs are excluded because the new section 110(1A) of the U.K. Construction Act (relating to pay when certified provisions) would “adversely affect PFI projects to an unwarranted degree and it is for this reason that this ‘excluding’ instrument is being made”. Explanatory Memorandum to the Construction Contracts (England) Exclusion Order 2011, 2011 No 2332 at 7.2 online: <http://www.legislation.gov.uk/uksi/2011/2332/pdfs/uksiem_20112332_en.pdf>.

¹⁰⁰⁵ Pickavance, *supra* at 4.83 and 4.94: citing

¹⁰⁰⁶ Davis, Richard, *Construction Insolvency: Security, Risk and Renewal in Construction Contracts* (2011) [Davis] at p 332-333 citing for example, *All in One Building v Makers* [2006] CILL 2321; *Banner Holdings v Colchester BC* (2010) 131 Con LR 77; *Volker Stevin v Holystone Contracts* [2010] EWHC.

¹⁰⁰⁷ Davis, *supra* at 332-333 citing *Orange v ABB* [2003] B.L.R. 323.

¹⁰⁰⁸ Davis, *supra* at 332-333 citing *Makers v Camden LBC* [2008] BLR 470, followed by *Camden LBC v Makers* (2009) 124 Con LR 32.

¹⁰⁰⁹ *New Zealand Act*, s 25.

¹⁰¹⁰ *Ibid.*

¹⁰¹¹ *Construction Contracts Amendment Act 2015* (2015 No 92), s 8. Note however, that the exception to this was in relation to charging orders as it is still not possible to seek charging orders against a residential occupier of the construction site under the *New Zealand Act*.

along with disputes related to land where planned construction work has yet to commence.¹⁰¹²

- b) The *Ireland Act* provides that adjudication can be initiated in relation to disputes under construction contracts that are created for the purpose of carrying out, arranging or providing labour for construction operations. The legislation provides a wide definition of both “construction operations” and “construction contracts”.¹⁰¹³ Exceptions include construction contracts of a value of less than €10,000, or contracts between a state authority and partner in a public private partnership arrangement.¹⁰¹⁴
- c) In Singapore and Australia (West and East), only payment matters can be referred to adjudication. Some commentators have noted that, in reality, while not specifically provided for under statute in Australia or Singapore, issues such as delay and disruption are inextricably bound up in some payment disputes.¹⁰¹⁵
- d) In Malaysia, adjudication applies to any ‘dispute arising from a payment claim’ under “every construction contract made in writing relating to construction work carried out wholly or partly within the territory of Malaysia including a construction contract entered into by the Government.”¹⁰¹⁶ A number of government contracts are exempt from adjudication, namely: 1) construction necessitated by emergency and unforeseen circumstances, such as natural disasters or fire; and 2) construction related to national security interests.¹⁰¹⁷ The Malaysia Act does not apply to a construction contract entered into by “natural persons” for any construction work relating to a building less than 4 storeys high, and “wholly intended” for the contracting party’s occupation.¹⁰¹⁸
- e) Under the proposed Hong Kong security for payment (adjudication) legislation, adjudication arises “in the event of non-payment and when there are disputes about the value of work, services, materials or plant and/or disputes about extension of time and financial claims under the contract.”¹⁰¹⁹ Thus, almost all relevant construction disputes will be subject to the new legislation once enacted, “whether they are subject to Hong Kong law or another law and regardless of the nationality of the parties”, so long as the

¹⁰¹² New Zealand, Ministry of Business, Innovation & Employment, “Construction Contracts Amendment Act 2015 – Changes relating to adjudication and enforcement”, online: <http://www.mbie.govt.nz/info-services/building-construction/current-work/review-of-the-construction-contracts-act-2002/CCAA_act_changes.pdf> [NZ Amendment Changes].

¹⁰¹³ *Ireland Act*, s 1(1).

¹⁰¹⁴ *Ireland Act*, s 2(1)-(3). We note that this exclusion appears to follow from the UK experience and thus follows the Exclusion Orders discussed above generally.

¹⁰¹⁵ Chan ICE, *supra* at 255.

¹⁰¹⁶ *Malaysia Act*, s 2.

¹⁰¹⁷ Pickavance, *supra* at 477, ss 24.23-24.24.

¹⁰¹⁸ *Malaysia Act*, s 3.

¹⁰¹⁹ Hong Kong Consultation Document at 2, 33, 34. The Hong Kong Development Bureau noted that extension of time issues were included in their adjudication proposal as they are “often crucial to unlocking financial disputes on construction projects both in terms of entitlements to loss and expense and employer entitlements to liquidated damages for delay. Although they can be complex, and may be hard to resolve in the tight timeframe of adjudication, their early resolution may help prevent future disputes. It therefore makes sense to allow these disputes to be adjudicated in isolation and not just when they form part of a time related financial claim.”

relevant construction activities are carried out within Hong Kong.¹⁰²⁰ Where design services are outsourced to foreign parties, and the construction site is in Hong Kong, the legislation would still apply to those foreign parties.

2.3.4 What Is The Adjudication Process and How Are Costs Dealt With?

Each of the jurisdictions we considered has its own process which are reviewed in detail in Appendix C, but below we set out brief summaries of key timing, procedural and costs issues.

2.3.4.1 What Is the Adjudication Process?

The process for an adjudication is intended to be simple and flexible. In the U.K. the process has been described as “inquisitorial” in the sense that the adjudicator is given flexibility to develop a process to gain an understanding of the relevant facts. In this regard, section 13 of the *Scheme* (i.e. the regulations to the *U.K. Construction Act* that set out the minimum standards for adjudication and prompt payment) provides the statutory minimum procedural powers of an adjudicator as follows:

13. The adjudicator may take the initiative in ascertaining the facts and the law necessary to determine the dispute, and shall decide on the procedure to be followed in the adjudication. In particular he may—
 - (a) request any party to the contract to supply him with such documents as he may reasonably require including, if he so directs, any written statement from any party to the contract supporting or supplementing the referral notice and any other documents given under paragraph 7(2),
 - (b) decide the language or languages to be used in the adjudication and whether a translation of any document is to be provided and if so by whom,
 - (c) meet and question any of the parties to the contract and their representatives,
 - (d) subject to obtaining any necessary consent from a third party or parties, make such site visits and inspections as he considers appropriate, whether accompanied by the parties or not,
 - (e) subject to obtaining any necessary consent from a third party or parties, carry out any tests or experiments,
 - (f) obtain and consider such representations and submissions as he requires, and, provided he has notified the parties of his intention, appoint experts, assessors or legal advisers,
 - (g) give directions as to the timetable for the adjudication, any deadlines, or limits as to the length of written documents or oral representations to be complied with, and
 - (h) issue other directions relating to the conduct of the adjudication.¹⁰²¹

Other jurisdictions have taken a slightly more prescriptive approach. For example, in New Zealand, Australia (East Coast), Australia (West Coast), Malaysia and Singapore, the conduct of

¹⁰²⁰ Ian Cocking & Sholto Hanvey, “Hong Kong SOPL: Security Measures”, online: <<http://www.building.co.uk/hong-kong-sopl-security-measures/5080001.article>>.

¹⁰²¹ *Scheme*, s 13; Ireland has similarly proposed to give an adjudicator broad rights to set its process – see Ireland Code of Conduct, *supra* at 20.

adjudication proceedings are prescribed in the legislation.¹⁰²² Included in these legislative regimes are procedural timelines for processes such as referring a dispute to adjudication, the referral notice, conduct of the adjudication itself (including submissions and replies) and the decision. In addition to the prescribed timeframes, discussed below, the legislation also prescribes the procedural powers of the adjudicator.

For example, while New Zealand prescribes specific timeframes for the delivery of a response and a reply, it also sets out broad powers for an adjudicator including: the power to conduct the adjudication in any manner he or she thinks fit; requesting further written submissions; requesting copies of documents that may reasonably be required; appointing an expert advisor; calling conferences; carrying out inspections of the work, issuing instructions, etc.¹⁰²³

One criticism of the U.K. process is that responding parties in an adjudication are prone to what is known as “ambush”, i.e. a situation where “the responding party believes it has not had sight of the claim (or part of it) at all, or there has been an insufficient time to consider and respond to the claim, such that a dispute has not formed.”¹⁰²⁴

The Hong Kong Development Bureau recently considered how to minimize the risk of ambush by allowing the adjudicator to “disregard any submission or evidence” submitted by the referring party “to the extent that the adjudicator considers the same comprises submissions or evidence which the responding party was unaware of at the time the notice of adjudication was served and which should reasonably have been served ... in advance of the notice of adjudication”.¹⁰²⁵

In addition, it has been proposed that an adjudicator in Hong Kong will be entitled to resign if he or she considers that it is not possible to determine the dispute fairly in the time available.¹⁰²⁶

These two proposals were intended to reduce the likelihood that “a claimant deliberately holds back new submissions and evidence to deploy for the first time in adjudication in the hope of gaining a tactical advantage.”¹⁰²⁷

In New Zealand, an adjudicator’s power to determine a dispute will not be affected by the failure of: a) a respondent to serve a response; b) the failure of any of the parties to make a submission, comment, or provide specified information within the time allotted; c) comply with the adjudicator’s call for a conference; or d) do any other thing the adjudicator requests or directs.¹⁰²⁸

The *New Zealand Act* also provides the adjudicator with the ability to draw inferences and

¹⁰²² *New Zealand Act*, subpart 3; *Malaysia Act*, ss 7-11; *Western Australia Act*, Division 3; *New South Wales Act*, Division 2; *Singapore Act*, Part IV.

¹⁰²³ *New Zealand Act*, s 42.

¹⁰²⁴ Pickavance, *supra* at 7.32.

¹⁰²⁵ Hong Kong Consultation Document at 37.

¹⁰²⁶ *Ibid.*

¹⁰²⁷ Hong Kong Consultation Document at 38.

¹⁰²⁸ *New Zealand Act*, s 43.

determine a dispute based on the information available in circumstances where these failures occur.¹⁰²⁹

2.3.4.2 Timing of Statutory Adjudication

In terms of timing, the key questions to be considered are:

- a) What is the timeframe to deliver a notice of adjudication?
- b) What is the timeframe to refer the dispute to an adjudicator, after the adjudicator has been selected?
- c) What is the timeframe for a response and reply?
- d) What is the timeframe for a decision following commencement of the adjudication?

Each of these questions is addressed below.

(a) What Is the Timeframe to Refer a Dispute to Adjudication?

The timeframe to deliver a notice of adjudication varies between the jurisdictions canvassed, however, the approaches can generally be grouped into two categories: not restricted (i.e. commence at any time) or restricted (i.e. within a certain time period following the date a dispute arises or a claim for payment is made)

By way of brief summary, the following chart illustrates the general approaches taken in the jurisdictions we have considered:

U.K.	New Zealand	Ireland	Singapore	Malaysia	Hong Kong (Proposed)	Australia (East Coast)	Australia (West Coast)
No restriction (s.108(2))	No restriction (s.25)	No restriction s.6(2)	Restricted to a specific time period (7-14 days - s.12/13)	Restricted (but no time period) (s.7(2))	Restricted to a specific time period ¹⁰³⁰ (28 days)	Restricted to a specific time period (20 business days - s.17(2) NSW)	Restricted to a specific time period (28 days - s. 26 WA)

¹⁰²⁹ *New Zealand Act*, s 44.

¹⁰³⁰ Hong Kong Consultation Document, at 35. The requirement of serving the notice within 28 days is one of a number of anti-ambush provisions under the proposed legislation.

(b) What is the timeframe to refer the dispute to an adjudicator, after the adjudicator has been selected?

After a notice of adjudication is delivered and an adjudicator is then selected, the next period of time to consider is the period of time allotted for the parties to refer the dispute to the adjudicator that has been selected or appointed.¹⁰³¹ In some jurisdictions, this is not a separate step, as the notice of adjudication includes a “claim package” such that no separate notice of referral to an adjudicator is required. The following is a brief summary of the time frames employed in referring a matter to adjudication, where applicable:

U.K.	New Zealand	Ireland	Singapore	Malaysia	Hong Kong (Proposed)	Australia (East Coast)	Australia (West Coast)
Yes (7 days - s. 108(2) / Scheme s. 7)	Yes (5 working days - s. 36)	Yes (7 days - s. 6(5))	No – included with notice (s. 13)	Yes (10 working days – s. 9)	No – given to adjudicator on day of appointment	No – included with application (s. 17 NSW)	No – included with application (s. 26 WA)

(c) What is the timeframe for a response and reply?

The third timing issue to be considered relates to what time period is imposed by the statute, if any, for a responding party to deliver a response to the referral to adjudication. Again, a variety of approaches have been taken. Some jurisdictions have chosen to set no statutory period to respond whereas others have set a specific requirement. The following brief summary indicates whether or not each of the jurisdictions provides for a statutory period for a response and if so, the time limit for such a response:

¹⁰³¹ The time period for selecting an adjudicator is usually a very short period of approximately 7 days, as discussed in the section above which addresses the nomination procedure.

U.K.	New Zealand	Ireland	Singapore	Malaysia	Hong Kong (Proposed)	Australia (East Coast)	Australia (West Coast)
No ¹⁰³²	Yes (5 working days - s.37)	No ¹⁰³³	Yes ¹⁰³⁴ (7 days – s. 15)	Yes (10 Business Days – s. 10(1))	Yes (20 Working Days)	Yes ¹⁰³⁵ (5 Business Days – s. 20(1) NSW)	Yes (14 days – s. 27 WA)

Finally, some jurisdictions also prescribe a statutory time period for reply submissions to be made:

U.K.	New Zealand	Ireland	Singapore	Malaysia	Hong Kong (Proposed)	Australia (East Coast)	Australia (West Coast)
Not prescribed ¹⁰³⁶	Yes (5 working days – s. 37A) ¹⁰³⁷	Not prescribed ¹⁰³⁸	Not prescribed	Yes (s. 11) (5 Business Days)	Not prescribed	Not prescribed	Not prescribed

(d) What is the timeframe for a decision following commencement of the adjudication?

Finally, the most fundamental timing question to be addressed is the duration of the entire adjudication process. Commentators have noted that all adjudication regimes require three things in relation to timing: “(1) that the Adjudicator make a decision within a specific time frame, failing which (2) the decision is invalid and therefore not binding save that (3) the parties are

¹⁰³² In the U.K., under the Scheme an adjudicator can set its own procedure which may include a time period for a reply.

¹⁰³³ Ireland has released a draft copy of a code of conduct that sets out general principles and procedural requirements in relation to the *Ireland Act* titled Construction Contracts Act 2013 (Code of Practice) (Adjudication) Order 2014 [Ireland Code of Conduct]. This document has not yet been enacted, copy online: <[https://www.engineersireland.ie/EngineersIreland/media/SiteMedia/groups/Divisions/civil/Construction-Contracts-Act-2013-\(Code-of-Practice\)-\(Adjudication\)-Order-2014.pdf?ext=.pdf](https://www.engineersireland.ie/EngineersIreland/media/SiteMedia/groups/Divisions/civil/Construction-Contracts-Act-2013-(Code-of-Practice)-(Adjudication)-Order-2014.pdf?ext=.pdf)>.

¹⁰³⁴ Although according to section 15(3) of the Singapore, a paying party can only issue a response if it has taken certain steps (e.g. issued a valid payment schedule).

¹⁰³⁵ Similarly, under section 20(2A) of the *New South Wales Act*, a paying party can only issue a response if it has taken certain steps (e.g. issued a valid payment schedule).

¹⁰³⁶ In the U.K., under the Scheme an adjudicator would provide a timetable which may include a time period for a response.

¹⁰³⁷ An adjudicator in New Zealand may also allow a respondent up to 2 working days to serve a rejoinder to the claimants reply (s 37A(4)).

¹⁰³⁸ Ireland Code of Conduct, *supra* does not set a timeframe for a response or reply, however the adjudicator will be able to set a process as allowed under s 20.

permitted to extend the period for the decision by agreement.”¹⁰³⁹ The jurisdictions examined establish different approaches to the duration of the adjudication process as follows:

- a) Several jurisdictions focused on the fundamental objectives of cash flow and efficiency. Singapore, Australia (East Coast) and Australia (West Coast) emphasize speed, requiring an adjudicator to render a decision in no more than **14 calendar days** or **10 business days** (depending on the jurisdiction).¹⁰⁴⁰ The time periods selected by these regimes indicates that the adjudication regime is intended to be an extension of the prompt payment regime.¹⁰⁴¹ This timing has resulted in some “due process” criticism, i.e. that there is not sufficient time to conduct necessary processes. Some commentators note that the industry has developed its own “hack” of this system, by simply agreeing to longer timelines.¹⁰⁴² In Australia (West Coast) an adjudicator has the jurisdiction to simply dismiss the adjudication if it is too complex to be resolved within the specified timeframe.¹⁰⁴³
- b) Trending towards middle ground, the U.K.¹⁰⁴⁴ and Ireland¹⁰⁴⁵ employ a **28 calendar day** process which starts to run at the time a matter is referred to the adjudicator, with extension permitted on consent where necessary. In the U.K. the referring party can consent to extend the determination period by up to 14 days for a total of **42 calendar days** (although both parties can agree to a longer extension under the *Scheme*).¹⁰⁴⁶
- c) In New Zealand, the process can take approximately **30 working days** depending on the length of time it takes for parties to file and serve relevant documents and whether there have been any extensions.¹⁰⁴⁷ Subject to any extensions agreed to by the parties, a respondent has 5 working days to serve a written response on the adjudicator from the later of: a) the date the respondent received the claim; or b) the adjudicator’s notice of acceptance.¹⁰⁴⁸ Following the receipt of a response, the adjudicator has 20 working days to make a determination.¹⁰⁴⁹ This timeline is subject to a possible extension of 10

¹⁰³⁹ Steven Cannon and Ian Black, Eversheds, “Statutory Adjudication”, December 2014, online: <http://www.eversheds.com/documents/services/construction/04020%20-%20Construction%20Article%20-%20December_V7.pdf> [Cannon and Black].

¹⁰⁴⁰ *Singapore Act*, s 17(b) provides 14 calendar days; Australia (East Coast) is 10 business days – See *New South Wales Act*, s 21(3); *Western Australia Act*, s 31(1) provides 14 calendar days, Northern Territory Act, s 33 provides 10 working days.

¹⁰⁴¹ Cannon and Black, *supra*.

¹⁰⁴² Chan ICE, *supra* at 257.

¹⁰⁴³ Note that in Western Australia for example, this discretion under section 31 is rarely exercised and the adjudicator is required to do the best he/she can in making a determination in the given timeframe as noted in the decision of *Silent Vector Pty Ltd v Squarcini* [2008] WASAT 39. Importantly, in the *Western Australia Act*, a person who is aggrieved by an adjudication decision under section 31(a) can apply to the State Administrative Tribunal for a review of the decision. Thus, a decision to exercise discretion under section 31 may trigger a review.

¹⁰⁴⁴ *U.K. Construction Act*, s 108(2)(c); *Scheme*, s 19.

¹⁰⁴⁵ *Ireland Act*, s 6(6).

¹⁰⁴⁶ *U.K. Construction Act*, s 108(2)(d); *Scheme*, s 19(1)(b) and (c); see also the *Ireland Act*, s 6(7).

¹⁰⁴⁷ *New Zealand Act*, s 46.

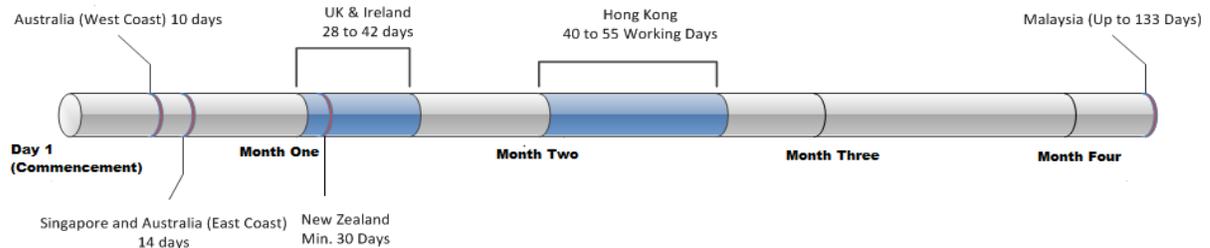
¹⁰⁴⁸ *New Zealand Act*, s 37.

¹⁰⁴⁹ *New Zealand Act*, s 46.

working days if the adjudicator determines it necessary, or longer if both parties agree to an extension.¹⁰⁵⁰

- d) The legislation proposed in Hong Kong grants the adjudicator **40 business days** to adjudicate the dispute with an option to extend the overall period, but not to exceed **55 business days** without consent of the parties.¹⁰⁵¹
- e) In Malaysia an adjudicator must reach a decision within **45 working days** from the expiry of the period for serving the response or from service of the response, whichever is later.¹⁰⁵² When you consider the maximum time available under each of the steps in the *Malaysia Act*, an adjudicator may have up to 19 weeks (133 days) to make a decision, which puts this jurisdiction at the far end of the spectrum.¹⁰⁵³

In summary, the length of the adjudication process in the jurisdictions examined falls along the following spectrum:¹⁰⁵⁴



2.3.4.3 How Are Costs Dealt With?

We have also considered the costs of adjudication. A number of the jurisdictions considered by the Review did not have enough empirical data or commentary to allow us to develop a reliable sense of the costs issue. However, it is apparent that adjudication offers significant cost savings in comparison to the costs of litigation or arbitration.

The following are some interesting publicly available statistics on adjudication costs:

¹⁰⁵⁰ *New Zealand Act*, s 46.

¹⁰⁵¹ Hong Kong Consultation Document at 36.

¹⁰⁵² *Malaysia Act*, s 12(2)

¹⁰⁵³ *Cannon and Black, supra* at 8 noting as follows: This assumes the following maximum time table (all in working days) (1) Notice of Adjudication; then (2) 10 days to seek to agree an adjudicator (s.21(a)); then (3) 5 days for nomination of adjudicator by KLRCA (s.23(1)); then (4) 10 days for negotiation of terms of appointment (s.23(2)); then (4) 10 days for the service of the Adjudication Claim (s.9(1)); then (5) 10 days for the service of the Adjudication Response (s.10(1)); then (6) 5 days for the service of the Adjudication Reply (s.11(1)); and finally (7) 45 days for the Adjudicator’s decision.

¹⁰⁵⁴ In the following graphic days represents calendar days and certain timeframes are subject to extension by agreement of the parties.

- a) In the U.K., studies have shown that the most popular ranges of fees for an adjudication were between £2,500 and £5,000,¹⁰⁵⁵ however a very close second range of fees was between £15,001 to £20,000 per adjudication.¹⁰⁵⁶ No survey reported a fee for adjudication costing more than £40,000.¹⁰⁵⁷
- b) In New Zealand statistical data shows that the adjudication process costs on average about 12.3% of the amount claimed (16% of the total amount determined);¹⁰⁵⁸
- c) The Singapore Mediation Centre’s Fee Schedule¹⁰⁵⁹ requires that, for claims valued at up to SGD\$24,000,¹⁰⁶⁰ an adjudicator may charge up to SGD\$321 (inclusive of tax) per hour,¹⁰⁶¹ to a maximum of SGD\$2,568 for the adjudication. For claims valued at above SGD\$24,000, an adjudicator is entitled to charge the previously mentioned maximum, but on a daily basis. The total adjudicator fee cannot exceed 10% of the claimed amount.¹⁰⁶²
- d) In Malaysia, if the parties and the adjudicator fail to agree on a fee schedule, Section 19(1) of the *Malaysia Act* sets the KLRCA’s standard terms of appointment and fees as the default. KLRCA’s recommended range is from RM8,400¹⁰⁶³ for a dispute of up to RM150,000¹⁰⁶⁴ to a cap of RM89,615.5¹⁰⁶⁵ for a dispute of up to RM15 million.¹⁰⁶⁶

The allocation of costs issue is addressed in Appendix C, including a consideration of who bears the costs of the adjudicator and the legal fees of the parties, what factors affect the allocation of fees, and the discretion of the adjudicator in the allocation of fees.

2.3.5 How Are Adjudicated Decisions Enforced?

In all jurisdictions considered, adjudicator’s decisions are binding on an interim basis and as such are enforceable through court processes as interim binding decisions. These processes are described in the Appendix C. However, by way of example, below we discuss the mechanics of enforcement of an adjudicator’s decision in the U.K.

¹⁰⁵⁵ Approximately \$CAD 4500 to \$CAD 9000.

¹⁰⁵⁶ Approximately \$CAD 27,000 to \$CAD 36,000.

¹⁰⁵⁷ Approximately \$CAD 73,000. See Kennedy et al, “The Development of Statutory Adjudication in the UK and its relationship with construction workload”, Glasgow Caledonian University, School of the Built and Natural Environment (2010) updated in 2011 by the same authors [Kennedy et al (2010) and Kennedy et al (2011)].

¹⁰⁵⁸ Building Disputes Tribunal, Current Trends in Adjudication, Buildlaw, online: <<http://www.buildingdisputestribunal.co.nz/site/buildingdisputes/files/BuildLaw/Issue%202/CURRENT%20TRENDS%20IN%20ADJUDICATION%20revised.pdf>>.

¹⁰⁵⁹ See Singapore Mediation Centre, “Fee Schedule”, 3rd Edition, April 2015. <<http://www.mediation.com.sg/assets/business-services/SMC-Fee-Schedule-wef-1-June-2015.pdf>>.

¹⁰⁶⁰ Approximately \$22500 CAD.

¹⁰⁶¹ Approximately \$300 CAD.

¹⁰⁶² *Ibid* at 2.1.

¹⁰⁶³ Approximately \$CAD 2700.

¹⁰⁶⁴ Approximately \$CAD 50,000.

¹⁰⁶⁵ Approximately \$CAD 29,000.

¹⁰⁶⁶ Approximately \$CAD 4.8 million. KLRCA CIPAA Circular 02, “Circular on KLRCA’s Recommended Schedule of Fees”, August 1, 2014 at 138-139.

In the U.K., the *Scheme* provides:

23.—(1) In his decision, the adjudicator may, if he thinks fit, order any of the parties to comply peremptorily with his decision or any part of it.

(2) The decision of the adjudicator shall be binding on the parties, and they shall comply with it until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement between the parties.

While an adjudicator’s decision does not have the “binding force of a judgment” it has a “temporary or provisional finality which the parties agree to respect”.¹⁰⁶⁷ U.K. courts have noted generally that, provided the adjudicator answers the question asked, his or her decision will be enforced even if it is wrong in law or based on an arithmetic error.¹⁰⁶⁸

In the 2007 decision of *Carillion Construction Ltd v Devonport Royal Dockyard Ltd*,¹⁰⁶⁹ the U.K. Court of Appeal reviewed the circumstances in which a court could decline to enforce an adjudicator’s decision. In that case, the court stated as follows:

The objective which underlies the [*U.K. Construction Act*] and the [*Scheme*] requires the courts to respect and enforce the adjudicator’s decision **unless it is plain that the question which he has decided was not the question referred to him or the manner in which he has gone about his task is obviously unfair**. It will **only be in rare circumstances that the courts will interfere** with the decision of an adjudicator.¹⁰⁷⁰ [emphasis added]

In the U.K., an adjudicator’s decision gives rise to a cause of action in favour of the parties to the adjudication. The cause of action described by Tom Owen of Keating Chambers¹⁰⁷¹ is said to have two components: a “facially valid” adjudicator’s decision and a contractual obligation on the parties to comply with such a decision.¹⁰⁷²

The *U.K. Construction Act* is silent on how an adjudicator’s decision should be enforced¹⁰⁷³. In order to enforce an adjudication decision, a claimant typically brings an action and then moves for summary judgment in that action.¹⁰⁷⁴ The court judgment obtained engages all enforcement

¹⁰⁶⁷ Davis, *supra* at 12-003.

¹⁰⁶⁸ Davis, *supra* at 12-004 citing *Bouygues v Dahl-Jensen* [2000] BLR 522; *C&B Scene v Isobars* [2002] BLR 93.

¹⁰⁶⁹ *Carillion Construction*, *supra*.

¹⁰⁷⁰ *Ibid* at para 85.

¹⁰⁷¹ Tom Owen, Keating Chambers, “Construction Adjudication Enforcement”, <<http://www.keatingchambers.com/wp-content/uploads/2016/04/ConstructionAdjudicationEnforcement-TomOwen-KeatingChambers-forWestlawUKInsight.pdf>> [Tom Owens].

¹⁰⁷² *Ibid* citing section 108(3) of the *U.K. Construction Act* and section 23(2) of the *Scheme*; see also *VHE Construction Plc v RBSTB Trust Co Limited* [2000] 70 Con LR 51 at [54].

¹⁰⁷³ Summary enforcement is often included in either the contract directly as a provision, or alternatively, through a standard form or through a procedural guide that is incorporated by reference (e.g. provision 32 of the U.K. Construction Industry Council Model Adjudication Procedure entitles the parties to the redress set out in the adjudicator’s decision and to seek summary enforcement, whether or not the dispute is to be finally determined by legal proceedings or arbitration) CIC Model Adjudication Procedure, 5th edition, 2011 at s 32, p 4 [Model Procedure].

¹⁰⁷⁴ Part 24 of the Civil Procedure Rules 1998 (UK), No 3132, L 17. See also HM Courts & Tribunals Service, “Technology and Construction Court Guide, 2nd ed, 3rd rev (3 March 2014) at s 9.

methods available in respect of a court judgment (e.g. charging orders, warrants of execution, third party debt orders and attachment of earnings orders).¹⁰⁷⁵

In 2010, it was estimated that only about **five percent** of adjudicated decisions in the U.K. were the subject of enforcement applications.¹⁰⁷⁶

Other jurisdictions have provided as follows in relation to enforcement:

- a) In Australia and Singapore an award can only be stayed (i.e. enforcement refused) if the conditions precedent for the adjudicator’s jurisdiction have not been met and/or there has been a material breach of natural justice.¹⁰⁷⁷
- b) Hong Kong’s proposed legislation includes a provision that allows adjudicator’s decisions to be enforced in the same way as judgments of the court. The proposed legislation will not allow set off or deduction and only allows responding parties a short period within which to lodge any challenge to the validity of an adjudicator’s decision.¹⁰⁷⁸
- c) In Ireland, the decision of an adjudicator is (unless otherwise agreed) binding on the parties for all purposes and may be relied upon by any party “by way of defence, set-off, or otherwise, in any legal proceedings”.¹⁰⁷⁹

2.3.6 The Interface Between Adjudication and Lien Legislation

Most of the jurisdictions that have adopted adjudication do not have lien legislation, including the following: The U.K., Ireland, Hong Kong, Singapore and Malaysia. In New Zealand, the legislation which was in place to provide a measure of security for payments in the construction industry was repealed in the decade leading up to the adoption of adjudication.¹⁰⁸⁰

Certain Australian states and territories¹⁰⁸¹ have a form of lien; however these liens are in relation to unpaid progress payments¹⁰⁸² or in relation to amounts due pursuant to an adjudication award and are not directly comparable to a construction lien as conceived of by the *Act*.

¹⁰⁷⁵ Tom Owens, *supra* citing *Macob Civil Engineering Ltd v Morrison Construction Ltd* (1999) 1 T.C.L.R. 113; see Civil Procedure Rules, online: <<https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part24>>.

¹⁰⁷⁶ Davis, *supra* at 12-003.

¹⁰⁷⁷ Chan ICE, *supra* at 5.

¹⁰⁷⁸ Hong Kong Consultation Document at 42.

¹⁰⁷⁹ *Ireland Act*, s 6(12).

¹⁰⁸⁰ According to a 1999 paper prepared by the Law Commission of New Zealand entitled *Protecting Construction Contractors NZLC SP3*, the 1939 legislation had been repealed in 1987 following a lack of consensus to a process of the Ministry of Justice to reform a revised lien act. When agreement within the industry was not possible, and the Minister noted the situation seemed hopeless, a repeal of the act of the Act was recommended. In the years that followed, issues in the construction industry were rife, ultimately leading to numerous calls for legislative action resulting ultimately in the Construction Contracts Act 2002, online: <[tp://www.nzlii.org/nz/other/nzlc/sp/SP3/SP3.pdf](http://www.nzlii.org/nz/other/nzlc/sp/SP3/SP3.pdf)>.

¹⁰⁸¹ (Northern Territory, Western Australia, Victoria, Australian Capital Territory, Queensland and Tasmania)

¹⁰⁸² See for example, *New South Wales Act*, s 11(3).

South Australia maintained its lien legislation, even after the introduction of adjudication. Under the *Worker's Liens Act 1893*, a worker, contractor or subcontractor is entitled to a registrable lien for the contract price or part thereof, so far as accrued due, on the estate or interest in land on which work was performed or materials provided, owned by any owner or occupier who assented expressly or implicitly to such work.¹⁰⁸³ A worker or subcontractor is also entitled to a charge on any money payable and owing for work done or materials supplied under the construction contract.¹⁰⁸⁴

In South Australia, the *Worker's Liens Act 1893* and the *Building and Construction Industry Security of Payment Act 2009* work side-by-side.¹⁰⁸⁵ Contractors have a choice of procedures in the two Acts to enforce their rights to progress payments.¹⁰⁸⁶ Under the lien legislation, a contractor or subcontractor is entitled to lien under section 5 as follows:

- A contractor or sub-contractor shall have a lien for the contract price, so far as accrued due, on the estate or interest in land of any owner or occupier in each of the following cases:
- Where the work is done, with the assent, express or implied, of the owner or occupier to the land or to any fixture thereon:
- Where the materials are, with the assent, express or implied, of the owner or occupier, used or intended to be used in or about work done, or intended to be done, to the land or to any fixture thereon.

The legislation in Queensland and Western Australia provides for a charge in the nature of a security interest in favour of an employee over monies due to an employer from the principal.¹⁰⁸⁷ Queensland also allows for subcontractors to secure payment for work performed under the *Subcontractors' Charges Act 1974*. As noted by the Economics Reform Committee of the Australian Senate, the “effect of making a claim under [the *Subcontractors' Charges Act 1974*] is that a sum of money is taken out of circulation and charged for the benefit of the subcontractor. This puts the subcontractor in the position of a secured creditor.”¹⁰⁸⁸ This limited charge legislation has been noted to be of “little benefit in practice” and is often not used as the adjudication regime is the preferred alternative.¹⁰⁸⁹

¹⁰⁸³ *Worker's Liens Act 1893*, s 4(1) (for workers) and s 5 (for contractors or subcontractors).

¹⁰⁸⁴ *Worker's Liens Act 1893*, s 7(1),(2).

¹⁰⁸⁵ MinterEllison, “Construction Law Made Easy”, Security of Payment Legislation South Australia, online: <<http://www.constructionlawmadeeasy.com/SecurityofPaymentSA>>.

¹⁰⁸⁶ *Ibid.*

¹⁰⁸⁷ NT Discussion Paper, *supra* at 10.4 citing the *Workmen's Wages Act 1898* (ss 4, 5) and *Workplace Relations Act 1997* (Qld) (Ch. 9, Pt 2, Divn 2.).

¹⁰⁸⁸ Economics Reform Committee of the Australian Senate, *Insolvency in the Australian Construction Industry*, December 2015 at 126.

¹⁰⁸⁹ NT Discussion Paper, *supra* at 10.6.1 citing 7 S.A. Select Committee at 4 and see further the discussion in “The Subcontractors' Charges Act 1974: Yet More Judicial Clarification” (August/September 1997) 55 ACLN 52-58 cf. the recommendations of the (Queensland) Implementation Steering Committee, “Securing Our Industry's Future” (October 1997), quoted in Pyman & Voll at 24.

In Tasmania, a form of attachment is created which is dependant for its final operation on a judgment obtained under the *Contractors' Debts Act, 1939*. This system operates in tandem with Tasmania's adjudication regime.

Other Australian states and territories had lien legislation before adjudication was introduced, but repealed such legislation. In 1996, the Australian Procurement and Construction Council Inc. ("APCC") (the council of departments responsible for procurement and construction policy of the Australian Federal, State and Territory Governments) in its review of the Australian construction industry, noted that "the use of statutory liens is not (or no longer) an appropriate mechanism for securing financial protection in the building and construction industry."¹⁰⁹⁰

The Northern Territory, for example, elected to repeal its lien legislation. In a discussion paper by the Northern Territory Department of Justice,¹⁰⁹¹ it was noted that: "related legislation in Queensland, *The Contractors' and Workers' Lien Act 1906* (Qld), [was] judicially described as 'a lawyer's nightmare' which should 'be repealed' and was repealed in 1964."¹⁰⁹² When the Northern Territory legislation was repealed in 2004, commentators in the construction industry noted that this legislation was "outdated and largely ineffective, in light of modern security of payment legislation".¹⁰⁹³

Western Australia had considered lien legislation but concluded that it should not be introduced in part because it would "not materially assist subcontractors and would tend to create more difficulties than it seeks to solve."¹⁰⁹⁴

Based on the regimes in place in other jurisdictions, it is clear is that the securitization regimes existing in these jurisdictions are not comparable to Ontario lien legislation. Accordingly, the adoption of adjudication into the *Act* in Ontario's would be unprecedented in terms of its formulation and requires a "made-in-Ontario" solution. In order to develop such a solution, we have taken into account the submissions of Ontario stakeholders, which are summarized below.

3. Summary of Stakeholder Views

The EKOS Survey data reflected very positive feedback on adjudication as a concept.¹⁰⁹⁵ While not all stakeholders supported adjudication outright, most were very supportive and the balance expressed an interest in adjudication as an alternative.

Those who were supportive of adjudication saw it was a mechanism to improve the speed of dispute resolution and cash flow including the following:

¹⁰⁹⁰ *Ibid* at 10.2.1 citing APCC at 10.

¹⁰⁹¹ NT Discussion Paper

¹⁰⁹² *Ibid* at 9.3.

¹⁰⁹³ Julian Bailey, *Construction Law* (Routledge: London, 2011) at 944, footnote 308.

¹⁰⁹⁴ NT Discussion Paper at 10.2.1 citing the LRC 1974 WA Report.

¹⁰⁹⁵ EKOS Survey at Q92 and Q93.

- a) Prompt Payment Ontario endorsed adjudication in its submissions and in its consultation meeting.¹⁰⁹⁶ Prompt Payment Ontario submitted that all participants in the construction industry “need a remedy for disputes that is impartial, technically competent, speedy, efficient and cost-effective” and noted that other jurisdictions appeared to have considerable success with adjudication in this regard.¹⁰⁹⁷
- b) The Greater Toronto Sewer and Watermain Contractors Association supported mandatory alternative dispute resolution mechanism, such as adjudication, based on its successful application in the U.K and emphasized that “access to timely and efficient dispute resolution process(es) is paramount to mitigating delays in payment and ensuring that funds are properly disbursed”.¹⁰⁹⁸
- c) The Carpenter’s District Council of Ontario noted that “any adjudication model that is quick and inexpensive is favored” and that “adjudication would take away the fear that subcontractors have” in initiating lien claims.¹⁰⁹⁹
- d) The Council of Ontario Construction Associations supported adjudication, subject to the consideration of certain possible exclusions (e.g. no adjudication for contracts with consumers and no adjudication for funds previously certified as being payable by a payment certifier).¹¹⁰⁰
- e) The Ontario General Contractors Association encouraged consideration of adjudication, although noted that certain specific issues would need to be addressed such as: interplay with the lien legislation, developing qualified adjudicators, potential costs, adjudication in relation to insolvent parties, enforcement and adjudication in the context of AFP projects.¹¹⁰¹
- f) The OBA CLA Reform Committee suggested that adopting a form of adjudication could help address current litigation cost issues by having “disputes dealt with in real time during the project, thereby reducing the chances that the disputes will escalate out of control”¹¹⁰² however, it noted that adjudication would need to be carefully dovetailed with the existing lien process.¹¹⁰³
- g) The Surety Association of Canada supported adjudication but suggested that there should be the option for parties to agree to something more efficient than what the *Act* ultimately provides.¹¹⁰⁴ The Surety Association of Canada suggested that we consider adjudication

¹⁰⁹⁶ PPO Submissions to the CLA Review at 8, 47; PPO Supplemental (New Issues) Submissions to the CLA Review at 6. PPO noted that that all AFP projects should be subject to adjudication (PPO Submissions at 43).

¹⁰⁹⁷ PPO Supplemental (New Issues) Submissions to the CLA Review at 6.

¹⁰⁹⁸ GTSWCA Submissions to the CLA Review at 6.

¹⁰⁹⁹ Carpenter’s District Council of Ontario – Official Summary of Consultation Meeting at 2.

¹¹⁰⁰ COCA Submissions to the CLA Review at 3, 21.

¹¹⁰¹ OGCA Submissions to the CLA Review at 7.

¹¹⁰² OBA CLA Reform Committee Submission to the CLA Review at 32.

¹¹⁰³ OBA CLA Reform Committee Submission to the CLA Review at 14.

¹¹⁰⁴ SAC Submissions to the CLA Review at p. 8, 15, and 20.

in relation to claims for set-off, progress payment complaints and performance bond claims.¹¹⁰⁵

Some stakeholders were more cautious in their approval or were wary of a potential infringement on the freedom of contract, including the following:

- a) The City of Toronto noted that “adjudication of owner’s claims may lead to many mini-hearings with focus of the participants shifting from completing the process to making/defending the claims”.¹¹⁰⁶ The City of Toronto preferred an elective adjudication system.
- b) The Toronto Transit Commission, Infrastructure Ontario, Metrolinx and Ministry of Transportation suggested generally that the parties ought to be able to contract for the type of ADR that best fit their situation.¹¹⁰⁷ Metrolinx noted that any solutions to a court process should be economical and not further burdensome from a financial, time or resource perspective.¹¹⁰⁸
- c) Infrastructure Ontario suggested the possibility of an exception to the mandatory adjudication regime, if recommended, for AFP projects.¹¹⁰⁹ Infrastructure Ontario acknowledged that its current forms of Project Agreements include adjudication.¹¹¹⁰

As of January 2016, all Ministry of Transportation contracts will provide for a referee process, which has many strong similarities to the U.K. adjudication system under the *U.K. Construction Act*. The Ministry’s referee system was adopted from the British Columbia Department of Transportation model. The Ministry of Transportation referee model will generate binding interim decisions in relation to its construction contracts. The Ministry of Transportation has spent a significant amount of time and effort consulting with stakeholders (including the Ontario Road Builders’ Association and the Consulting Engineers of Ontario) in order to develop these new contract forms. Further information on the referee system can be obtained directly from the Ministry of Transportation.¹¹¹¹

Certain stakeholders made submissions in relation to the enforceability of the decision of an adjudicator:

- a) The Council of Ontario Construction Associations’ suggested that an adjudicated decision should be enforceable even if there are alleged errors of law or fact provided that

¹¹⁰⁵ Surety Association of Canada Submissions to the CLA Review at 8.

¹¹⁰⁶ City of Toronto Submissions to the CLA Review at 8.

¹¹⁰⁷ TTC Submissions to the CLA Review at 38, Infrastructure Ontario Attachment to Submissions at 23, MTO Submissions to the CLA Review at 6, and Metrolinx Submissions to the CLA Review at 5.

¹¹⁰⁸ Metrolinx Submissions to the CLA Review at 5.

¹¹⁰⁹ Infrastructure Ontario Submissions to the CLA Review at 5.

¹¹¹⁰ An example of such a provision from a recent Infrastructure Ontario Project Agreement can be found at the Infrastructure Ontario website. IO Submissions to the CLA Review at 4 citing Peel Memorial Centre Project Agreement, online: <<http://www.infrastructureontario.ca/WorkArea/DownloadAsset.aspx?id=2147492195>>.

¹¹¹¹ MTO Contact Page, online: <<http://www.mto.gov.on.ca/english/about/contact-us.shtml>>.

the ruling of an adjudicator is only binding until the end of a contract.¹¹¹² The Council of Ontario Construction Associations also submitted that adjudicators should be able to rule on their jurisdiction without a right of appeal noting that a “slip rule” should be implemented to permit adjudicators to correct inadvertent clerical errors in their awards.¹¹¹³

- b) The Surety Association of Canada submitted that a fast track adjudication process for resolution of payment disputes should be binding on an interim basis subject to appeal or review at some future milestone or contractual event.¹¹¹⁴ The Council of Ontario Construction Associations stated that allowing appeals on these grounds would frustrate the objective of resolving disputes on a summary basis.¹¹¹⁵
- c) Prompt Payment Ontario submitted that the adjudicator’s decision should be “binding and enforceable upon issuance, with no right of appeal therefrom, or other review thereof in any judicial process, until the earlier of the completion of the claimant’s work or the completion of the project”.¹¹¹⁶

4. Analysis and Recommendations

The current dispute resolution process under the *Act* attracted a significant degree of criticism during the stakeholder Consultation Process. Many expressed the view that, under the current regime, it simply takes too long and costs too much. Lien proceedings are well understood, but inefficient, and the industry is frustrated with this situation.

The great benefit of adjudication lies in its potential to quickly unlock contractual gridlock in regards to issues such as disputed change orders, and set-offs, allowing funds to flow promptly down the contractual pyramid. Distinct advantages of adjudication include:¹¹¹⁷ speed¹¹¹⁸, continuity¹¹¹⁹, reduced cost¹¹²⁰, increased flexibility¹¹²¹, privacy¹¹²², familiarity¹¹²³, availability¹¹²⁴, choice of decision maker and the speed and certainty of enforcement.¹¹²⁵

¹¹¹² COCA Supplemental (New Issues) Submissions to the CLA Review at 3.

¹¹¹³ COCA Supplemental (New Issues) Submissions to the CLA Review at 3.

¹¹¹⁴ Surety Association of Canada Submissions to the CLA Review at 8.

¹¹¹⁵ COCA Supplemental (New Issues) Submissions to the CLA Review at 3.

¹¹¹⁶ PPO Supplemental (New Issues) Submissions to the CLA Review at 7.

¹¹¹⁷ See the collective discussion of advantages in the UK at Pickavance at 3.4.2.

¹¹¹⁸ Often a key advantage of adjudication - the relatively short timeframes of adjudication compare favourably to litigation and arbitration in most circumstances.

¹¹¹⁹ The process is relatively fast so the gridlock inherent in a litigation or arbitration regime is contained to a short period, thus allowing the project to continue with minimal interruptions.

¹¹²⁰ Although it is noted that costs may depend on the nature of the dispute, adjudication is typically cheaper than arbitration or litigation (particularly when the timetable is not extended).

¹¹²¹ While dependent on specifics of the contract and form of adjudication, adjudication is typically flexible to the type of dispute being adjudicated. In the UK for example, all sorts of disputes may be, and regularly are, resolved via adjudication. Parties are free to agree on adjudication procedure so long as mandatory minimum requirements are met.

¹¹²² Adjudication is similar to arbitration and mediation in that the submissions, hearings and decision are not accessible to the public.

In other jurisdictions, adjudication is reported to have had an unexpectedly transformative effect by encouraging proper and prompt valuation of claims (for payment or otherwise) even in circumstances where litigation or arbitration is inevitable.¹¹²⁶ Some commentators have noted that adjudication seems to make parties to a construction contract “think more carefully before adopting intransigent or unreasonable positions.”¹¹²⁷

When originally implemented, adjudication was an unprecedented step,¹¹²⁸ but now adjudication is well established and well understood. Statutory adjudication has been utilized successfully in the U.K. for almost 20 years successfully. It works.

In fairness, it must be recognized that adjudication has been noted as having certain disadvantages including¹¹²⁹: some complain that the process is too summary,¹¹³⁰ some say that the quality of submissions, adjudicators and ANBs is not yet there¹¹³¹, some say the summary process is ill-suited to large disputes¹¹³², some criticize the interim nature of the remedy¹¹³³ and irrecoverable costs¹¹³⁴, ambush tactics¹¹³⁵, no automatic right to interest¹¹³⁶, no statutory

¹¹²³ The concept of adjudication is now well established internationally. In applying adjudication locally, the Ontario construction industry will have access to a wealth of commentary and procedural know how that has been established in jurisdictions such as the UK, New Zealand and others.

¹¹²⁴ In the UK for example, adjudication can be commenced at any time. Subject to the proposed mechanics of adjudication, a key benefit of the concept is the availability at various points in a project.

¹¹²⁵ In the UK, the court system has developed a fast track procedure for the enforcement of adjudication decisions on an interim binding basis. Typically, the court will reach a decision and publish its judgment in no more than 8 weeks.

¹¹²⁶ See for example, the Hong Kong Consultation Document prepared by the Hong Kong Development Bureau, 2015.

¹¹²⁷ Pickavance, *supra* at 25.03 discussing the *New Zealand Act*.

¹¹²⁸ FCIARb N A N Ameer Ali, *Statutory Adjudication Under Nine Commonwealth Jurisdictions – A User’s Perspective on Legislative Drafting Style*, CALC Conference (2010), online: <http://www.opc.gov.au/calc/docs/Loophole_papers/Ali_Dec2010.pdf> citing Uff, J QC suggesting in relation to statutory adjudication: ‘It is difficult to identify any precedent for statutory intervention of this sort, into contracts made between private individuals.’ Uff, J QC, *Compulsory Adjudication and Its Effects on the Construction Industry in Contemporary Issues in Construction Law Volume II - Construction Contract Reform: A Plea for Sanity*, Edited by Uff, J QC, Construction Law Press, London, 1997 at 39.

¹¹²⁹ See author James Pickavance’s discussion of disadvantages in the U.K. at Pickavance, *supra* at 3.4.3.

¹¹³⁰ While speed is certainly a benefit, it can sometimes be perceived as a detriment. The tight timelines limit the ability for parties to prepare a reply and may affect the quality of submissions/evidence.

¹¹³¹ As further discussed in sections 3.35-3.37 of Pickavance, *supra* the speed of the adjudication process can result in the application of what is known colloquially as ‘rough justice’.

¹¹³² In some cases, for example where a dispute is referred in relation to a large projects’ final account, adjudication may not be appropriate without extended timelines. In these cases, parties often have contractual provisions to address large disputes or the disputes are otherwise dealt with through litigation or arbitration.

¹¹³³ In the UK, it was first perceived that the interim nature of the decision meant the process was a waste of time and/or money when compared to the final determinations of a judge or arbitrator. That said, author Pickavance notes that the vast majority of adjudications provide a decision that both parties accept, and in effect, the decision becomes final.

¹¹³⁴ In the U.K., depending on the modality of adjudication adopted by the parties (i.e. Scheme or otherwise), adjudicators might not have the power to direct the payment of professional costs incurred during adjudication (unless they provide for such a requirement under the contract). Depending on the size of the dispute and related adjudication, this is sometimes perceived as a disadvantage.

joinder¹¹³⁷, no non-contractual claims¹¹³⁸, and the fact that "evidence" given to an adjudicator is not under oath.¹¹³⁹

However, in our view, the benefits to be derived from targeted adjudication would clearly outweigh these potential disadvantages.

In the jurisdictions considered above, adjudication allows parties to craft their own adjudication provisions, but provides for minimum statutory standards. These minimum standards are generally set out in a "scheme" that deals with the mechanics of the application of adjudication. For entities that are already using adjudicative models, such as Infrastructure Ontario or the Ministry of Transportation, they would retain the contractual freedom to craft their own solutions.

Recommendations

- We recommend that adjudication be implemented as a targeted interim binding dispute resolution method available as a right to parties to construction contracts and subcontractors in both the public and private sectors in Ontario.
- In conjunction with our recommendations in Chapter 8 – Promptness of Payment in relation to prompt payment, we recommend that the *Act* allow the parties the freedom of contract to agree on provisions to be included in their contract for both promptness of payment and adjudication so long as such provisions are consistent with the *Act*. Should such provisions not be consistent with the provisions of the *Act*, a statutory default scheme should be implied into the contract (as further discussed below).
- The statutory default scheme should be set out in a regulation to the *Act*.

5. “Made-in-Ontario’ Adjudication

Below we articulate the key elements of a “made-in-Ontario” adjudication system, drawing on the experiences of other jurisdictions and the feedback received from stakeholders.

¹¹³⁵ In the U.K. commentators note that some referring parties can ‘ambush’ another party by spending a long period of time preparing a notice of adjudication where in contrast, the responding party has relatively little time to respond.

¹¹³⁶ Adjudicators in the U.K. cannot award interest on money decided to be paid barring: a provision in the contract; a specific statutory entitlement; a specific interest based dispute; or if the awarding of interest is contained within the adjudication procedure adopted by the parties.

¹¹³⁷ Unless the parties agree, adjudication is not available where there is a dispute involving parties under separate contracts. In such situations (i.e. where an owner has claims against the contractor and subcontractor), absent consent, the owner will commence two separate adjudications.

¹¹³⁸ Statutory adjudication is only available for certain disputes arising from the contract, depending on the nature of the legislative regime adopted.

¹¹³⁹ Adjudication is unlike litigation or arbitration in that evidence is not generally given under oath.

5.1 Who Can Require An Adjudication?

As discussed above, the jurisdictions examined that utilize adjudication fall into two camps: 1) those allowing **any party** to refer a construction dispute to an adjudicator;¹¹⁴⁰ or 2) those allowing **only any unpaid party** to refer a construction dispute to an adjudicator.¹¹⁴¹

In our view, a more inclusive approach seems to make sense in the Ontario context, such that adjudication should be available to any party to a construction contract.

Some stakeholders raised concerns about how adjudication works with multiple participants in the construction pyramid. Most of the jurisdictions canvassed do not contemplate multi-party adjudications. Adjudication is rooted in privity of contract. Multi-party adjudications do exist, but are relatively rare.¹¹⁴² It has been said that the rarity is largely a result of the desire to have a decision rendered in a relatively short period of time (i.e. 28 to 42 calendar days).¹¹⁴³ In the U.K., a design professional may be joined in an adjudication by the owner or contractor if there is a materially identical and cross referential multi-party clause in the dispute resolution portion of both the contract with the designer and the contract with the general contractor. Without the use of a clause such as this, under the U.K. legislation there is no mechanism to compel a third party to join in the adjudication.¹¹⁴⁴

In the Ontario context, a concern was raised about a need for back-to-back adjudications in relation to disputes as between an owner and a general contractor that flow down to a subcontractor. Given that an adjudicator's decision in relation to a dispute as between an owner and general contractor is binding on an interim basis, it is our view that it makes sense for an adjudication between that general contractor and its subcontractor(s) to take place on a back-to-back basis.

A further issue raised by stakeholders was how adjudication would account for multiple issues or 'disputes' occurring simultaneously on a project. Typically, in the U.K. (and other jurisdictions) disputes are addressed one at a time in adjudication, unless the parties agree otherwise, which is a practical way of proceeding if disputes are to be addressed swiftly. This issue was recently considered in the U.K. decision of *Deluxe Art & Theme Ltd v Beck Interiors Ltd*.¹¹⁴⁵ In this decision, the Technology and Construction Court held that "[o]n its face, paragraph 8(1) [of the

¹¹⁴⁰ This approach is modelled after the UK experience with adjudication and has since been adopted in some degree by New Zealand, Australia (West Coast), Ireland, Malaysia and Hong Kong (proposed).

¹¹⁴¹ This model started in Australia (East Coast) and has since been adopted in Singapore.

¹¹⁴² Lexis PSL Dispute Resolution, Construction disputes: commencing and progressing an adjudication, online: <<http://www.lexisnexis.com/uk/lexispsl/disputeresolution/document/393750/55KX-HP91-F18B-806S-00000-00/Multiple-parties>> [Lexis PSL Construction].

¹¹⁴³ *Ibid.*

¹¹⁴⁴ Importantly, in the UK example, the both contracts that have a joinder or multi-party clause would have to meet the definition of a "construction contract" in order for the clauses to be effective.

¹¹⁴⁵ [2016] EWHC 238 (TCC) (12 February 2016), online: <<http://www.bailii.org/ew/cases/EWHC/TCC/2016/238.html>> [Deluxe Art].

Scheme] allows the adjudicator to deal with more than one dispute at the same time, but only with the consent of all the parties.”¹¹⁴⁶ As there was no consent, the Technology and Construction Court did not enforce the adjudicator’s decision.

Recommendations

- Any party to a construction contract or subcontract should be given the right to adjudicate disputes arising under that contract or subcontract.
- Back-to-back adjudications should be permitted at the owner-general contractor and general contractor-subcontractor levels.
- Multi-issue adjudication should be permitted only through consensual contractual arrangements.

5.2 Who Can Adjudicate a Dispute and How is the Adjudicator Nominated?

The U.K. experience is that adjudicators must be able to appreciate complex legal and factual scenarios and quickly and accurately identify, isolate and analyze determinative issues.¹¹⁴⁷ Subject matter knowledge is essential,¹¹⁴⁸ as is ‘due process’ knowledge.

5.2.1 Who Can Adjudicate a Dispute?

In the U.K., adjudicators are natural persons, acting in their personal capacity,¹¹⁴⁹ who understand the construction process; understand how construction contracts work; and can apply that knowledge in producing decisions that parties can either accept as resolving their dispute or use as a basis for such resolution.¹¹⁵⁰ Various training programmes are offered by ANBs in order to become qualified as an adjudicator. That said, there are no prescribed requirements for an adjudicator under the *U.K. Construction Act*. This contrasts with all other jurisdictions, which have explicit requirements for adjudicators including training certifications, professional qualifications, number of years of experience, etc. We are of the view that explicit criteria will assist in ensuring that Ontario develops a well-qualified group of adjudicators, but that, in order to get the process underway, an initial pool of adjudicators should be created, as was done in the U.K.

¹¹⁴⁶ *Deluxe Art* at para 26.

¹¹⁴⁷ *Pickavance, supra* at 9.81.

¹¹⁴⁸ *Pickavance, supra* at 9.81-9.82.

¹¹⁴⁹ *Scheme* at para 4. Note, According to *Pickavance*, the rationale is that the role of adjudicator must be carried out by one person, as opposed to a panel, team or partnership. This does not mean that an individual cannot work with a company or partnership, nor does it mean that the individual cannot address the parties on his or her firm letterhead or solicit assistance from his team members, so long as he alone retains decision making responsibility. In addition, in the UK, the company or firm could also potentially administer his fees and/or recover them for him. (*Pickavance, supra* at 9.72).

¹¹⁵⁰ *Riches & Dancaster, supra* at 144-145.

Recommendations

- We recommend that the Ministries select a first tranche of eminently qualified individuals based in key centres such as Ottawa, Toronto, London and Windsor, with a distinct set of criteria (similar to those set out below) to act as the group of initial adjudicators until the training and qualification system described below is fully implemented.

- We recommend that an Ontario adjudicator should:
 - be a natural person;
 - not be a party to the disputed construction contract and have no legal conflict of interest (or disclose any conflict of interest and obtain the express prior consent of the participating parties);
 - be a member in good standing of a self-governing professional body, such as engineer, architect, accountant, lawyer, or quantity surveyor;
 - have at least 7 years of relevant working experience serving the Ontario construction industry;
 - have successfully completed a standardized Ontario training course and thereafter have received a certificate of authorization to adjudicate from the relevant body governing the Act (i.e. the Ministry or prescribed authorized nominating authority), renewable periodically upon proof of continuing education and a clear record; and
 - not be otherwise disqualified (i.e. by reason of bankruptcy, criminal conviction or for any other prescribed unsuitability).

5.2.2 How is the Adjudicator Nominated?

In nominating an adjudicator, there are two issues to consider: (1) timing; and (2) process.

In respect of timing, an adjudicator can either be nominated at the outset of a project (as a “standing adjudicator”), at any time or when a dispute arises. In the U.K, parties can avail themselves of any of these opportunities to select an adjudicator. In other jurisdictions however, the adjudicator may not be selected until a dispute arises.¹¹⁵¹ Appointing an adjudicator when the dispute arises is a more sensible approach as it allows the parties to select an adjudicator who is available at the time and is suited to address the dispute at issue. It also avoids inequality of bargaining power that may exist at the outset of contractual negotiations.¹¹⁵²

¹¹⁵¹ See for example, the *New Zealand Act*, s 33;

¹¹⁵² Hong Kong Consultation Document at p 41.

Several jurisdictions provide the parties with a short period of time in which to agree on an adjudicator following the notice of adjudication.¹¹⁵³ In the absence of such agreement in most jurisdictions, adjudicators are appointed following a request by a party to either an ANB or an ANA. Following such a request, the ANB or ANA is typically allotted a brief amount of time in which it must communicate to the parties the selection of an adjudicator.¹¹⁵⁴

In the jurisdictions canvassed, a number of ANAs or ANBs exist and adjudicators may sign up on the lists of more than one ANB or ANA. In the U.K. for example, there are over 20 ANBs¹¹⁵⁵ of various sizes and forms managing approximately 847 registered adjudicators (as of 2015). These ANBs provide training programs. A key benefit to such a scheme is that administrative support and funding for the statutory adjudication process comes from the private sector.

There are however some issues with this approach. One issue that has been raised in relation to multiple ANBs/ANAs is the resulting variation in quality of adjudicators because not all of these bodies are equal. In the U.K. the government has deliberately chosen not to regulate ANBs or adjudicators (thus taking no part in training or standardization) which compounds the problem of variations in quality of adjudicators and a lack of standardization though ANBs can ameliorate this problem through self-regulation through their member associations.¹¹⁵⁶ Typically, a referring party selects the ANB to use to nominate an adjudicator in jurisdictions where there is more than one such body, which can result in perceived procedural unfairness.¹¹⁵⁷

To avoid any perceived unfairness, the party delivering a notice of adjudication could be required to propose the name of an adjudicator in the notice of adjudication. The parties would then have two (2) business days to agree on an adjudicator, failing which either party would be able to request that the ANA appoint an adjudicator. The ANA would then appoint an adjudicator within five (5) business days. The adjudicator nominated by the ANA (or the parties, if they agree) would then have two (2) business days to confirm his or her availability. The party that issued a notice of adjudication would then have five (5) days from the date of the appointment of the adjudicator to refer the matter to the appointed adjudicator, as discussed in the process section below.

In terms of the body that appoints adjudicators, given the size of the Ontario construction market, we suggest one body (i.e. an Adjudicator Nominating Authority) is appropriate rather than the multiple bodies in place in jurisdictions such as the U.K.

¹¹⁵³ See for example, *New Zealand Act*, s 33 (5 days); *Ireland Act*, s 6(3) (5 days); *Malaysia Act*, s 21 (10 days); *Singapore Act*, s 14(3) (7 days).

¹¹⁵⁴ See for example, *Scheme*, s 5 (5 days); *Western Australia Act*, s 28 (5 days); *New South Wales Act*, s 17(6) (as soon as practicable); *Malaysia Act*, s 23(1) (5 working days).

¹¹⁵⁵ See for example, details of 15 prominent ANBs at Appendix 6 of Pickavance, *supra* at 571.

¹¹⁵⁶ Leslie J. Edwards, Richard N.M. Anderson, *Practical Adjudication for Construction Professionals*, 2002 at p. 105.

¹¹⁵⁷ *Ibid.*

In Ontario it may make sense to have the adjudication nomination function administered by the Ministry of the Attorney General. Alternatively, establishing a single Ontario Adjudicator Nominating Authority to be managed and administered by a private entity may allow the government to achieve some cost and administrative savings.

One of the concerns raised in the early years of U.K. adjudication was the adjudicator's immunity from liability. The experience in the U.K. demonstrates that to secure and encourage the most talented adjudicators, such individuals must be immune from liability in the exercise of their functions, as long as they do not act in bad faith. This has been implemented in the U.K.¹¹⁵⁸ and other jurisdictions. As well, in jurisdictions such as New Zealand "[a]n adjudicator may not be required to give evidence in any civil proceedings on anything connected with an adjudication that has come to his or her knowledge in the course of adjudication proceedings."¹¹⁵⁹ Such measures make sense as a way to ensuring that adjudicators are not subjected to law suits unnecessary involvement in future proceedings.

Recommendations

- An adjudicator should be nominated after a dispute has arisen, not at the outset of a Project.
- An adjudicator should be named in the Notice of Adjudication by the party delivering the notice.
- The parties should have two (2) Business Days after delivery of the Notice of Adjudication to agree on an adjudicator, failing which either party would request that the Adjudicator Nominating Authority appoint an adjudicator within five (5) Business Days.
- We recommend the creation of a single official Authorized Nominating Authority that will administer the appointments, certification and training of all adjudicators in Ontario to be administered either by the Ministry of the Attorney General or by a private entity designated by the Ministries as an Adjudicator Nominating Authority.
- Adjudicators should have immunity from liability in relation to their decisions and should not be compelled to give evidence in civil proceedings.

¹¹⁵⁸ Other fundamental principles in the U.K. include for example, that the adjudicator is required to act impartially and inquisitorially and that the decision of the adjudicator is binding until the dispute is finally determined by legal proceedings, by arbitration or by agreement. See Gould & Linneman, *Ten Years on: Review of Adjudication in the United Kingdom* (2008).

¹¹⁵⁹ *New Zealand Act*, s 69.

5.3 What Disputes Get Adjudicated?

Internationally, there are a number of schools of thought in terms of what kinds of disputes can be adjudicated. These schools of thought range over a spectrum, at one end of which are jurisdictions like the U.K. where a dispute arising under the contract¹¹⁶⁰ can be adjudicated to the other end where only disputes in relation to certain types of payment claims are adjudicated (as in the Australia (East Coast) Model).

As noted above, in the U.K., parties can refer any dispute (that includes any difference) that arises under a construction contract to adjudication. As to what constitutes a “construction contract”, the U.K. Construction Act defines a construction contract to be an agreement for the carrying out of, arranging for, or providing labour for construction operations,¹¹⁶¹ and includes contracts for architectural or engineering work, surveying work, design, landscaping or decoration work. Other jurisdictions, such as New Zealand, Malaysia, Singapore, and Hong Kong use broad definitions of what constitutes a construction contract. As described in Appendix C, the legislation in some jurisdictions carves out certain types of contracts from adjudication. For example, contracts of employment are excluded in many jurisdictions (e.g. U.K., Australia (New South Wales) and Singapore).

In Ontario, the word “contract” is defined in the Act to mean “the contract between the owner and the contractor, and includes any amendment to that contract”.¹¹⁶² A subcontract is defined as “any agreement between the contractor and a subcontractor, or between two or more subcontractors, relating to the supply of services or materials to the improvement and includes any amendment to that agreement”.¹¹⁶³ To give these concepts more content, one must look to the definition of improvement in the Act, which is a very broad definition as discussed in Chapter 3 - Lienability and in relation to which we have proposed amendments. Therefore, adjudication could be applied to all contracts and subcontracts related to an improvement, as those terms are presently defined in the Act, which includes public and private projects. Certain possible exceptions could be implemented by way of regulation.

In Ontario, the feedback we have received is that given the desire to continue to allow construction liens, the U.K. model, pursuant to which “any dispute” can be adjudicated is too broad.

¹¹⁶⁰ Subject of course, to the notable exclusions as discussed above.

¹¹⁶¹ As noted earlier, construction operations is widely defined to include: construction, alternation, repair, maintenance, extension, demolition or dismantling of buildings or structures or works forming part of land; installation of fittings; cleaning carried out in the course of construction; or operations which form an integral part of, or are preparatory to, or are for rendering complete, construction operations; tunnelling, boring, laying of foundations, access work; and painting or decorating internal or external surfaces of any building or structure.

¹¹⁶² *Ontario Act*, s 1.

¹¹⁶³ *Ontario Act*, s 1.

Some commentators have referred to adjudication regimes like that in the U.K as “unrestricted warfare”.¹¹⁶⁴ In our view, a more focussed adjudication model is warranted for Ontario. The Hong Kong Development Bureau articulated its rationale for limiting the right to adjudication as follows:

It ensures that the right is focused on disputes which are likely to delay payment. This is consistent with the overriding objective of introduction of [security of payment legislation] in Hong Kong which is to improve payment practices and reduce payment disputes and delays. Limiting the right to adjudicate financial claims to those which have been made as Payment Claims means it is possible to define and limit the circumstances and timescales for commencing adjudication ... It means that there is less scope for ambush compared to the U.K. model which allows any dispute to be adjudicated at (literally) any time.¹¹⁶⁵

In Hong Kong, it is proposed that adjudication apply to disputes concerning the time for performance or entitlement to extension of the time for performance of work or services or supply of materials or plant under the contract¹¹⁶⁶ because such issues “are often crucial to unlocking financial disputes on construction projects both in terms of entitlements to loss and expense and employer entitlements to liquidated damages for delay”.¹¹⁶⁷

In Chapter 8 – Promptness of Payment, we recommended that a regime be implemented to ensure that suppliers of materials and services on construction projects are paid promptly. One of the distinguishing features of our recommendations in Chapter 8 – Promptness of Payment is that if a payer does not comply with its payment obligations, the parties should be free to adjudicate.

In addition, we are also mindful of our recommendation in Chapter 6 – Summary Procedure in regard to small claims court and a threshold minimum for claims of \$25,000. We therefore propose that for disputes under a value of \$25,000, parties to a construction contract should be able to elect to proceed either go to adjudication or to small claims court.

¹¹⁶⁴ Cannon and Black, *supra* at 8.

¹¹⁶⁵ Hong Kong Consultation Document at 33.

¹¹⁶⁶ Hong Kong Consultation Document at 33.

¹¹⁶⁷ Hong Kong Consultation Document at 34.

Recommendations

- We recommend that parties to a construction contract or subcontract be entitled to refer a dispute to adjudication that flows from a proper invoice under a construction contract or subcontract (being a claim for payment under a contract or a subcontract in relation to an improvement) including:
 - The valuation of work, services, materials and equipment supplied to an improvement and claimed as part of a proper invoice;
 - Other monetary claims made in accordance with the provisions of the construction contract (that had been claimed in a proper invoice), including the change orders and proposed change orders;
 - A claim in relation to any security held by a party under the construction contract;
 - Set offs and deductions (i.e. for deficiencies) against amounts due under a proper invoice as set out in the notice of intention to withhold or otherwise; and
 - Delay issues as they relate to claims for payment.
- We recommend that for disputes valued at under \$25,000, parties can refer such disputes to adjudication or to the small claims court.

5.4 What Process and at What Cost?

5.4.1 Process

In terms of process, the point of adjudication is that the process is simple. In Australia, for example, it has been noted that “the ‘secret of the success’ of these [adjudication statutes] are the confluence of a number of factors such that the process is ‘quick, efficient, cheap, effective and fair’”.¹¹⁶⁸ Adjudicators should have the ability to create their own processes in their “inquisitorial” role.

Under the U.K. system, adjudication proceeds in accordance with the requirements of Part 1 of the Scheme or alternatively, as set out by contract so long as that contracted procedure is consistent with the *U.K. Construction Act*. In other words, where a construction contract does not

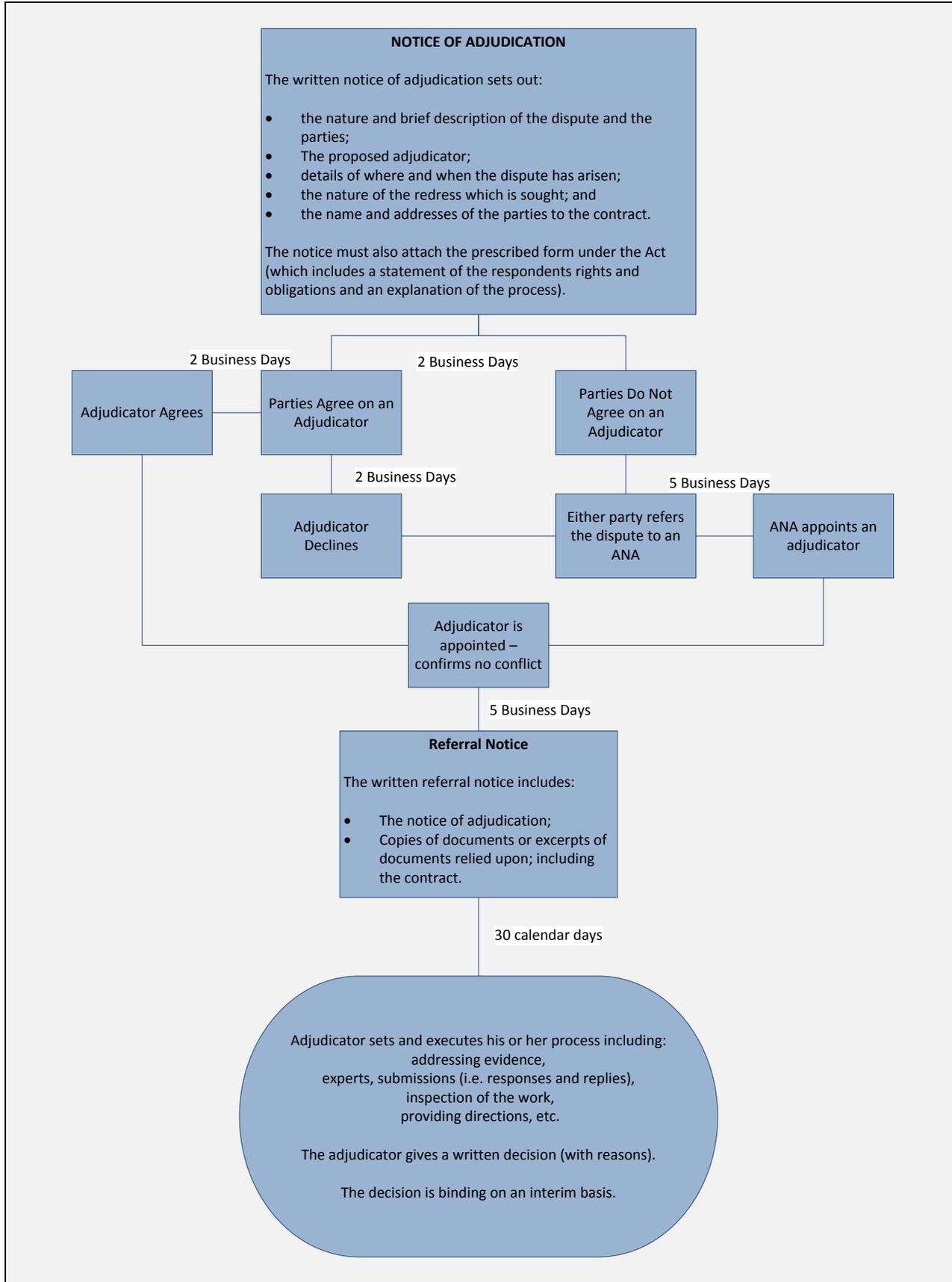
¹¹⁶⁸ Economics Reform Committee of the Australian Senate, *Insolvency in the Australian Construction Industry*, (December 2015) at 132, online: <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Insolvency_construction/Report>.

comply with the requirements of the *U.K. Construction Act*, the *Scheme* takes effect as an implied term of the contract.¹¹⁶⁹ We are of the view that this general approach makes sense.

Recommendations

- If the parties do not agree on an adjudication process that meets the minimum standards of the new Ontario legislation, minimum standards for adjudication set out in a default scheme (under a regulation to the *Act* as noted above) should be implied with respect to: notice of adjudication, appointment of adjudicators, timetables for an adjudication, powers of an adjudicator (including the ability to draw inferences based on conduct of the parties), the adjudicator's duties, allowing an adjudicator to establish a process (with appropriate limitations), and providing that the decision is binding on an interim basis.
- The following process and timelines should be considered:

¹¹⁶⁹ Hudson's Building and Engineering Contracts, at 11-009; *U.K. Construction Act*, s 114(4).



5.4.2 Costs

Savings in costs is one of the main benefits of adjudication. That said, setting the specific fees of an adjudicator in advance is a difficult task. In jurisdictions such as the U.K. and New Zealand parties are free to agree on the payments to be made to an adjudicator. Conversely, in certain Australian states and Malaysia fee ranges are employed.

The majority of adjudication regimes allow the parties the right to agree on an adjudicator’s fees and failing such agreement, a third party (such as an ANA or ANB) will determine what is reasonable. This approach makes sense.

In addition to an adjudicator’s fees and expenses, the fees and expense of the parties should be considered as should the allocation of such fees and expenses. As noted in the Hong Kong Consultation Document, there are often circumstances where “larger paying parties will be able to resource and fund teams of lawyers and experts to represent them at high cost. The prospect of losing and becoming liable for these costs would be a major disincentive to adjudicating.”¹¹⁷⁰ It is for this reason, among others, that Hong Kong and other jurisdictions suggest that each party bears its own legal costs regardless of the outcome of adjudication. However, in other jurisdictions such as Singapore and New Zealand, the adjudicator can award costs against a party in the case of bad faith or there has been frivolous or vexatious conduct, which is a sensible exception to the general rule.¹¹⁷¹

Recommendations
<ul style="list-style-type: none"> ➤ In terms of the amount of the adjudicator’s fees, the parties should be free to agree on the fees of the adjudicator and if they cannot agree, the ANA should determine the fees of the adjudicator. The general rule should be that the fees of the adjudicator will be apportioned equally. ➤ In terms of the parties’ own costs, including legal fees, the general rule should be that each party should bear its own costs. ➤ However, the adjudicator should be given the ability to depart from: 1) an equal apportionment of the adjudicator’s fees/expenses; and 2) the principle that each party should bear its own legal fees and costs, if the parties have acted in bad faith or there has been frivolous, or vexatious conduct.

5.5 How Are Adjudicated Decisions Enforced?

As noted above, enforcement of an adjudicator’s decision on an interim basis is crucial to keep funds flowing and in all adjudication jurisdictions the local courts are enlisted to ensure that the

¹¹⁷⁰ Hong Kong Consultation Document at 39.

¹¹⁷¹ *Singapore Act*, s 30(3); and *New Zealand Act*, ss 56(1) and 57(4).

adjudicator's award is are enforced on an interim basis. Section 23(2) of the *Scheme* provides as follows with respect to the interim binding nature of such decisions:

Effects of the decision

23.—

(2) The decision of the adjudicator shall be binding on the parties, and they shall comply with it until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement between the parties

A summary of each jurisdiction's enforcement procedures is found in Appendix C. To oversimplify, these jurisdictions generally provide that an adjudicator's decision will be enforced barring a breach of natural justice or want of jurisdiction. These fundamentals should carry forward into adjudication in Ontario.

The enforcement of these interim adjudication decisions does not, however, make such decisions final and binding as parties remain free to pursue their existing remedies under the *Act*, or arbitrate their disputes (if the contract provides for arbitration) following adjudication.

In Ontario, an adjudicator's decision could be enforced in the same way as the award of an arbitrator under a domestic arbitration is enforced (i.e. notice of application, affidavit attaching original award or certified copy).

Following such an application, the court will be required to give a judgment enforcing the adjudicator's decision unless the two year period prescribed by the *Limitations Act, 2002*¹¹⁷² has expired, the award has already been set aside or declared invalid, or the court determines that there has been a material breach of natural justice or alternatively, that the adjudicator did not have jurisdiction to make the decision.

In the UK, when adjudication was first introduced some were of the view that the interim nature of the decision meant the process was a waste of time and/or money when compared to the final determinations of a judge or arbitrator. However, one commentator has noted that: "the vast majority of adjudications provide a decision that both parties accept, and in effect, the decision becomes final. That is so even when either or both parties can identify clear flaws in the decision. There appears to be a significant premium placed by the parties on an adjudication as closure, even if the outcome is not one they had wished for."¹¹⁷³

We are of the view that adjudication can serve as an effective enforceable interim binding dispute resolution mechanism in Ontario given its potential to provide swift closure of disputes.

¹¹⁷² *Limitations Act, 2002*, SO 2002, c 24, Sch B, s 4.

¹¹⁷³ Pickavance, *supra* at 3.40.

Recommendations

- We recommend that the decision of an adjudicator should be binding on the parties and they should comply with the decision until either: a) the dispute is finally determined by legal proceedings (including lien proceedings) or arbitration (if provided for under the contract or the parties agree to arbitrate); or b) by agreement by the parties that the decision of the adjudicator is finally binding.
- We recommend the adjudication decisions be enforced, if necessary, by way of application to the Superior Court of Justice, in a manner similar to that employed in respect of the awards in domestic arbitrations under the *Arbitration Act, 1991* (i.e. issuing a notice of application on notice to the person against whom enforcement is sought, attaching an affidavit and the adjudication decision or a certified copy, within two years of the decision).

5.6 How Would Adjudication Interface with the *Act*?

During the course of the Consultation Process and Advisory Group process, questions were asked about how adjudication would work within a lien regime. What became apparent to us was that there is a need not only to preserve rights under the current *Act*, but also to attempt to ensure that the preservation of those rights does not defuse the potential usefulness of an adjudication regime.

It is our view parties should maintain lien rights. In the U.K., the existence of the adjudication regime does not prevent parties from litigating or arbitrating their disputes, and the U.K. has created a specialized Technology and Construction Court to litigate such disputes. Similarly, in Ontario, stakeholders and the Advisory Group expressed a strong preference that the lien remedy remain in place. In Chapter 6 – Summary Procedure, we made certain recommendations with respect to improving the efficiency of the summary procedures under the *Act* and in Chapter 4 – Preservation, Perfection and Expiry of Liens we provided lien claimants with additional time to pursue their lien rights. These changes, however, will not sufficiently ameliorate the problems with the efficiency and cost of dispute resolution in Ontario. Adjudication is the solution, particularly in conjunction with a prompt payment regime as articulated in Chapter 8 – Promptness of Payment. If successful, the need to resort to the lien as a remedy will, we anticipate, diminish.

Under the adjudication regime we recommend, adjudicators are not judges. They are individuals who are tasked with attempting to resolve disputes on construction projects on an interim binding basis, and their authority is derived from the construction contracts entered into between the parties. A dispute between parties to a construction project would still be subject to final and binding determination through legal proceedings (including lien proceedings) or arbitration (if the contract provides for arbitration or the parties agree to arbitrate). The adjudication in that

sense is not “like a s. 96 court” (in reference to section 96 of the *Constitution Act 1867*). Based on our research, we do not understand adjudicators to be acting as in contravention of section 96 of the *Constitution Act, 1867*.

Recommendation

- We recommend that parties maintain their lien rights such that, if a party wants to have a dispute finally determined through a lien proceeding, they can proceed to preserve and perfect a lien and proceed with a lien action.

1. Overview

Surety bonds guarantee, among other things, payment of either fifty percent or one hundred percent of the amounts owed by general contractors to the suppliers of labour and materials, and guarantee the owner that, in the event of the insolvency of the general contractor, construction will be completed. Bid bonds are also commonly provided in support of the procurement process for both public and private projects. As well, lien bonds are the most common form of security used to vacate liens and allow funds to continue to flow in the event of a dispute between a general contractor and a subcontractor that gives rise to a lien.

The surety companies that underwrite these instruments are regulated both federally and provincially and must meet capital and reinsurance requirements in order to comply with licensing requirements. Furthermore, sureties have indemnities in their favour from the entities they underwrite, and sometimes the shareholders and related companies. Accordingly, compared with the U.S., the solvency of surety bonding companies is a reliable assumption. As well, the surety industry has a strong voice in the form of its trade association, the Surety Association of Canada.

Currently, while surety bonds are frequently used on both public and private projects, there is no provincial legislation that requires contractors to post surety bonds (performance or labour and material payment bonds). For the purposes of the Review, our primary focus is in respect of labour and material payment bonds, i.e. those instruments intended to protect the suppliers of labour and materials. Instead of providing for mandatory labour and material payment bonds (hereinafter referred to as “payment bonds”), Canadian provincial legislation provides for liens and holdbacks as the primary statutory safeguards in respect of security of payment, on both private and public projects. In the U.S., the principle of federal or state sovereign immunity prohibits encumbrances such as liens against public projects. Rather than drawing a distinction between liens that attach and liens that do not attach to the land, U.S. federal and state statutes, namely the *Miller Act* and the “Little Miller Acts” (described below), require that contractors post both performance and payment bonds on public projects to secure payment to the subcontractors and their suppliers.

In respect of surety bonds, we considered the following issues:

- Surety Bonds Generally
- Mandatory Surety Bonds
- The Electronic Delivery of Surety Bonds
- Subcontractor Default Insurance

2. Context

2.1 Surety Bonds Generally

Surety bonds are “on default” instruments that provide different types of guarantees of the performance of underlying contractual obligations. In order to protect against the risk of the general contractor’s insolvency, an owner may require performance and payment bonds. (As well, and as noted above, as part of the procurement process, the owner may require a bid bond as part of the contractor’s tender package, to establish the contractor’s financial and technical pre-qualification by the surety.)

In its main written submission to the Review, the Surety Association of Canada described the role of surety bonding as follows:

Surety bonds have been in use since the late 19th century to bring accountability and stability to the construction industry. A bond is a financial instrument that protects construction purchasers, subcontractors and suppliers from the risks arising from a project contractor’s default by transferring these risks to a third party; the bonding company. Surety bonds provide two essential assurances to construction stakeholders:

1. Prequalification – Surety companies undertake a thorough, comprehensive and ongoing review all bonded contractors to ensure that the contractor is capable of fulfilling the obligations under its contract; both financial and performance.

2. Financial Security – A surety company protects an owner from financial loss in the event of a contractor default by funding any additional completion costs that exceed the original contracted value. Subcontractors and suppliers of a defaulted project contractor are also protected against the risk of financial loss arising from the inability or unwillingness of the bonded contractor to pay for labour and materials supplied.

Protection through bonding is typically provided through two separate but interdependent instruments being: the Performance Bond; and the Labour and Material Payment Bond, defined as follows:

The Performance Bond

Generally, a Performance Bond constitutes a promise from the surety to the obligee that if the principal defaults in the performance of a specific contract, so long as the obligee has performed its obligations under the contract, then the surety, usually subject to certain conditions, will be obliged to either remedy the default, complete the contract or put bids for completion to the obligee.¹¹⁷⁴

The Labour and Material Payment Bond

Generally, a Labour and Material Payment Bond constitutes a promise by the surety to the obligee under the bond that if the principal fails to pay suppliers of services and/or materials to the principal with respect to a specific contractor or project then, subject to

¹¹⁷⁴ Kenneth Scott & Bruce Reynolds, *Scott and Reynolds on Surety Bonds*, looseleaf (Toronto:Carswell, 1994) at 10-22 [Scott & Reynolds].

certain conditions being satisfied, the surety will pay the claims of those claimants pursuant to the bond.¹¹⁷⁵

In respect of a payment bond, to oversimplify somewhat, and using the example of the general contractor's bond, a payment bond constitutes a promise by the general contractor and the surety to the owner that if the general contractor fails to pay suppliers of services or materials (usually "first tier" subcontractors), then the surety will pay the valid claims of those unpaid subcontractors, subject to limits and certain conditions set out in the Labour and Material Payment Bond.¹¹⁷⁶ The owner benefits from a payment bond because payment of the subcontractors makes it more likely that the subcontractors will agree to complete their remaining work for the replacement contractor. It also benefits the subcontractors directly as they will be paid instead of having to seek recovery from a potentially insolvent contractor.

A contractor's obligation to obtain a payment bond is provided for in the underlying contract between the owner and the contractor. As a result, subcontractors may not always be aware that a payment bond was issued with respect to the project. This is addressed in the current section 39 of the *Act*, which provides that a lien claimant or trust claimant is entitled to request a copy of any payment bond issued in respect of the contract.¹¹⁷⁷

A surety's liability to a claimant under a payment bond is, at most, co-extensive with that of its principal, that is to say the surety's liability can be no greater than the liability of its principal, which means that a surety is not liable unless its principal is liable, such that the surety is entitled to raise any defence otherwise available to the principal.¹¹⁷⁸ For example, if the subcontract between the principal and a claimant contains a "pay-when-paid" clause, then the surety will not be liable to the claimant under the bond if the clause is operative.¹¹⁷⁹ In addition, the surety is also entitled to raise "surety defences", which are either available under the specific bond wording in issue or generally at law.

Because a surety bond is an "on default" obligation, before deciding whether to accept liability and making any payment under a bond, a surety is entitled to a reasonable amount of time to investigate the claim (and is obligated to its indemnitors to do so). The surety's investigation typically involves a number of steps, including ensuring that the original executed bond is in the owner's possession, notifying its indemnitors in writing of the claim(s), reviewing the bonded contract, the progress certificates and the accounting related to the contract and subcontracts, and ensuring that no changes were made to the underlying contract without the surety's approval. Based on such factors, the surety will determine whether it is liable to pay the claimant(s).¹¹⁸⁰ The surety is entitled to a reasonable amount of time to investigate even if the obligee attempts to

¹¹⁷⁵ *Ibid* at 11-2.1.

¹¹⁷⁶ *Ibid* at 11-2.1.

¹¹⁷⁷ *Ibid* at 11-10.8 and 11-10.9.

¹¹⁷⁸ *Ibid* at 11-10.8 and 11-10.9.

¹¹⁷⁹ *Ibid* at 11-18.18(3).

¹¹⁸⁰ *Ibid* at 13-8 to 13-14.

press the surety into a quick decision.¹¹⁸¹ The decision to accept or deny liability must be carefully considered.¹¹⁸² It has been suggested that to a degree, a lack of clarity in respect of the best practices for surety adjusting gives rise to inconsistent expectations on the part of claimants. A number of stakeholders expressed frustration with the payment bond claims process.

2.2 Mandatory Surety Bonds

Currently, statutory mandatory bond regimes for public projects only exist in the U.S. but the use of payment bonds for the protection of subcontractors and suppliers is common in Canada. Fundamentally, payment bonds are currently a North American phenomenon. However, mandatory payment bonds have been considered in some other jurisdictions.

2.2.1 United States

2.2.1.1 The Federal Regime

Prior to the enactment of the *Miller Act* (referred to above), “federal-project contractors were at risk because the federal government’s sovereign immunity prevented them from perfecting a mechanic’s lien”.¹¹⁸³ In 1894, Congress enacted the *Heard Act*, which was intended to protect the interests of taxpayers against contractor defaults on federal projects by way of mandatory surety bonds.¹¹⁸⁴ The *Heard Act* was repealed and was replaced with the *Miller Act* in 1935 when it became evident, with the large New Deal federal projects that could not be liened due to the principle of federal sovereign immunity, that subcontractors and suppliers needed protection from defaulting contractors.¹¹⁸⁵ Therefore, the *Miller Act* was enacted to provide a statutory regime to protect the interests of persons supplying materials and services to contractors and subcontractors working on federal projects and to shift the ultimate risk of nonpayment from workers and suppliers to the surety.¹¹⁸⁶ Commentators have noted that the *Miller Act* “provides recourse to such claimants who have not been paid for the materials and/or labor provided”¹¹⁸⁷ and it “completely eliminated the right of a subcontractor or supplier to impose any form of mechanic’s lien or other encumbrance against federal public works projects”¹¹⁸⁸. All federal public construction projects valued over \$100,000, with few exceptions, are subject to the provisions of the *Miller Act*¹¹⁸⁹ which requires that “a payment bond must be provided by the

¹¹⁸¹ *Ibid* at 13-14.

¹¹⁸² *Ibid* at 13-14.10 to 13-14.12.

¹¹⁸³ Gregory Paonessa, “The Mechanic’s Lien – Are You Protected?” (2013-2014) 48 New Eng L Rev 579 at 592 (HeinOnline) [Paonessa].

¹¹⁸⁴ James D. Fullerton, *Construction Bonds on Public Projects*, Manual of Credit and Commercial Laws, 104 ed, reprinted in Construction Law Survival Manual (2005), online: <http://www.fullertonlaw.com/docs/appendices/50_state_survey_of_payment_bond_rights.pdf> at 609 [Fullerton].

¹¹⁸⁵ Paonessa, *supra* at 592; See also Fullerton, *supra* at 609.

¹¹⁸⁶ Kevin L. Lybeck & H. Bruce Shreves, eds, *The Law of Payment Bonds* (Chicago: American Bar Association, 1998) at 65 [Lybeck and Shreves].

¹¹⁸⁷ *Ibid*.

¹¹⁸⁸ Fullerton, *supra* at 609.

¹¹⁸⁹ Fullerton, *supra* at 609.

principal or general contractor on every federal contract to protect the right of payment for those supplying materials or services to the federal project”.¹¹⁹⁰ The *Miller Act* provides as follows:

Before any contract of more than \$100,000 is awarded for the construction, alteration, or repair of any public building or public work of the Federal Government, a person must furnish to the Government [...] [a] payment bond [...] for the protection of all persons supplying labor and material in carrying out the work provided for in the contract.¹¹⁹¹

Under the *Miller Act*, a contractor is also required to obtain a performance bond and as noted by some, “these bonds protect the interests of the federal government, taxpayers, subcontractors, and suppliers from defaulting parties”.¹¹⁹² While the performance bond ensures that the project will be completed, the payment bond provides for security of payment to anyone who supplies services and materials to the project.¹¹⁹³ The onus is on a claimant who relies on the *Miller Act* to prove that:

- (a) It supplied material or labor in prosecution of work provided for in the contract;
- (b) Payment has not been made;
- (c) There is a good faith belief that materials were intended for the specified work; and
- (d) The jurisdictional requisites of timely notice and filing required by the *Miller Act* are satisfied.¹¹⁹⁴

Commentators have noted, however, that the *Miller Act* does not protect the interests of the general contractor (which has a direct contract with the government or government agency) against default by the government or government agency.¹¹⁹⁵ It is also important to note that the *Miller Act* only applies to a limited group of potential claimants:

The *Miller Act* limits the right to make a claim and file a lawsuit to those suppliers and subcontractors who deal directly with the prime contractor and to those suppliers who, lacking any contractual relationship with the general contractor, have a direct contractual relationship with a subcontractor. A supplier to another supplier who then sells goods to the general contractor has no claim, nor does anyone whose relationship to the general contractor is more remote than a second tier subcontractor.¹¹⁹⁶

2.2.1.2 The State Regimes

Commentators explain that after the “success” of the *Miller Act* on federal projects, each one of the 50 states enacted a “Little Miller Act”,¹¹⁹⁷ each modeled after the federal *Miller Act*, and each

¹¹⁹⁰ Fullerton, *supra* at 609. See also Lybeck and Shreves, *supra* at 65.

¹¹⁹¹ 40 USC § 3131(b).

¹¹⁹² Paonessa, *supra* at 592.

¹¹⁹³ N. Pieter M. O’Leary, “Bullies in the Sandbox: Federal Construction Projects, the *Miller Act*, and a Material Supplier’s Right to Recover Attorney’s Fees and Other “Sums Justly Due” Under a General Contractor’s Payment Bond” (2011) 38:1 Transp LJ at 6 (HeinOnline).

¹¹⁹⁴ Lybeck and Shreves, *supra* at 66.

¹¹⁹⁵ Paonessa, *supra* at 604.

¹¹⁹⁶ Fullerton, *supra* at 611.

¹¹⁹⁷ Fullerton, *supra* at 609; Lawrence R. Moelmann & John T. Harris, eds, *The Law of Performance Bonds*, (Chicago: American Bar Association, 1999) at 8.

generally interpreted by state courts in conformity with the federal statute.¹¹⁹⁸ The Little Miller Acts fulfill the same purpose as the *Miller Act* and provide security to trade contractors on state, county, municipal and other local projects,¹¹⁹⁹ as they require a contractor to post a payment bond as a pre-condition to contract award.¹²⁰⁰ Commentators have described the requirement as follows:

This payment bond takes the place of any right of a supplier or subcontractor to assert a mechanic's or other type of lien. Since the substantive rights of the suppliers and subcontractors were not being adversely affected and, in fact, in many instances were being enhanced, public policy and constitutional protections permitted the elimination of the right to claim a mechanic's lien on state and municipally funded public projects.¹²⁰¹

Commentators have noted that, although similar to all other Little Miller Acts, each statute has its own particularities and differences from equivalent statutes in other states.¹²⁰²

For example, from state to state there is a wide range in contract values that trigger the statutory bonding requirement. Mandatory bonds are required in some states regardless of the contract value, in other states specific values of contracts ranging from \$20,000, \$100,000, \$150,000 and \$200,000 are used as threshold values for the requirement of bonds. In most states, bonds must equal the exact value of the contract price or original contract price, but in some cases, a bond is only required to 50% of the contract price.¹²⁰³ Finally, in other states, the required amount of the bond varies on a sliding scale proportionate to the contract price.¹²⁰⁴

In terms of the claims handling process, in the U.S., there are some states that “regulate or prohibit unfair claims practices”, and others do not.¹²⁰⁵

2.3 The Electronic Delivery of Surety Bonds

The common law requires that, because it is a deed, a surety bond must be in writing, on paper, and be signed sealed and delivered in order to be effective.¹²⁰⁶ Stakeholders have expressed positive views on the amendment of the *Act* to expressly permit e-bonding. The Surety Association of Canada has drafted guidelines to ensure that electronic surety bonds are reliable and enforceable. For example, an electronic document must meet a number of requirements,

¹¹⁹⁸ Fullerton, *supra* at 609.

¹¹⁹⁹ Fullerton, *supra* at 609.

¹²⁰⁰ Paonessa, *supra* at 609.

¹²⁰¹ *Ibid.*

¹²⁰² Foundation of the American Subcontractors Association, Inc., “Lien and Bond Claims in the 50 States” (Columbus: American Subcontractors Association, Inc., 2014), online: <<http://www.keglerbrown.com/content/uploads/2014/09/ASA-Lien-and-Bond-Manual-2014-Edition.pdf>> [American Subcontractors Association].

¹²⁰³ Fullerton, *supra*.

¹²⁰⁴ American Subcontractors Association, *supra*.

¹²⁰⁵ Scott & Reynolds, *supra* at 13-28.

¹²⁰⁶ *Paul D'Acoust Construction ltd. v Markel Insurance Company of Canada*, [1999] OJ No 1837, aff'd [2001] 3 SCR 744.

including integrity of content (assurances that the document received is the true document executed), secure access (restricted access to those authorized to view or download the document), and verifiability/enforceability (assurances that the document was duly executed and enforceable in law).¹²⁰⁷

All provinces and territories have enacted legislation in place to regulate the electronic delivery of information.¹²⁰⁸ By way of summary, the electronic delivery of a document is not mandatory, but requires the consent of both parties. In the event that consent is granted, information that needs to be in writing can typically be delivered in electronic form. In some provinces (Newfoundland and Labrador, Nova Scotia, Nunavut, Ontario, Prince Edward Island, and Saskatchewan) the legislation provides that a contract may be formed, or any matter material to a contract may occur by way of electronic transmission of information or in the form of an electronic document.

While all provinces have enacted legislation regarding delivery of a document electronically, only the legislation in Ontario and Nunavut specifically provide for sealing of electronic documents. In this regard, subsection 11(6) of the *Electronic Commerce Act, 2000*¹²⁰⁹ provides that a document shall be deemed to be sealed if the legal requirement that the document be signed is satisfied in accordance with Subsections 11(1), (3) and (4) of the *Electronic Commerce Act* and the electronic document meets the “prescribed seal equivalency requirements”.¹²¹⁰ However, to date, no regulations have been prescribed in respect of the Ontario *Electronic Commerce Act* and thus there are no seal equivalency requirements that a document can meet. As a result, in Ontario, as long as seal equivalency requirements are not prescribed, arguably no document that is delivered electronically can be considered a deed and thus there is a risk that surety bonds delivered electronically could be alleged to be ineffective, by interested persons attempting to prevent a surety from accepting liability for example.

2.4 Subcontractor Default Insurance

Subcontractor default insurance (“SDI”) offers an alternative to performance and payment bonds but it is entirely different from performance and Labour and Material Payment Bonds. Default insurance can be obtained by an owner as a form of insurance (not a bond) against default by the

¹²⁰⁷ Surety Association of Canada, “E-Bonding”, online: <<http://www.surety-canada.com/en/ebonding/index.html>>.

¹²⁰⁸ Alberta: *Electronic Transactions Act*, SA 2001, c E-5.5; British Columbia: *Electronic Transactions Act*, SBC 2001, c 10; Manitoba: *Electronic Commerce and Information Act*, CCSM, c E55; New Brunswick: *Electronic Transactions Act*, RSNB 2011, c 145; Newfoundland and Labrador: *Electronic Commerce Act*, SNL 2001, c E-5.2; Northwest Territories: *Electronic Transactions Act*, SNWT 2011, c 13; Nova Scotia: *Electronic Commerce Act*, SNS 2000, c 26; Nunavut: *Electronic Commerce Act*, S Nu 2004, c 7; Ontario: *Electronic Commerce Act 2000*, SO 2000, c 17; Prince Edward Island: *Electronic Commerce Act*, RSPEI 1988, c E-4.1; Quebec: *An Act to Establish a Legal Framework for Information Technology*, c C-1.1; Saskatchewan: *Electronic Information and Documents Act 2000*, SS 2000, c E-7.22; and Yukon Territory: *Electronic Commerce Act*, RSY 2002, c 66.

¹²⁰⁹ *Electronic Commerce Act, 2000*, SO 2000, c 17, s 11(6)(b).

¹²¹⁰ *Ibid.*

contractor or by the contractor against default by a subcontractor.¹²¹¹ Contrary to a bonding agreement which is a three party agreement between the principal, the obligee and the surety, an insurance policy (such as a SDI policy) is a two party agreement between an insured and an insurer. The obligation of the insurer is triggered by an insurable event, which is typically an accidental event, error or omission.

SDI transfers an initial portion of the risk of loss to the insured through non-qualifying losses and a deductible. It also transfers a portion of the remaining risk to the insured with a co-payment percentage clause, up to the limits of the policy.¹²¹² In addition, the insured is required to complete the work itself rather than rely on a surety under a performance bond.¹²¹³

3. Summary of Stakeholder Views

Respondents were almost evenly split regarding mandatory Labour and Material Payment Bonds. 32% of main group respondents suggested that payment bonds should be mandatory, 37% of main group respondents responded in the negative, and 32% of main group members did not respond.

Of those who suggested that payment bonds should be mandatory, 71% of main group respondents believed they should be mandatory on all projects, while 51% of Ontario Association of Architects' members believed they should be mandatory on some projects.

As a preliminary matter, stakeholders were asked to provide their positions on whether prompt payment should be required in relation to undisputed amounts to be paid by payment bond sureties. In this regard, stakeholders provided as follows:

- a) Most of the responding stakeholders were in favour of requiring prompt payment of undisputed amounts by payment bond sureties.¹²¹⁴
- b) The Ontario Road Builders' Association expressed the view that this could result in the more expeditious resolution of claims, and observed that withholding the entire amount where only a portion is disputed is illogical.
- c) The Surety Association of Canada supported the proposition so long as the provision does not prejudice a payer's ability to seek a proper resolution to the disputed

¹²¹¹ Helmut K. Johannsen, P. Eng., C. Arb. "Contractor/Subcontractor Default Insurance" (2012) J Can C Construction Lawyers 115 [Johannsen]. See also Ian Houston "Use of Subcontractor Default Insurance During the Global Financial Crisis—A Practitioner's Perspective" (2011) J Can College of Construction Lawyers 27.

¹²¹² Johannsen, *supra*.

¹²¹³ *Ibid.*

¹²¹⁴ CIQS Submissions to the CLA Review at 10; IO Submissions to the CLA Review at 27; Local 793 and PBCTCO Submissions to the CLA Review at 13; LIUNA 183 Submissions to the CLA Review at 12; ORBA Submissions to the CLA Review at 13-14; Surety Association of Canada Submissions to the CLA Review at 16; York Region Submissions to the CLA Review at 6.

amounts.¹²¹⁵ Specifically, the Surety Association of Canada stated as follows with regards to the issue:

SAC would generally support a recommendation by the Review that undisputed amounts under a payment bond should be paid promptly, provided the recommendation:

- avoids creating a scenario in which a surety under a payment bond would be required to pay more than the amount its principal would ultimately be required to pay under the subcontract, and
- ensures that prompt payment under a payment bond does not prejudice the ability of the payer or of the surety to seek a proper resolution of disputed issues and amounts.

This issue has been addressed by the surety industry in the United States... We would invite the Review to consider ... recent efforts by the Canadian surety industry to improve the responsiveness of the payment bond and address the issue of prompt payment of undisputed amounts.¹²¹⁶

In relation to the requirement for Payment Bond payees to complete their subcontracts, the stakeholders submitted as follows:

- a) The Canadian Institute of Quantity Surveyors and the Surety Association of Canada advised that they would not be in favour of amending the *Act* to require payment bond payees to complete their subcontracts.
- b) One stakeholder observed that the issues involved are typically more complex than the legislation could provide for,¹²¹⁷ that there can be uncertainty as to which party may have custody of a construction site in an insolvency, and that the contractual structure of completion may be uncertain at the moment of settlement of the payment bond claim.¹²¹⁸
- c) Conversely, Infrastructure Ontario would support this proposal provided that it is the owner that determines what is in the best interests of the project.¹²¹⁹

As noted above, stakeholders were asked whether payment bonding for public projects should be mandatory. The responses were split.

- a) The principal opposition to the idea came from certain public owners.¹²²⁰ The central concern expressed by these stakeholders was that mandatory bonding is a one-size-fits-all approach that would not be practical in certain circumstances, and would unnecessarily

¹²¹⁵ Surety Association of Canada Submissions to the CLA Review at 16.

¹²¹⁶ Surety Association of Canada Submissions to the CLA Review at 16.

¹²¹⁷ CIWS Submissions to the CLA Review at 10.

¹²¹⁸ Surety Association of Canada Submissions to the CLA Review at 17.

¹²¹⁹ IO Supp. (Attachment) to the CLA Review at 27.

¹²²⁰ City of Mississauga Submissions at 2; Council of Ontario Universities Submissions at 3; IO Supp. (Attachment) to the CLA Review at 27; MTO Letter Submissions to the CLA Review at 5; TTC Submissions to the CLA Review at 42; Metrolinx Submissions to the CLA Review at 5.

increase costs and administrative burden. Some public stakeholders also cited freedom of contract.

- b) Other stakeholders were in favour of mandatory payment bonding on public projects, with some expressing the view that bonding should be mandatory above a certain financial threshold (\$100,000 and \$250,000 were suggested).¹²²¹
- c) The Surety Association of Canada pointed out that payment bonds are interdependent with performance bonds and are therefore issued only in conjunction with performance bonds, and the Surety Association of Canada also proposed that consideration should be given to the adoption of standard forms of bonds that should include practical provisions for the claims process, timelines of payment, and dispute resolution provisions.¹²²² It was further suggested that consideration should be given to whether the bonds should be mandatory with respect to prime contracts only, or also on subcontracts and trade contracts to protect payees further down the payment chain.¹²²³

In relation to imposing requirements in respect of adjusting bond claims, stakeholders submitted as follows:

- a) The Surety Association of Canada expressed support for requirements in respect of adjusting bond claims, for example, practical provisions for the claim process, timelines for payment, and dispute resolution provisions.¹²²⁴

On the issue of providing for electronic delivery of surety bonds, responding stakeholders were unanimous in their support for a provision allowing for the electronic delivery of surety bonds.¹²²⁵

Stakeholders were also asked to consider whether they would support the adjudication of bond claims:

- a) Several of the responding stakeholders expressed support for subjecting bond claims to adjudication.¹²²⁶
- b) The Surety Association of Canada expressed support for an alternative dispute resolution process that would include fast-tracked timelines for the commencement of the process, the appointment of the adjudicator, and the delivery of an interim award. The Surety

¹²²¹ COCA Submissions to the CLA Review at 23; OALA Submissions to the CLA Review at 4; OPWA Submissions to the CLA Review at 4; ORBA Submissions to the CLA Review at 14; SAC Submissions to the CLA Review at 18; York Region Submissions to the CLA Review at 6.

¹²²² Surety Association of Canada Submissions to the CLA Review at 16.

¹²²³ Surety Association of Canada Submissions to the CLA Review at 18.

¹²²⁴ Surety Association of Canada Submissions to the CLA Review at 19.

¹²²⁵ CIQS Submissions to the CLA Review at 11; COU Submissions to the CLA Review at 3; IO Supp. (Attachment) to the CLA Review at 28; OALA Submissions to the CLA Review at 4; ORBA Submissions to the CLA Review at 14; Surety Association of Canada Submissions to the CLA Review at 19; York Region Submissions to the CLA Review at 6.

¹²²⁶ CIQS Submissions to the CLA Review at 11; IO Supp. (Attachment) to the CLA Review at 28; OASBO and OPSBA Submissions to the CLA Review at 5.

Association of Canada was also of the view that the process should also allow for full or partial security for a review or an appeal of an interim award. Further, the Surety Association of Canada submitted that the parties involved should be able to contractually agree to shorter timelines than what is statutorily required.¹²²⁷

- c) Conversely, the Ontario Association of Landscape Architects suggested that adjudication would delay the progress in completing a project and expressed opposition to bringing bond claims within the ambit of adjudication.¹²²⁸

On the issue of the third party beneficiary rule:

- a) Few stakeholders responded when asked whether changes to the third party beneficiary rule are appropriate in order to enable payment by owners directly to subcontractors and suppliers.
- b) York Region was generally in favour of changes to this effect.¹²²⁹
- c) The Ontario Association of Landscape Architects suggested that owners be able to take advantage of the third-party beneficiary rule if they are enabled to pay subcontractors and suppliers directly, although there would be some pushback by sureties to an amendment to this effect.¹²³⁰
- d) The City of Toronto commented that there would be risk to an owner making direct payments to a third party without privity of contract to ensure that the amount being claimed and paid is justified. Thus, the provision would have to protect owners from future liability.¹²³¹

Finally, Stakeholders were asked whether the *Act* requires any revisions in light of the existence of contractor and subcontractor default insurance.

- a) The City of Toronto suggested that the *Act* should not interfere with freedom of contract by mandating insurance or bonding; parties should be free to allocate and mitigate risks in their contracts.¹²³²
- b) The Surety Association of Canada did not recommend changes to the *Act* in this respect, but commented that default insurance is designed to protect a general contractor from costs associated with the default of a subcontractor and does not provide security or payment protection for unpaid subcontractors, supplies, or others in the construction payment chain.¹²³³

¹²²⁷ Surety Association of Canada Submissions to the CLA Review at 15.

¹²²⁸ OALA Submissions to the CLA Review at 4.

¹²²⁹ York Region Submissions to the CLA Review at 7.

¹²³⁰ OALA Submissions to the CLA Review at 4.

¹²³¹ City of Toronto Submissions to the CLA Review at 8.

¹²³² City of Toronto Submissions to the CLA Review at 8-9.

¹²³³ Surety Association of Canada Submissions to the CLA Review at 19.

4. Analysis and Recommendations

Surety bonds are a well-understood product that provides targeted protection for both owners and subcontractors in circumstances where a general contractor has become insolvent. As discussed in Chapter 7 – Construction Trusts, this is the very area in which the evolution of case law in Ontario has left subcontractors and suppliers with little assurance of protection.

As discussed in Chapter 7, the two available solutions to the core issue of insolvency risk are mandatory trust accounts, which are not certain of success in the face of a constitutional attack, and mandatory payment bonds. Having said this, as noted above, payment bonds are interdependent with performance bonds and the two instruments are issued in tandem for a single premium. Accordingly, if payment bonds are the appropriate solution to the core issue of insolvency risk, it must be recognized that this would result in owners obtaining additional security of completion as well, even though some owners – such as the Ministry of Transportation – do not wish to have surety bond security for the completion risk.

If mandatory surety bonds are the most reliable solution to the insolvency problem – which it appears they are, the next question that arises is whether to adopt a statutory approach similar to the *Little Miller Act* regimes in the U.S., where surety bonds are required to be posted only on public sector projects, or whether to require surety bonds on both private and public sector projects in Ontario. In this respect, it is important to acknowledge that the U.S. approach was borne out of the general policy to the effect that subcontractors supplying to public projects should not go unpaid, and in recognition that, as constitutional matter, public projects cannot be subjected to liens. In Ontario, the former consideration applies, but not the latter, as the holdback maintained by public sector and broader public sector owners is subject to liens in Ontario, giving lien claimants at least the prospect of partial recovery. As well, if surety bonds were made mandatory for public and/or broader public sector projects, the applicable surety bond premiums would increase the cost of public projects to some extent – although there is no evidence that this has inhibited the development of public projects in the U.S. As for private projects, not only is there no precedent for such a requirement but it would be an obvious and major incursion into the freedom of contract if the *Act* were to mandate performance and payment security on private projects.

Given the current uncertain economy, and recent indications that interest rates will gradually increase, as well as the multiple major infrastructure initiatives underway in Ontario, particularly in the linear transit sector, we are of the view that the fundamental objective of the *Act*, to protect subcontractors and suppliers, would be best served by making surety bonds mandatory for public sector projects in Ontario. One need only consider the current economic challenges being faced by the provinces of Newfoundland and Labrador, Saskatchewan, and Alberta to appreciate how rapidly economic circumstances can shift. In our view, the core issue of insolvency risk can only be addressed with certainty by introducing into the *Act* a statutory requirement for mandatory surety bonds, and there is a powerful policy argument to the effect that suppliers to public

projects should not go unpaid. The same policy consideration does not, however, apply in the case of private projects, in respect of which we recommend in Chapter 7 – Construction Trusts that Project Bank Accounts be the subject of pilot projects in the public sector in order to determine their potential efficiency for adoption more broadly in the private sector. As for AFP projects, we recommend that mandatory surety bonds not apply at the level of the Project Agreement but at the level of the contract(s) between Project Co and the Construction Contractor or Design-Builder. As for whether surety bonds should be required at the level of subcontract, the answer lies in the Surety Association of Canada broad form payment bond, which would provide payment bond protection at all levels of the contractual structure through a single payment bond. The Surety Association of Canada has an initiative underway in this respect, which it has described to us as follows:

SAC is currently engaged in discussions with the Canadian Construction Documents Committee (CCDC) in an effort to update its standard performance and payment bond wordings and is contemplating major changes to the labour and material payment bond.

In addition to modernizing the archaic language, SAC is proposing an optional expansion of the scope of protection which will address this very issue. This enhanced protection will be added to the bond by way of a “Broad Form Rider”, a sample copy of which is included as Appendix II (b). The rider expands the scope of the standard CCDC 222 payment bond by including:

- An extension of coverage to the second tier subcontractors and suppliers.
- A requirement for accelerated payment of undisputed amounts.
- Timelines for the surety’s acknowledgement of a notice of a claim, response to the claim itself and for payment of amounts due.

We should point out that this approach mirrors the current practice in the United States as set out in the standard American Institute of Architects (AIA) 312 Payment Bond Form (copy attached as Appendix A (iii)). We refer to Clauses 7.1 and 7.2 which require the surety to pay any undisputed amount within 60 days of receipt of a claim.

In fact, this requirement is also found in the statutes of numerous states across the country which call for bonds on all publicly funded construction work and regulate the manner in which they’re used. These statutes are collectively referred to as “Little Miller Acts” as they are derived from the federal legislation of the same name.

Regarding surety claims adjusting, as noted above the Surety Association of Canada supports the mandatory payment of undisputed amounts, and supports the development of a best practices surety claims adjusting protocol. In our view, these are both valuable initiatives that should be recognized in the *Act*.

Accordingly, we make recommendations as follows.

Recommendations

- The *Act* should be amended to require broad form surety bonds to be issued for all public sector projects, the form of such surety bonds should be developed in consultation with the Surety Association of Canada, and once finalized they should become Forms under the *Act*.
- The *Act* should be amended to require sureties to pay all undisputed amounts within a reasonable time from the receipt of a payment bond claim.
- A Regulation to the *Act* should be promulgated to embody a surety claims handling protocol, and that such surety claims handling protocol be developed in consultation with the Surety Association of Canada.
- No change should be made in respect of the third party beneficiary rule, or default insurance. The adjudication issue is addressed in Chapter 9 - Adjudication above.

1. Overview

As part of the Review, stakeholders raised a variety of technical issues, primarily of concern to construction lawyers practising in Ontario. We have grouped these technical issues together in this Chapter.

The following technical issues are considered in this section:

- Irregularities that can be cured under the *Act*
- Statutory Settlement Meetings
- Harmonization of the *Act* with the *Registry Act*
- Right to seize machinery and equipment
- Additional information in the Certificate of Substantial Performance
- Sheltering
- Written Notices of Lien
- Requests for Information
- Vacating Liens Through the Posting of Security
- Statement of Allocation of a Mortgagee

2. Irregularities That Can Be Cured Under the *Act*

Section 6 of the *Act* provides as follows:

Minor irregularities

6. No certificate, declaration or claim for lien is invalidated by reason only of a failure to comply strictly with subsection 32 (2) or (5), subsection 33 (1) or subsection 34 (5), unless in the opinion of the court a person has been prejudiced thereby, and then only to the extent of the prejudice suffered. R.S.O. 1990, c. C.30, s. 6.

According to Glaholt & Keeshan in *The 2016 Annotated Construction Lien Act*,¹²³⁴ the “so-called ‘curative’ section of the Act was radically altered by the Construction Lien Act, 1983. The previous provision ... had required only ‘substantial compliance’ with the statutory requirements of the claim for lien and the procedural aspects of a lien action.”¹²³⁵ This more liberal standard

¹²³⁴ Duncan Glaholt & David Keeshan, *The 2016 Annotated Construction Lien Act* (Toronto: Carswell, 2015) [Annotated Act].

¹²³⁵ *Ibid* at 66.

(of substantial compliance) is incorporated in the lien statutes of Alberta, Manitoba, Newfoundland, New Brunswick, Nova Scotia, PEI, Saskatchewan and the Northwest Territories.¹²³⁶ Importantly, no stakeholders asked the Review to consider moving back towards the application of a “substantial compliance” standard under the *Act*.

The discretion under section 6 of the *Act* allows the court to cure minor or technical irregularities, but errors that cause prejudice (e.g. failure to name the owner) result in invalidation of the affected certificate, declaration, or claim for lien. Although Section 6 was originally viewed as a general curative power it has since become more rigidly limited in its application by the courts.¹²³⁷ Under this section, what is or is not curable may vary depending on the context of the case.¹²³⁸ However, some examples of items that may be, but are not always, cured include: incorrect date of last supply, failure to name person to whom materials and services were supplied (provided the owner was correctly named),¹²³⁹ registering against the wrong premises,¹²⁴⁰ the language of the prayer for relief,¹²⁴¹ and inserting an owner’s name in the wrong part of a statement.¹²⁴²

Certain stakeholders submitted that greater precision should be provided for under Section 6,¹²⁴³ but no specific recommendations were provided by stakeholders in this regard.

As the scope of the Review does not include drafting at this stage, we recommend simply that Section 6 be clarified as to what irregularities may be cured as long as no prejudice is caused to other parties, as noted in the current section.

¹²³⁶ *Ibid* at 66 citing the *Alberta Act*, s 37, *Manitoba Act*, ss 41(1), 45(8), 48), *Newfoundland Act*, s 19, *New Brunswick Act*, s 22, *Nova Scotia Act*, s 21, *P.E.I. Act*, s 21, *Saskatchewan Act*, s 100, and *Northwest Territories Act*, s 10.

¹²³⁷ *Ibid* at 66.

¹²³⁸ Note for example, in the case of *Williams & Prior Ltd. v Taskon Construction Ltd.*, [2003] OJ No 498, Master Sandler found that failing to name a party or describe the leased premises in the claim for lien was not a minor or technical irregularity as it was more than a failure to ‘strictly comply’ in that it was a serious error. Conversely, in *Govan Brown & Associates Ltd. v Equinox 199 Bay Street Co.*, 2014 ONSC 3924, the owner was named but named incorrectly which was found to be curable under section 6.

¹²³⁹ Andrew J. Heal, *Common Errors in Construction Litigation – Best Practices to Avoid Them and What to do When They Occur*, presentation at Ontario Bar Association February 2011 Institute Current Events in Construction Law at 12-13; online: <http://www.blaney.com/sites/default/files/Common-Mistakes_AJH.pdf> [Heal].

¹²⁴⁰ Annotated Act, *supra* at 77.

¹²⁴¹ Heal, *supra* at 20 noting that “a failure to abide by the usual language in the prayer for relief is not fatal to a lien”.

¹²⁴² *Govan Brown & Associates Ltd. v Equinox 199 Bay Street Co.*, *supra* at para 41.

¹²⁴³ City of Toronto Submissions to the CLA Review at 9; York Region Submissions to the CLA Review at 7; Local 793 Submissions to the CLA Review at 13; OALA Submissions to the CLA Review at 5.

Recommendation
<p>➤ Clarify the <i>Act</i> to confirm that the following irregularities may be cured so long as no prejudice is caused to other parties:</p> <ul style="list-style-type: none"> ○ Failure to correctly name the owner and or person to whom materials and services were supplied; ○ Minor errors in the legal description; and ○ Inserting an owner's name in the wrong part of a statement.

3. Statutory Settlement Meetings

Sections 60 and 61 of the *Act* provide a complete code for setting down and conducting a settlement meeting. This procedure is unique to the *Act*. Section 60(1) provides parties with the flexibility to concurrently fix a trial date and provide for a settlement meeting, or to take either step separately by making a motion to the courts.¹²⁴⁴ Section 60(2) requires that notice of a settlement meeting must be served at least ten days before the date appointed for the holding of the meeting. Subsection (2) lists the parties who must be served which includes all lien claimants, the owner, any other defendant or third party in any lien action, and where a lien attaches to the premises, any person with a registered interest in the premises or any execution creditor.

The settlement meeting procedure under the *Act* is not the same as a pre-trial conference under the *Rules of Civil Procedure*.¹²⁴⁵ As a consequence, Rule 50 of the *Rules of Civil Procedure* does not apply. However, these two procedures share the objective of resolving or narrowing issues to be tried. Section 61 of the *Act* prescribes mandatory rules for the conduct of settlement meetings. As a general rule, settlement meetings are conciliatory in nature, not quasi-judicial or judicial.¹²⁴⁶ Parties can agree on issues of fact and issues of law, subject to the overriding discretion of the court in enforcing such agreements.¹²⁴⁷ A properly conducted settlement meeting should record both successes and failures, thereby streamlining specific issues for trial.¹²⁴⁸

Although ss. 61(1) through (4) codify the nature, purpose and conduct of the meeting, there is variety of practice across Ontario in terms of such meetings. For example, such settlement

¹²⁴⁴ *Ibid*; Annotated Act, *supra* at 440-441.

¹²⁴⁵ RRO 1990, Reg 194; Ontario Act at ss 61(6), 67(3); Duncan Glaholt & David Keeshan, *2016 Annotated Construction Lien Act* (Toronto: Carswell, 2015) at 445.

¹²⁴⁶ Duncan W. Glaholt, *Conduct of a Lien Action 2016* (Toronto: Carswell, 2015) at 276 [Conduct of a Lien Action]; Annotated Act, *supra* at 446.

¹²⁴⁷ *Ontario Act*, ss 61(3), 61(5).

¹²⁴⁸ *Conduct of a Lien Action*, *supra* at 277.

meetings are sometimes held without the participation of a judge in jurisdictions like Essex County, Chatham, Sarnia, Southwest Region and London.¹²⁴⁹

The results of a settlement meeting are formally set out in a statement of settlement that is filed with the court and becomes part of the court record and is binding upon all those served with notice at the settlement meeting. All attendees at a settlement meeting must sign this statement.¹²⁵⁰

The court has broad powers under section 61(5) of the *Act* to make whatever orders are necessary as a result of the meeting. However, in practice courts are reluctant to interfere with the results of a settlement meeting where the meeting was properly constituted and conducted.¹²⁵¹

In their submission to the Review, the OBA CLA Reform Committee submitted that Rule 50 of the *Rules of Civil Procedure* could be adopted into the *Act* such that section 61(6) (i.e. the provision of the *Act* preventing the applicability of Rule 50) would be revoked.¹²⁵² Importantly, however, while the purposes of Rule 50 and sections 60 and 61 of the *Act* are similar, in that both are mechanisms used to narrow the issues for trial, there are different practices applicable to each. A settlement conference takes place at an early stage of a lien proceeding and is a mechanism used to set the procedure for the lien action. A pre-trial is held much later. Furthermore, the implementation of a pre-trial conference under Rule 50 is a hearing presided over by a master or a judge, whereas a settlement meeting is generally conducted by the lawyers involved.¹²⁵³

Recommendation

- As the nature of each of these provisions and the intent differs, we recommend no change be made to the *Act* (sections 60 and 61) but note that practice directions would be helpful (to be included in the Practice Directions described in Chapter 12 – Industry Education and Periodic Review).

4. Harmonization of the *Act* with the *Registry Act*

During the Consultation Process, certain stakeholders advised that there is an unintended inconsistency between the *Act* and the *Registry Act*.¹²⁵⁴

¹²⁴⁹ Conduct of a Lien Action, *supra* at 277.

¹²⁵⁰ *Ibid*; Heal, *supra* at 32.

¹²⁵¹ Conduct of a Lien Action, *supra* at 279; see also *Heritage Contracting & Design London Ltd. v Bayley-Hay*, 1990 CarswellOnt 658, [1990] OJ No 3144 (Master Browne).

¹²⁵² OBA CLA Reform Committee Submission to the CLA Review at 14.

¹²⁵³ John Margie & Markus Rotterdam, *Construction Liens: Get it Right*, citing Master Sandler at 10, online: <<http://www.glaholt.com/files/027b.pdf>>.

¹²⁵⁴ RSO, c C.30; RSO 1990 c R.20.

During the consultation with the Construction Lien Masters of Toronto and Ottawa, the Masters stated that making the two statutes consistent would be helpful and suggested (by way of example) that there could be a prescribed form under the *Act* and that vacated liens would be registered using the form” and providing it be specific (i.e. as with other statutes that allow things to be registered as a Document General).¹²⁵⁵

In relation to electronic registration under the *Registry Act*, (i.e. the E-Reg system), author Roger J. Gillot stated that “two possibilities exist as to the appropriate electronic document to register to effect registration of the [order to vacate liens]: 1) An ‘Application to Amend the Register Based on a Court Order’; and 2) A ‘Discharge of Construction Lien’.”¹²⁵⁶

In relation to such registration, the Advocates Society noted that the “[d]isharmony between the two Acts has resulted in confusion and sometimes prejudice to lien claimants. In particular, [...] the [*Act*] provides for the ability to either vacate or discharge a lien from title. Both have the effect of clearing title, but the latter results in the loss of lien rights to a lien claimant. However, the *Registry Act* forms have until recently provided only for a discharge of construction lien form; as a result, counsel inexperienced in the intricacies of the [*Act*] have sometimes inadvertently discharged their clients’ liens while attempting to vacate them from title.”¹²⁵⁷

In this regard, Gillot notes that in late 2012 it was reported that some Land Titles Offices were refusing to register orders vacating liens as “Applications to Amend.”¹²⁵⁸ This resulted in lawyers being forced by the Land Titles Office to use the “Discharge of Construction Lien” to register both discharges and vacating orders.¹²⁵⁹ Gillot identifies two issues resulting from the insistence of the Land Titles Office that the same form be used:

- 1) First, title was unclear, because the term “Discharge of Construction Lien” would appear on the Abstract of Title, when the underlying instrument could be any of a Release of Lien, an Order vacating the registration of a claim for lien and/or certificate of action, or a Discharge of Construction Lien.
- 2) The second issue stemmed from attempts to follow the instructions of the Land Titles Office. Having registered an “Application to Amend Based on Court Order”, with the Order vacating the registration of the claim for lien attached, and having perhaps advanced funds under a mortgage in reliance upon title being clear, parties were being faced with the Land Titles Office ordering that the Application to Amend be vacated and replaced with a Discharge of Construction Lien. Because the Land Registrar has 21 days

¹²⁵⁵ Lien Masters – Official Summary of Consultation Meeting at 7.

¹²⁵⁶ Roger J Gillot, “A New Problem with E-Reg: Vacating/Discharging/Releasing Claims for Lien/Liens” (2013) Ontario Bar Association, Construction and Infrastructure Branch, online: <<https://www.oba.org/Sections/Construction-Law/Articles/Articles-2013/July-2013/A-New-Problem-with-E-Reg-Vacating-Discharging-Rele>> [Gillot].

¹²⁵⁷ The Advocates Society Supplemental (New Issues) Submissions to the CLA Review at 2-3.

¹²⁵⁸ Gillot, *supra*.

¹²⁵⁹ *Ibid.*

to either “certify” or refuse to certify each title document, these rulings were sometimes being made long after the events in question.¹²⁶⁰

In view of this issue, in 2013 the Ontario Bar Association’s Construction Law Section Executive issued a notice to the profession.¹²⁶¹ The notice identified that the registration problems “may be potentially confusing since it may appear to the unwary that a lien is “discharged” when it is only really vacated – creating problems both ways – inadvertent discharge potentially or inadvertent reliance on a lien being completely discharged, when in fact it has only been vacated from title.”

Gillot noted that “[a]s a result of this controversy, the Construction Lien Masters in Toronto started including language in their vacating Orders requiring the Land Registrars to register their Orders as Applications to Amend the Register, and not as Discharges of Construction Lien.”¹²⁶²

If counsel do not use this language in their vacating orders, the Masters will apply a stamp with the language to the order. Notably, judges outside of Toronto may not have access to this stamp and if the language is not included, lawyers may be required by the Land Registry Office to register the Order through a Discharge of Construction Lien.¹²⁶³ In response to a request from the Ontario Bar Association, the Ministry of Government Services confirmed that it would “direct the Land Registrars to register the Orders as ‘Applications to Amend the Register’ in accordance with the wording of the Master’s order.”¹²⁶⁴

In its submission, the Advocates Society noted that while the situation was “improved by Teraview’s recent introduction of a new Application to Delete Construction Lien form” the *Act* could benefit from explicit harmonizing amendments so as to create separate prescribed forms for the registration, vacating and discharge of constructions liens.¹²⁶⁵

In this regard, separate forms could be prepared to harmonize the *Act* with the *Registry Act*.

According to Gillot, “the E-Reg Sub-Committee of the OBA CLA Reform Committee raised [the issue of separate forms] with the [Ministry of the Attorney General] years ago, and suggested having three separate electronic documents, one to Release a lien, one to Discharge a lien by Court Order, and one to Vacate the registration of a claim for lien or certificate of action. However, at that time the [Ministry of the Attorney General] refused, on the grounds that they needed to minimize the number of different electronic documents.”¹²⁶⁶

¹²⁶⁰ *Ibid.*

¹²⁶¹ *Ibid* at Appendix A.

¹²⁶² *Ibid.* The language was as follows: “THIS COURT ORDERS THAT the land registrar accept the registration of this order as an Application to Amend and not record it as a discharge of lien against the abstract of title for the lands and premises described herein.”

¹²⁶³ *Ibid.*

¹²⁶⁴ *Ibid.*

¹²⁶⁵ *Ibid.*

¹²⁶⁶ Gillot, *supra*.

Only one stakeholder submitted that the *Act* and the *Registry Act* are already sufficiently harmonized.¹²⁶⁷

Recommendation

- We recommend the implementation of separate forms (available electronically and physically). Specifically: one to release a lien, one to discharge a lien or certificate of action, and one to vacate the registration of a claim for lien or certificate of action.

5. Right to Seize Machinery and Equipment

The Ontario Electrical League submitted that the *Act* should include a provision to enable electrical contractor to seize machinery and equipment from a customer who has not paid the contractor for the installation of that property. They have noted that in the electrical industry the work done for process work far exceeds the “building” work and want an opportunity to seize machinery and equipment so as to encourage payment of outstanding accounts.¹²⁶⁸

This proposition was met with considerable opposition from other stakeholders. The Ontario Association of School Business Officials noted that allowing any subcontractor (electrical or otherwise) to remove materials from a construction site presents a myriad of challenges including, for example, that the Owner may have paid for work completed but for reasons outside of the owner’s control, the particular subcontractor that installed the equipment may not have been paid. The removal of materials or equipment would therefore put the owner and the project in a compromised situation.¹²⁶⁹

The City of Mississauga expressed concern that the proposal seems to suggest preferential treatment to a particular trade; and more importantly, the proposal amounts to an extraordinary remedy to seize any material and equipment (without specificity) for non-payment.¹²⁷⁰

The Ministry of Transportation also disagreed with the notion of removing machinery or equipment as, from the Ministry of Transportation’s perspective, such a mechanism could result in the potential seizing of highway safety devices such as traffic signals and power units for traffic signals removed from the highway. The Ministry of Transportation submitted that “[s]uch a right or ability would create chaos in the industry and impose a threat to the safety of the travelling public” and would “run in conflict to the goals of the Act to address payment issues in an orderly way”.¹²⁷¹

¹²⁶⁷ PPO Submissions to the CLA Review at 8.

¹²⁶⁸ OEL Submissions to the CLA Review at 1.

¹²⁶⁹ OASBO Submissions to the CLA Review at 4.

¹²⁷⁰ Mississauga Supplemental (New Issues) Submissions to the CLA Review at 1.

¹²⁷¹ MTO Supplemental (New Issues) Submissions to the CLA Review at 4.

Prompt Payment Ontario suggested that, with respect to machinery and equipment, trade contractors register a lien or seek a security remedy under the applicable conditional sales agreement pursuant to the *Personal Property Security Act* and that therefore no legislative amendment was required.¹²⁷²

We agree that such an amendment would impose an extraordinary remedy before any dispute resolution has taken place, essentially allowing enforcement before judgement, and such a measure could cause significant unintended consequences and would potentially involve treating one group of subcontractors differently than others. Accordingly, we recommend that this additional remedy for electrical contractors not be added to the *Act*.

Recommendation

- There should be no amendment to add an additional remedy for unpaid electrical contractors and subcontractors that would allow them to seize machinery and equipment after installation.

6. Additional Information in the Certificate of Substantial Performance

Section 32(2) of the *Act* sets out the contents of a certificate of substantial performance as follows:

Contents of certificate

- (2) Every certificate or declaration made or given under this section shall include,
 - (a) the name and address for service of the owner and of the contractor;
 - (b) the name and address of the payment certifier, where there is one;
 - (c) a short description of the improvement;
 - (d) the date on which the contract was substantially performed;
 - (e) where the lien attaches to the premises, a concise description containing a reference to lot and plan or instrument registration number sufficient to identify the premises; and
 - (f) the street address, if any, of the premises.¹²⁷³

Several Stakeholders submitted that further detail should be provided under this section requiring additional information for certification.

The OBA CLA Reform Committee submitted that additional requirements should be added including “legal description, PINs, specific municipal address” and in the case of a lien to be given (i.e. where the lien does not attach to the land), the name and address of the persons to whom a claim for lien must be given. The OBA CLA Reform Committee also submitted that the Review should consider “sanctions for the failure to provide correct and complete information in

¹²⁷² PPO Supplemental (New Issues) Submissions to the CLA Review at 8.

¹²⁷³ *Ontario Act*, s 32(2).

the certificate/declaration of substantial performance in order to ensure better adherence to the content requirements.”¹²⁷⁴

Prompt Payment Ontario also made specific recommendations in relation to what further information should be provided. Specifically, it recommended that the additional right to information under section 39 should be integrated into the informational requirements of section 32(2). Prompt Payment Ontario submitted that the certificate of substantial performance should also provide: 1) the names of the parties to the prime contract(s) (if construction management) and the names of the parties between the “contractor(s)” and its/their subcontractors; 2) the state of accounts between the owner and the contractor and between the contractor and its subcontractors including the revised prime contract price as at the last certified payment; and 3) particulars of any labour and material payment bond by any contractor or subcontractor provided for that particular improvement.¹²⁷⁵

Clarity in relation to the certificate of substantial performance is an objective in accordance with the goals of the *Act*. It is our view however, that the addition of all information under section 39 would be too great an administrative burden to be required in addition to the existing contents of a certificate under Section 32(2).

Recommendation

- We recommend that modifications be made to the requirements of section 32(2) of the *Act* to incorporate the legal description, including PINs and specific municipal address(es); and in the case of a lien to be given (i.e. where the lien does not attach to the land), the name and address of the person(s) to whom a claim for lien must be given.

7. Sheltering

Section 36(4) of the *Act* sets out specific rules in relation to the ‘sheltering’ of liens. This section permits sheltering of lien claims which effectively operates as an exception to the requirement that a lien be properly perfected under section 36.¹²⁷⁶ Sheltering provides a safety net for those lien claimants that do not perfect their liens in a timely way. This doctrine was developed “to avoid a multiplicity of actions relating to the same improvement and to simplify the procedure required to perfect small liens”.¹²⁷⁷ It was also created in order to provide further protection for subcontractors in the spirit of the *Act*. There is no comparable provision in the any of the provinces in Canada.¹²⁷⁸

¹²⁷⁴ OBA CLA Reform Committee Submission to the CLA Review at 16.

¹²⁷⁵ PPO Supplemental (New Issues) Submission to the CLA Review at 8.

¹²⁷⁶ Annotated Act, *supra* at 280.

¹²⁷⁷ *Ibid.*

¹²⁷⁸ *Ibid* at 279

Some commentators take the position that the sheltering provision contained in section 36(4) of the *Act* is “arguably an integral part of the ‘class proceeding’ concept of the *Act*”.¹²⁷⁹ According to author Karen Groulx of Dentons in a paper to the Ontario Bar Association, “the sheltering rules can provide protection to lien claimants who do not need to incur the expense of issuing and serving Statements of Claim where liens have been perfected prior to the expiration of the lien of the sheltering lien claimant.”¹²⁸⁰ In this regard, sheltering allows the lien claimants to proceed as a form of class and provides benefits to those persons with very small claims particularly when the prospect of retaining counsel and paying for a statement of claim is unreasonable.¹²⁸¹

Author Duncan Glaholt notes “[t]he sheltering of a preserved lien under the perfected lien of another claimant is fraught with danger. The consequences can be fatal to the lien itself or to the jurisdiction of the Court over the lien, or both.”¹²⁸² In his commentary, Glaholt notes that sheltering should only be looked upon in practice as a saving provision and not as an acceptable method of avoiding the cost of a lien action.¹²⁸³ Similarly, another commentator noted that “the potential consequences to the lien itself or to the jurisdiction of the Court over the lien are likely not worth what may amount to insignificant cost savings”.¹²⁸⁴

A significant risk of sheltering is that as the lien is only sheltered to the “defendants and the nature of the relief” claimed in the statement of claim, there can be consequences when sheltering, particularly where the sheltering claim is a nullity.¹²⁸⁵

In this regard, the OBA CLA Reform Committee recommended that we remove or abolish the sheltering provisions¹²⁸⁶ however, when asked for rationale, the OBA CLA Reform Committee noted that it did not have “a unified view on the advantages and disadvantages of removing the sheltering provisions.”

A specific concern raised was that generally, construction lien claimants are not advised by their lawyers to shelter under section 36(4). The OBA CLA Reform Committee submitted that “[i]f these provisions remain in the *Act*, there should be a notice requirement and greater specificity.”¹²⁸⁷

¹²⁷⁹ Ontario Bar Association, “*Sheltering Under My Umbrella: Case Comment on Deslaurier v. Le Groupe Brigi*”, Case Comment (26 April 2013) at 3 [Sheltering My Umbrella].

¹²⁸⁰ *Ibid.*

¹²⁸¹ *Ibid* at 4.

¹²⁸² Annotated Act, *supra* at 280.

¹²⁸³ *Ibid.*

¹²⁸⁴ Sheltering My Umbrella, *supra* at 4.

¹²⁸⁵ *Ibid* at 9.

¹²⁸⁶ OBA CLA Reform Committee Submission to the CLA Review at 16.

¹²⁸⁷ *Ibid.*

The OBA CLA Reform Committee also noted that sheltering creates uncertainty because from a review of title you do not know whether a lien is sheltered or not.¹²⁸⁸

Some experienced construction practitioners advised that they did not necessarily share the view of the OBA CLA Reform Committee. Rather, it was suggested that the rules under section 36(4) provided clear steps in relation to sheltering that are detailed enough to follow and appropriate in consideration of not only the purpose of the *Act* but also the context of other provisions. Information about whether or not a lien has been sheltered under another lien can be obtained without undue burden. It is possible to sort out which liens are sheltered and which are not at the first case conference before a master in Toronto or Ottawa. Outside of these jurisdictions, this information is easily determined at a section 60 settlement meeting. In our view, given these available procedures temporary uncertainty as to whether a lien has been sheltered is not a compelling reason to modify section 36(4).

The OBA CLA Reform Committee also noted that “the sheltering provisions force additional costs to parties where, particularly where there are multiple liens and multiple actions, knowing which liens are perfected, or allegedly perfected, under which actions.”¹²⁸⁹ However, conversely, the OBA CLA Reform Committee noted benefits of sheltering that included “(I) keeping costs down for small liens; and (II) preventing liens from being discharged in circumstances where the lien is perfected late, or not at all.”¹²⁹⁰ The OBA CLA Reform Committee submitted that “[i]f sheltering provisions remain in any lien act amendment, one possible avenue to maintain clarity is for the sheltering lien claimant to be required to provide notice (registered on title, or otherwise) of which action that lien claimant's lien is sheltering under.”¹²⁹¹ We are of the view that notice is already provided through registration. Title searches would be performed regularly at the point in time where sheltering is of a concern and the additional burden for notice is not a pragmatic add on to an otherwise effective provision.

Another issue raised by the OBA CLA Reform Committee in their supplementary submissions was in relation to the Ontario Superior Court of Justice case of *The State Group Inc. v Quebecor World Inc. and 4307046 Canada Inc.*¹²⁹² The OBA CLA Reform Committee noted that in this decision “Master Wiebe held that a contractor can shelter under its subcontractor's lien”.¹²⁹³

The OBA CLA Reform Committee recommended that any proposed “[a]mendments to the sheltering provisions should include: (i) whether a lien claimant can shelter under any action, or whether it should only be permitted to shelter under an action in that same stream; and (ii)

¹²⁸⁸ *Ibid.*

¹²⁸⁹ *Ibid.*

¹²⁹⁰ *Ibid.*

¹²⁹¹ *Ibid.*

¹²⁹² 2013 ONSC 2277.

¹²⁹³ Email from the OBA CLA Reform Committee Submission received on March 29, 2016.

whether a lien claimant can only shelter under an action in that same class (i.e. expressly disallowing a general contractor to shelter under the action of a subcontractor)”¹²⁹⁴

We do not agree. An action under the *Act* is essentially a class action.¹²⁹⁵ The scheme of the *Act* is intended to ensure that all lien claims against a premises are tried at once, where practicable, to avoid a multiplicity of proceedings.¹²⁹⁶ In this regard, we see no compelling reason to depart from this intent.

Recommendation

- We recommend that no change be made to the section 36(4) sheltering provisions under the *Act*.

8. Written Notices of Lien

The purpose of the written notice of lien is to permit the payment of funds down the construction pyramid, but at the same time require the holdback of an amount sufficient to satisfy the lien.¹²⁹⁷ The payment of funds ought to continue in the face of a written notice of lien, subject to an increased holdback.¹²⁹⁸

Few Canadian jurisdictions have legislated written notice of lien provisions. In Saskatchewan, the written notice of lien provision mirrors that in Ontario, where “a payer may, without jeopardy, make payments on a contract or subcontract up to 90% of the price of the contract of subcontract price, less the [holdback] amount retained” following receipt of a written notice of lien.¹²⁹⁹ The written notice of lien in Saskatchewan is given in a prescribed form under the regulations.

Responding stakeholders were split on the question of removing the written notice of lien provision from the *Act*. Those in favour of keeping it suggested that it serves a useful purpose in creating a notice holdback, while those opposed suggested that it has the effect of halting funds without the requirement of registering a lien.

¹²⁹⁴ *Ibid.*

¹²⁹⁵ R. Bruce Reynolds & Robert B. Pattison, “Sheltering, Consolidation and Trial Together: The Construction Lien Action as a ‘Class Action’” (1996) 29 CONSTRLR-ART 214 at 1, citing Harvey Kirsh, *A Guide to Construction Liens in Ontario* 2d ed (Toronto: Butterworths, 1995) at 166; D. Macklem & D. Bristow, *Construction Builders' and Mechanics' Lien in Canada*, 6th ed (Scarborough, Ontario: Carswell, 1990) at 11-1.

¹²⁹⁶ Report of the Attorney General’s Advisory Committee on the Draft Construction Lien Act, 1982, Appendix A to Duncan Glaholt & David Keeshan, *The 2016 Annotated Construction Lien Act* (Toronto: Carswell, 2015) at 280 [AG Report].

¹²⁹⁷ *Ibid.*

¹²⁹⁸ Andrew J. Heal, “Holdback Funds: Rights and Obligations” (2010) Blaney McMurtry LLP at 3, online: <http://www.blaney.com/sites/default/files/Holdback-Funds_Rights_and_Obligations_AJH.pdf>.

¹²⁹⁹ *Saskatchewan Act*, s 40.

Most of the responding stakeholders were not opposed to keeping the notice provisions, but did note that there should be a simple regulated form to satisfy “the required elements set out in the jurisprudence and the project can be easily identified”.¹³⁰⁰ That is, the individual receiving the written notice of lien should know that it is a written notice of lien and it should be clear what it applies to.

Infrastructure Ontario expressed support for the concept of a standardized form, further noting that the written notice allows for early resolution of lien claims.¹³⁰¹ York Region suggested clarifying the notice of lien provisions.¹³⁰² The Council of Universities also cited the early resolution of claims as a reason for keeping the written notice of lien.¹³⁰³

The Council of Ontario Construction Associations, which was also in favour of preserving the written notice provisions, suggested that any concerns with the written notice requirements could be addressed by clarifying the procedure to withdraw the written notice rather than eliminating the provision entirely.¹³⁰⁴

Goldman Sloan Nash & Haber LLP suggested that once a lien is vacated or discharged, any related notice of lien should be deemed to be withdrawn. Alternatively, a prescribed form could be used to include withdrawal of the notice of lien as part of the order sought in vacating or discharging a lien.¹³⁰⁵ The OBA CLA Reform Committee also suggested a prescribed form for the withdrawal of the written notice of lien.¹³⁰⁶

Prompt Payment Ontario suggested that the written notice of lien serves a useful purpose, that is, to allow for continued payments, but also suggested the creation of a further notice holdback in addition to the statutory holdback.¹³⁰⁷

Conversely, the Toronto Transit Commission submitted that the written notice of lien should be removed from the *Act*. There was concern that the informality of the written notice makes it too likely that project staff may not even know they have received a notice, and it has the impact of halting funds despite the claimant not having to swear a document, be subject to cross-examination, or be subject to costs under section 86 of the *Act*. As an alternative, the Toronto Transit Commission recommended the introduction of a new standardized form by Regulation that does not extend the time to lien. The Toronto Transit Commission also recommended defining “written notice of lien” to legislate what is to be included and effectively make the

¹³⁰⁰ City of Toronto Submissions to the CLA Review at 3.

¹³⁰¹ IO Submissions to the CLA Review at 5-6.

¹³⁰² York Region Supplemental (New Issues) Submissions to the CLA Review at 1.

¹³⁰³ COU Submissions to the CLA Review at 2.

¹³⁰⁴ COCA Submissions to the CLA Review at 13.

¹³⁰⁵ Goldman Sloan Nash & Haber LLP Submissions to the CLA Review at 4.

¹³⁰⁶ OBA CLA Reform Committee Submission to the CLA Review at 18.

¹³⁰⁷ PPO Supplemental (New Issues) Submissions to the CLA Review at 2.

document a formal one.¹³⁰⁸ The Ontario Association of School Business Officials was also in support of removing the written notice section.¹³⁰⁹

There were also submissions about practical issues that arise from the delivery of a written notice of lien. For example, Antonio Azevedo described a scenario where a notice was sent by a contractor to an owner and no lien was ever registered, but the lender stopped advancing funds.¹³¹⁰ Thus, the written notice of lien had the effect of stopping the advance of funds, but the owner did not have the ability to post security to vacate the lien.

Stakeholders submitted that a central issue with regards to the written notice of lien is the variation in how it is submitted; often, it is difficult to ascertain what is and what is not a “written notice of lien”. Multiple stakeholders have proposed that written notices of a lien be in a prescribed form under the regulations to the *Act* due to the fact that the letters that are typically used for this purpose are frequently so vague as to raise issues in the mind of the recipient as to whether they are “written notice of a lien”. As well, stakeholders also suggested that the process for withdrawing a “written notice of lien” be simplified. This, too, should be done in a prescribed form to eliminate any ambiguities.

Recommendations

- The definition of “written notice of a lien” should be amended to provide further particulars as to service and a form of written notice of lien should be added to the regulations.
- Section 44 should be amended to provide for the posting of security to vacate a written notice of lien.
- The withdrawal of a “written notice of lien” should also be in a prescribed form.

9. Requests for Information

Section 39 of the *Act* permits a person with a lien and/or trust claim to request information regarding the names of the parties to the contract, the state of accounts, substantial completion, and the existence of labour and material payment bonds, which is information they need to properly enforce their remedies.¹³¹¹ The intent of section 39 is to encourage transparency.¹³¹²

The statutory right to information first appeared in *The Mechanics’ and Wage-Earners’ Lien Act*, 1896, SO 1896, c 35. However, the right has expanded significantly to its current form under section 39. Some authors have noted that the purpose of Part VI is to create a procedure to

¹³⁰⁸ TTC Submissions to the CLA Review at 14-15.

¹³⁰⁹ OASBO Supplemental (New Issues) Submissions to the CLA Review at 1.

¹³¹⁰ Antonio Azevedo Submissions to the CLA Review at 1-2.

¹³¹¹ Conduct of a Lien Action, *supra* at 3.11.

¹³¹² *Ibid.*

require the disclosure of information which can assist and enable enforcement of remedies under the Act.¹³¹³ A person entitled to information under section 39 can bring a motion to compel disclosure at any time, “whether or not an action has been commenced”.¹³¹⁴

Other provinces provide rights to individuals involved in the construction process through their respective legislation. For example, the BC Act provides lien holders with rights to certain information.¹³¹⁵ In particular, section 41 of the BC Act entitles a lien holder to submit a written request to the owner requiring information in relation to the location of the holdback account, its account number, as well as particulars of credits to and payments from the holdback account. Other examples include: the Alberta Act, the Manitoba Act, the Saskatchewan Act, the New Brunswick Act, the Nova Scotia Act, and the PEI Act.¹³¹⁶ These examples are similarly related to requirements to provide information in a lien action or other action under the legislation, rather than at the outset of the project.

While the equivalent provisions across Canada are similar, British Columbia and Saskatchewan add two more items which owners must provide:

- (ii) the name and address of the savings institution in which a holdback account has been opened, and the account number,
- (iii) particulars of credits to and payments from the holdback account, including the dates of credits and payments, and the balance at the time the information is given

The central concern among stakeholders was the lack of clarity in the section, particularly the vagueness of the term “state of accounts”. With respect to this term, Corbett J held in *Urbacon Building Groups Corp. v Guelph (City)* that ““state of accounts”” includes, at minimum: (a) the value of the work done; (b) the amount paid; (c) the amount held back pursuant to the Act; (d) the balance owed”.¹³¹⁷ Corbett J went on to note that the purpose of this section is “to enable lien claimants to obtain information ‘pertinent to the decision of whether or not to preserve a lien claim or to prosecute a lien action’”.¹³¹⁸

While stakeholder submissions on requests for information varied, the predominant concern was with the lack of clarity in the section. Several stakeholders suggested that section 39 should be

¹³¹³ Annotated Act, *supra* at 305.

¹³¹⁴ *Sunview Doors Ltd v Academy Doors & Windows Ltd.*, 87 CLR (3d) 163 (Ont CA).

¹³¹⁵ *B.C. Act*, s 41.

¹³¹⁶ *Alberta Act*, s 33; *Manitoba Act*, s 58; *Saskatchewan Act*, s 82; *New Brunswick Act*, s 32; *Nova Scotia Act*, s 32; and *P.E.I. Act*, s 32.

¹³¹⁷ 2009 CarswellOnt 8127 at para 9 (Sup Ct J).

¹³¹⁸ *Ibid* at para 10.

amended to clarify what type of information the requester is entitled to and what constitutes a “state of accounts” under section 39(1)1.iii.¹³¹⁹

Other stakeholders suggested minor amendments. For example, the Canadian Bankers Association suggested that mortgagees should not have to provide information regarding advances on revolving lines of credit that were made prior to the registration of the lien, as producing those records can cause unnecessary costs and delays.¹³²⁰ The Provincial Building and Construction Trades Council of Ontario and the International Union of Operating Engineers Local 793 suggested in their joint submission that the responding party should also be required to provide an “estimated statutory holdback position” along with supporting documentation,¹³²¹ while the Ontario Road Builders Association suggested including all statutory declarations issued by the contractor as part of the information provided.¹³²²

The Council of Ontario Construction Associations suggested several additions to the requirements under section 39: that owners disclose the names of any tenants on the property and any amounts paid by tenants pursuant to a leasehold improvement allowance, and that trustees produce current records of receipts and disbursements of trust funds. The Council of Ontario Construction Associations also suggested that trust beneficiaries receive a production of the trust accounting upon request.¹³²³

It is clear from the review of legislation in other jurisdictions and comments from stakeholders that more clarity is required in respect of section 39 requests for information. The purpose of the section is to provide lien claimants with pertinent information to allow them to decide whether to lien and whether to prosecute a lien action.

Recommendation

- We recommend that section 39 should be amended to clarify what type of information the person making the request is entitled to and, in particular, what constitutes a “state of accounts” under section 39(1)1.iii, and should include: the value of the work done, the amount paid, the amount held back pursuant to the *Act*, the balance owed, and the leasehold information described in Chapter 3 – Lienability.

10. Vacating Liens Through the Posting of Security

A lien can be removed from title by being vacated, discharged or released. Vacating the registration of a lien will result in the lien claimant using the security in the Court in place of an

¹³¹⁹ City of Toronto Submissions to the CLA Review 4; IO Submissions to the CLA Review at 7-8; Metrolinx Submissions to the CLA Review at 3; TTC Submissions to the CLA Review at 21; York Region Submissions to the CLA Review at 3.

¹³²⁰ CBA Submissions to the CLA Review at 4.

¹³²¹ Local 793 and PBCTCO Submissions to the CLA Review at 8.

¹³²² ORBA Submissions to the CLA Review at 6.

¹³²³ COCA Submissions to the CLA Review at 13, 16.

interest within the premises or subject of the construction.¹³²⁴ The amount paid into the court will be statutorily defined or otherwise agreed upon.¹³²⁵ Once a lien is vacated, “the lien becomes a charge upon the security and no longer attaches to the premises...or the holdback.”¹³²⁶ Instead, the entitlement that exists is a charge upon the security posted with the court.¹³²⁷

10.1 Who is Permitted to Vacate a Lien

Goldman Sloan Nash & Haber LLP suggested that there is an issue with section 44(1) of the *Act*, which allows any person to vacate the lien, without notice, upon payment into Court in accordance with subsections (c) and (d) and does not require that the person posting the security be a ‘payer’ within the meaning of section 1 of the *Act* or otherwise involved in the construction project in any way.¹³²⁸ Goldman Sloan Nash & Haber note that this “permits persons/entities outside the construction lien chain with no liability contractually, statutorily, or otherwise (i.e. the mortgagee) to post security, vacate a lien, and thereafter seek to have the full amount of security posted returned to them without any liability to the lien claimant”.¹³²⁹ They recommended that the *Act* should be amended to state that even though any person may post security to vacate a lien, that person stands, at best, in the same position as the owner or building mortgagee or subsequent mortgagee (as the circumstances may require) upon the posting of security to vacate the lien.

10.2 Amount of Security

In Ontario, the statutory amount includes the full amount owing in the claim for lien and the lesser of \$50,000 or 25% of the amount owing for costs.¹³³⁰ This \$50,000 amount has not changed since 1983.¹³³¹ The only other province to prescribe a specific amount for costs is Saskatchewan, where the amount of security mirrors that in Ontario.¹³³² In most other provinces, the amount for costs is fixed by the court. In Alberta, for example, the court may order that the moving party pay the amount of the claim or “such lesser amount as the court determines”, and the court will fix costs.¹³³³ Ontario and Saskatchewan are the only provinces that specify that the motion to post security can be brought on an *ex parte* basis. In Alberta, the court will make the order on application.

¹³²⁴ Annotated Act, *supra* at 320.

¹³²⁵ Torkin Manes, “Construction Law Primer” (April 13, 2011) at 16, online: <https://www.acc.com/chapters/ontario/upload/TorkinManes_ConstructionLawPrimer_13APR11.pdf> [Construction Law Primer].

¹³²⁶ Annotated Act, *supra* at 321.

¹³²⁷ Construction Law Primer, *supra* at 17.

¹³²⁸ Goldman Sloan Nash & Haber LLP Submission at 1.

¹³²⁹ *Ibid* at 2.

¹³³⁰ *Ontario Act*, s 44(1).

¹³³¹ *Ontario Act*, s 44.

¹³³² *Saskatchewan Act*, s 56(1).

¹³³³ *Alberta Act*, s 48(1).

The *Mechanics Lien Act*, which was the precursor to the *Act* prior to 1983, did not provide any monetary limits for the security of costs when vacating a lien. Instead, the applicable section gave discretion to the judge or master to set “such costs as he may fix”.¹³³⁴

While the amount required to be posted for security for cost has not changed, legal costs and expenses have increased significantly since the *Act* came into force. The most commonly cited reasons for price rises included increasing overhead costs, inflation, and greater complexity of the work lawyers are taking on.¹³³⁵ Other law firms also cite competitor pricing as a drive to increase their hourly rates.¹³³⁶ Between 2013 and 2014 the rates for five-year calls and ten-year calls both increased 4%. In the same time frame, lawyers with twenty-years of experience increased on average 7%.¹³³⁷ The trend of increasing fees seems unlikely to cease in the coming years. In 2015, 48% of practitioners were planning to increase their fees further.¹³³⁸

All of the stakeholders who commented on the security regime recommended, to some degree, continuing the current regime for posting security to vacate liens. The Council of Ontario Universities¹³³⁹ and the Surety Association of Canada¹³⁴⁰ expressed support for a continuation of the current regime while other stakeholders suggested increasing the amount posted for security. Infrastructure Ontario¹³⁴¹ and the City of Toronto¹³⁴² both cited increased legal costs as a reason why the minimum posted for security for costs ought to be increased. The Ontario Public Works Association further suggested clarification on the effects that posting security and vacating liens has on lien claimants. The OBA CLA Reform Committee suggested that consideration be given to amendments that would make it easier to settle with a particular lien claimant in a situation where security has been posted for all liens, and if security should stand only for a particular lien claim.¹³⁴³

During the Consultation Process, it was suggested that in circumstances where costs are awarded to a lien claimant and there remains a balance (in the fund secured for costs), that balance should be applied against interest (calculated on the basis of the interest stipulated in the contract or failing which, in accordance with the *Courts of Justice Act*). We did not receive any substantive submissions or suggestions from the Stakeholders in relation to this issue.

According to the OBA CLA Reform Committee, in some circumstances “counsel have adopted a practice of asking the court for leave to allow the posting of security where the delivery of a

¹³³⁴ *Mechanics’ Lien Act*, RSO 1980, c 261, s 29(2)(a).

¹³³⁵ Michael McKierman, “The going rate” (June 2, 2014), online: <<http://www.canadianlawyermag.com/5151/The-going-rate.html>>.

¹³³⁶ *Ibid.*

¹³³⁷ *Ibid.*

¹³³⁸ *Ibid.*

¹³³⁹ COU Submissions to the CLA Review at 1.

¹³⁴⁰ SAC Submissions to the CLA Review at 7.

¹³⁴¹ IO Submissions to the CLA Review at 5.

¹³⁴² City of Toronto Submissions to the CLA Review at 3.

¹³⁴³ OBA CLA Reform Committee Submission to the CLA Review at 18.

written notice of lien has interrupted the flow of funds and the payer needs to post security even before the lien is preserved.”¹³⁴⁴ The OBA CLA Reform Committee noted that in order for this amendment to be successful, a further amendment is required that allows the payer to obtain an order from the court vacating the actual registration of the lien where this occurs based on the security already posted. Alternatively, the court would be able to declare that any lien to be preserved in respect of the written notice of lien no longer attaches to the premises and shall be preserved by giving the claim for lien to the owner and person to whom the lien claimant provided services.¹³⁴⁵

10.3 Acceptable Types of Security

The only forms of security which will be accepted by the Court are bank drafts, certified cheques payable to the Accountant of the Superior Court of Justice, or financial guarantee bonds in the prescribed form.¹³⁴⁶

Section 44(2) requires that the court must be satisfied that the amount paid into court or the security must be reasonable in the circumstances to satisfy the lien. While the *Act* does not specify the kind of security needed to bond off a construction lien, the court reserves the right to approve any security posted to vacate a construction lien.¹³⁴⁷ In addition, case law in Ontario has developed so as to allow a letter of credit to be treated as satisfactory security in a similar manner to cash.¹³⁴⁸

In Toronto, “Construction Lien Masters have insisted that [letters of credit] posted as security must not contain any reference to international commercial conventions concerning letters of credit”.¹³⁴⁹ If present, such references will result in the refusal to approve the letters of credit.

In a 2012 decision by Master Polika, *Naylor Group Inc. v Enfinity Canada EPC Inc.*, the Master confirmed that letters of credit must be absolutely unconditional.¹³⁵⁰ In that case, Enfinity “intended to post a letter of credit that was ‘subject to’” ICC Publication 590 of the International Chamber of Commerce”.¹³⁵¹ Enfinity’s European parent company had arranged for the letter of credit from a European bank the beneficiary of which was the Royal Bank of Canada. That letter of credit was to be used as security for a letter of credit issued by Royal Bank to bond off the construction lien. The party’s motion to vacate the lien and post security was dismissed because

¹³⁴⁴ *Ibid.*

¹³⁴⁵ *Ibid.*

¹³⁴⁶ Construction Law Primer, *supra* at 17.

¹³⁴⁷ This practice originates from s 29(4) of the old *Mechanics Lien Act*, RSO 1970, c 267 according to Christopher Stanek, “Posting Letters of Credit to Bond Off Construction Liens: Time to Change an Irrelevant Practice?” (2013), online: <<https://www.oba.org/Sections/Construction-Law/Articles/Articles-2013/July-2013/Posting-Letters-of-Credit-to-Bond-Off-Construction>> [Stanek].

¹³⁴⁸ Annotated Act, *supra* at 325.

¹³⁴⁹ *Ibid.*

¹³⁵⁰ *Naylor Group Incorporated v Enfinity Canada EPC INC.*, 2012 ONSC 4365 (CanLII).

¹³⁵¹ Stanek, *supra*.

“by inserting the term, on its face the letter of credit is subject to ICC Publication 590 and there is a potential that the term will be invoked to deny payment.”

In his text *Conduct of a Lien Action* Duncan Glaholt suggested that, “[b]y insisting on unconditional language, the masters simply ensure that there is no chance of the Accountant of the Superior Court being embroiled in litigation because of some conditional language”.¹³⁵² Therefore, the letter of credit “*must be irrevocable and unconditional* and from a well-known financial institution, preferably a Canadian chartered bank” [emphasis in original].¹³⁵³

It has been suggested that the crux of the problem with respect to the position taken by the Construction Lien Masters is “that international conventions in letters of credit are essential in a global economy.” Specifically,

“when a letter of credit is issued by an Ontario bank at the request of (and on the security of) an international company, the Ontario bank cannot recover the funds it pays out to that international company under the letter of credit without referencing an international convention. Similarly, a foreign bank putting up the security for a Canadian Bank to issue a letter of credit, would not do so if the letter of credit that bonded off the lien did not include the terms of an international convention, because it would make the terms of that international transaction uncertain.”¹³⁵⁴

Many common law jurisdictions are not as hesitant as Ontario in accepting these international conventions. For example, the UK allows for letters of credit to reference the Uniform Customs and Practice for Documentary Credits (“UCP”), developed by the International Chamber of Commerce “[t]o standardise terms and procedures and avoid misunderstandings [...] the UCP standards give definitions to important terms that are used in letters of credits” and “[w]hen referring to letters of credit, banks and others involved in international trade will generally use the UCP definitions of key terms and phrases”.¹³⁵⁵

Similarly, Australia and New Zealand allow for UCP to be included in letters of credit.¹³⁵⁶ Since UCP is of no legal force in either Australia or New Zealand, “[i]t is therefore necessary for the UCP or [ICC International Standby Practices (ISP98)] system to be specifically written into the terms of the credit”.¹³⁵⁷

Each of UCC 5, UCP and ISP98 (as used in the European Union) detail how a bank issuing a letter of credit may draw upon the security of its customer when the letter of credit is paid. It has been suggested that “[w]ithout reference to an international convention, no Ontario bank would

¹³⁵² *Conduct of a Lien Action*, *supra* at 146.

¹³⁵³ *Ibid.*

¹³⁵⁴ *Ibid.*

¹³⁵⁵ HM Revenue & Customs, “Letters of credit for importers and exporters” (2012), online: <<https://www.gov.uk/guidance/letters-of-credit-for-importers-and-exporters>>.

¹³⁵⁶ Robin Burnett & Vivienne Bath, *Law of International Business in Australasia* (Annandale, NSW: The Federation Press, 2009) at 196-197.

¹³⁵⁷ *Ibid.*

have reliable rules for the collection on a letter of credit issued for a foreign company unless that company had assets in Canada. By insisting that posted letters of credit not contain these international terms, the Construction Lien Masters are creating a competitive disadvantage for foreign construction companies in Ontario”.¹³⁵⁸

Some stakeholders submitted that letters of credit with international commercial conventions should be accepted as security¹³⁵⁹ or in one example, they were open to their use provided they were accepted by the major Canadian banks.¹³⁶⁰

It has been also been suggested that the type of security that will be accepted under section 44(1) of the *Act* be narrowed. By way of example, Goldman Sloan Nash & Haber LLP submitted that outside of Toronto, there is an issue with respect to lien bonds being presented and accepted by the Court that are not from recognized sureties and in some cases, from individuals without bonding capacity and unknown financial status.¹³⁶¹ In this regard, it was submitted that we should recommend a specific type of security to be used in order to vacate liens.

10.4 Procedure for Posting Security

During the Consultation Process, an issue was raised that relates to procedural matters that are outside of the *Act*'s contemplation. These include procedural restrictions such as identifying whether or not the court has assigned a specific judge to oversee motions and matters under the *Act*; if so, the time and dates that specific judge is sitting and available to hear motions; and the procedure by which the court deals with *ex parte* motions where no action has been commenced.¹³⁶²

In Toronto, the Construction Lien Master's Office of the Superior Court of Justice has the jurisdiction to oversee section 44 motions.¹³⁶³ They sit every day and have generally accepted section 44 motions that concern non-Toronto properties if the lien action is not too advanced.¹³⁶⁴

According to the Advocates' Society, there exists an issue in relation to the urgent nature of posting security to vacate a lien outside of Toronto.¹³⁶⁵ In regions outside of Toronto, a person seeking to post security does not have certain “luxuries” available in Toronto (i.e. set windows available before Masters to vacate liens) but rather, “must wait for the regular motions sittings (unless the person moves on an urgent basis, the onus being on the moving party to demonstrate the urgency) or obtain an order over the counter.”¹³⁶⁶

¹³⁵⁸ Stanek, *supra*.

¹³⁵⁹ City of Toronto Submissions to the CLA Review at 9; see also Metrolinx Submissions to the CLA Review at 6.

¹³⁶⁰ See IO Supp. (Attachment) Submissions to the CLA Review at 28.

¹³⁶¹ Goldman Sloan Nash & Haber LLP Submissions to the CLA Review at 3.

¹³⁶² *Ibid* at 17.

¹³⁶³ *Ibid* at 18.

¹³⁶⁴ *Ibid*.

¹³⁶⁵ The Advocates Society Submissions to the CLA Review at 5.

¹³⁶⁶ *Ibid*.

Procedurally, the problem created in this circumstance is that if a person were to wait for a regular motion date, that person is still subject to waiting for his or her motion to be called based on the scheduling at court on that particular day. Importantly, in the construction industry, when liens are registered on title that constitutes “reason for a payer to withhold payment” and thus project funds are “frozen” until monies have been posted as security and the liens are vacated under section 44 of the *Act*.¹³⁶⁷ The freezing of project funds can, and typically does, have a detrimental effect on the whole of the project (whether by impacting schedule or otherwise).

The Advocates’ Society also notes the problem of backlogs in waiting for the security to be delivered to the Accountant’s Office of the Superior Court of Justice (particularly outside of Toronto). In relation to this issue, the Advocates Society suggested that the forms of security typically used (e.g. certified funds, construction lien bonds, letters of credit) are already acceptable to the Court prior to the Court granting any relief (i.e. while the step of taking it to the Accountant’s office for verification may be technically prudent, it could be considered an extraneous step).

Accordingly, the Advocates’ Society submitted that the *Act* be amended to remove the “urgency” required under the *Rules of Civil Procedure* in order to bring a motion immediately and without administrative delay. In relation to the nature of the security, the Advocates Society submitted that the *Act* be further amended such that when the Court is satisfied with the form of security, an order permitting a person posting security to vacate could be released to that person immediately (i.e. without requiring filing of the security or payment with the Registrar or Accountant as under the *Rules of Civil Procedure*).

Recommendations

- We recommend that the amount of security that is to be posted to vacate a lien under section 44(1) should be amended to include the total of the full amount claimed as owing in the claim for lien and the lesser of 25% or \$250,000 of the amount of the lien claim as security for costs.
- We recommend that Letters of Credit with reference to International Commercial Conventions should be accepted as security, provided the Letter of Credit is unconditional, the International Commercial Convention is written into the terms of the credit, and it is accepted by a bank listed under Schedule I of the *Bank Act*, S.C. 1991, c. 46. Sched. 1 operating in Ontario.
- We make no recommendations with respect to procedural issues that are outside of our remit (i.e. in relation to the Rules of Civil Procedure), however, we suggest that the Ministries further investigate the procedural and resourcing issues identified that have caused issues in respect of members of the construction industry gaining access to the courts to vacate a lien; particularly outside of Toronto and Ottawa.

¹³⁶⁷ *Ibid.*

11. Statement of Allocation of a Mortgagee

Under section 78(2) of the Act, lien claimants have priority over mortgagees for building mortgages to the extent of any deficiency in the holdback required to be retained by the owner.

In the 1982 Report of the Attorney General’s Committee, it was noted that “it is only fair that the mortgagee’s interest be partly subordinated to the liens of the suppliers to the improvement”.¹³⁶⁸ While the timing of the mortgage or advance is crucial under sections 78(3) to (6), the intention of the mortgagee is crucial under section 78(2), as the “building mortgage...is subordinate to the liens arising from an improvement to the extent of any deficiency in the holdbacks...**regardless of when the mortgage is registered**” [emphasis added].¹³⁶⁹

A building mortgage finances construction on the land, which is distinct from a mortgage that finances the acquisition of the land itself.¹³⁷⁰ Lien claimants, and courts, as the case may be, must look to the intention of the lender, not the borrower, to determine if a mortgage should be classified as a building mortgage.¹³⁷¹

In many cases, a single mortgage will be taken with a “dual intention” to “finance the acquisition of the lands” and finance “the construction on the lands”.¹³⁷² In these cases, the onus is on the lender to establish intention on a balance of probabilities. On amounts that were intended to finance the acquisition of land, the lender has priority over the lien claimants.¹³⁷³

Where a mortgage carries a “dual intention”, the mortgagee must “establish [its] intention very clearly upon a balance of probabilities by solid evidence, preferably contemporaneous documentary evidence establishing its intention”.¹³⁷⁴

With respect to the registration of mortgages and whether the purpose of the financing should be disclosed, stakeholders suggested the following:

- a) The City of Toronto suggested that mortgagees should be required to identify their financial purpose so that “building mortgages” could be easily identified.¹³⁷⁵

¹³⁶⁸ Report of the Attorney General’s Advisory Committee on the Draft Construction Lien Act, 1982, Appendix A to Duncan Glaholt & David Keeshan, *The 2016 Annotated Construction Lien Act* (Toronto: Carswell, 2015) at 974.

¹³⁶⁹ Chris Huband, “Mortgages and Construction Liens”, *Blakes Bulletin* (2012), online: <<http://www.blakes.com/English/Resources/Bulletins/Pages/Details.aspx?BulletinID=1642>> [Huband Mortgages].

¹³⁷⁰ Groulx, *supra* at 3.

¹³⁷¹ Huband Mortgages, *supra*.

¹³⁷² Karen Groulx, “Competing Priority Claims in the Construction Lien Act” Dentons (2010) at 3.

¹³⁷³ *Royal Bank v Lawton Developments Inc.* (1994), 16 OR (3d) 450 at para 10 (Gen Div), rev’d on other grounds (1996), 27 OR (3d) 417 (CA).

¹³⁷⁴ *Ibid.*

¹³⁷⁵ City of Toronto Submissions to the CLA Review at 6.

- b) The Ontario Road Builders' Association agreed with this proposition, although commented that it is already a fairly simple determination to make based on the mortgagee, lender, and interest rate.¹³⁷⁶
- c) The Canadian Institute of Quantity Surveyors noted that the purpose of the financing may not be known at the time financing is arranged as the lender financing the land purchase will carry on and finance the construction.¹³⁷⁷

While we agree with the comment by the Ontario Road Builders' Association that it may be simple to determine the intentions of mortgagees, requiring mortgagees to segregate their intentions with regards to mortgages between funds for the acquisition of land and funds towards improvement(s) to and/or on the land is a non-onerous requirement that would dispense with the need for litigation on the issue and would, in any case, provide greater clarity for lien claimants when assessing their position in the priorities regime.

Recommendation

- When a mortgagee makes a loan for the purpose of financing both land acquisition and the construction of an improvement, the mortgagee should be required to identify the amount intended for the acquisition of land and the amount intended for the improvement(s) to and/or on the land in mortgage documents.

¹³⁷⁶ ORBA Submissions to the CLA Review at 10.

¹³⁷⁷ CIQS Submissions to the CLA Review at 8.

1. Overview

As part of the Review, stakeholders expressed concern in relation to the *Act* being overly complex and/or not being accessible to the average construction industry participant. While many of our recommendations have been aimed at streamlining processes (i.e. increasing the efficiency and efficacy of procedures under the *Act*) we remain aware of the overarching need for understanding amongst not only the stakeholder communities, but also to those who may wish to know more about the *Act* and how it works.

In that regard, we have considered certain options that could be undertaken to ameliorate the complexities of the *Act* from an educational perspective, and we have considered standards of review to keep the *Act* modernized and accessible as the industry evolves over time. Accordingly, the following issues are considered in this Chapter:

- Practice Guides and Interpretive Bulletins
- Instituting a Periodic Review of the *Act*

2. Practice Guides and Interpretive Bulletins

The Stakeholders who commented on this issue uniformly agreed that alongside amendments to the *Act*, a practice guide or series of interpretive bulletins would be a beneficial recommendation.¹³⁷⁸

In its original submission the City of Toronto effectively summarized the issue as follows:

For the first time in decades, all of the sectors in the construction industry have been engaged to provide input as part of a full review of Act. Alongside the amendments to the Act, the City suggests that consideration be given to developing a practice guide and interpretation bulletins.

It is well established to have Practice Directions issued by the Court to explain details of court procedure that are absent from the Rules of Civil Procedure. It might be helpful to have additional guidance complement the Act for other issues. Given the complexity of the Act, changing technologies, and the broad cross-section of individuals affected, supplementary documentation could both explain the Act and facilitate the delivery of construction projects.

A practice guide could assist in the application of the Act and could also include other non-legislated steps that may be adopted on agreement of the parties. For instance, the guide could include a chart or drawing to more clearly show priorities that are only described with words under the Act. Also, if suggestions are made to impose a process for mandatory mediation and they do not end up being incorporated into the Act, the structure could instead be set out in the guide as a reference tool for parties who agree to use mediation to resolve a dispute and want to adopt an established process.

¹³⁷⁸ City of Toronto Supplemental (New Issues) Submissions to the CLA Review at 4; York Region Submissions to the CLA Review at 3; PPO Supplemental (New Issues) Submissions to the CLA Review at 9; MTO Supplemental (New Issues) Submissions to the CLA Review at 4; OASBO Supplemental (New Issues) Submissions to the CLA Review at 5.

The idea to introduce interpretation bulletins, like those used by the CRA for income tax, or a similar document, is to help resolve confusion in interpreting the Act. For example, an interpretation bulletin could set out specific examples of what is and is not lienable.¹³⁷⁹

Given the support of the stakeholders and interest in efficiency and clarity of the Act, we make the following recommendations:

Recommendations
<ul style="list-style-type: none"> ➤ We recommend that the Ministries provide education, awareness and support for industry participants. In this regard, we recommend the implementation of a practice guide and interpretative bulletins to be provided following the enactment of any amendments to the Act. ➤ We recommend that any practice guide and/or interpretation bulletins implemented should be updated periodically on a website designated by the Ministry of the Attorney General.¹³⁸⁰ ➤ We recommend that the stakeholders should be proactive in educating and training their constituents on the recommendations from this report that are ultimately adopted by the Ministries and implemented under the Act, if any.

3. Instituting a Periodic Review of the Act

As noted in the Information Package, the Act was last amended as part of Ontario’s *Open for Business Act, 2010*; but was last reviewed in a holistic manner in the early 1980s. Amendments made to the Act in the last thirty years have often been reactive rather than proactive. During the Consultation Process, the relative slow pace of amendments to the Act was compared with the relatively fast pace of evolution of the construction industry. In this regard, certain stakeholders recommended that the Review consider a periodic review of the Act in order to maintain currency, to the best degree possible.

The Canadian Institute of Quantity Surveyors, the City of Toronto, the Council of Ontario Construction Associations, Infrastructure Ontario, Metrolinx, the Ontario Association of Landscape Architects, Ontario Public Works Association, the Ontario Road Builders Association and York Region all recommended a periodic review of the Act. Specific recommendations were made in terms of how often a review should be undertaken which ranged from 5 to 10 years.

No stakeholder expressed opposition to a periodic review of the Act.

There are a variety of Canadian statutes that require periodic reviews in the legislation itself. For example, the following statutes require periodic reviews: *BIA*,¹³⁸¹ *Companies’ Creditors*

¹³⁷⁹ City of Toronto Submissions to the CLA Review at 9-10.

¹³⁸⁰ City of Toronto Supplemental (New Issues) Submissions to the CLA Review at 4.

¹³⁸¹ RSC 1985, c B-3, s 285 (review in 5 years).

Arrangement Act,¹³⁸² *Copyright Act*,¹³⁸³ *Canada Not-for-Profit Corporations Act*,¹³⁸⁴ and the *Motor Vehicle Transport Act*.¹³⁸⁵

In Australia certain statutes related to the construction industry also stipulate periodic reviews; typically between 3 and 5 years following the date of assent.¹³⁸⁶

Recommendation

- We recommend that an independent review of the *Act* to be conducted within 5 years of the enactment of the recommendations of this Report, and every 7 years thereafter (keeping in mind that the pilot project for project bank accounts will be subject to a much shorter review period, as described in Chapter 7 – Construction Trusts).

¹³⁸² RSC 1985, c C-36, s 63 (review in 5 years).

¹³⁸³ RSC 1985, c C-42, s 92 (review in 5 years).

¹³⁸⁴ SC 2009, c 23, s 299 (review in 5 years).

¹³⁸⁵ RSC 1985, c 29 (3rd Supp), s 26 (review in 4 years).

¹³⁸⁶ See for example, the *Contractors Debts Act* 1997 (NSW), s 24; the *Building and Construction Industry Security of Payment Act* 1999 (NSW), s 38; the *Construction Contracts Act* 2004 (WA), s 56; the *Building and Construction Industry (Security of Payment Act) 2009* (ACT), s 45; the *Building and Construction Industry Security of Payment Act* 2009 (SA), s 36; and the *Construction Contracts (Security of Payments) Act* 2004 (NT), s 65.

SUMMARY OF RECOMMENDATIONS

The following are our recommendations:

Lienability

1. Part (a) of the definition of “improvement” should be amended to refer to “any alteration or addition to the land and any **capital** repair to the land” (p 16).
2. “Capital repair” should be added as a definition and defined to include all repairs intended to extend the normal economic life or to improve the value and productivity of the land, or building, structure or works on the land, but not including maintenance work performed in order to prevent the normal deterioration of the land or building, structure or works on the land and to maintain them in a normal functional state (p 16).
3. The definition of “improvement” should not be amended to specifically include IT services, materials, equipment and software (p 16).
4. The definition of “owner” should be amended to provide for multiple owners on AFP projects such that Project Co is included as an owner (along with the Crown) and it is Project Co that should be responsible to maintain holdbacks (p 20).
5. The definition of “price” should be amended to include direct out-of-pocket costs of extended duration and exclude damages for delay (p 22).
6. The current definition of “supply of services” is sufficiently broad and need not be amended (p 23).
7. Municipal lands should not be subject to a court-ordered sale, such that lien claims against municipalities should be “given” and not registered, provided that there should be clarity in respect of to whom the lien must be given (p 32).
8. Liens should continue to attach to hospital, university, and school board lands due to the fact that they are private entities. As well, attempting to identify certain “broader public sector” owners would likely cause more confusion than clarity, such that the lands of these entities should continue to be liened by registration (p 32).

Preservation, Perfection and Expiry of Liens

9. The time period for preservation of a lien under section 31 of the *Act* should be extended to 60 calendar days, commencing as currently stipulated by the *Act* (p 38).
10. Termination should be added to the list of events that triggers the commencement of the time limit for preservation of liens under subsections 31(2)(a)(ii), 31(2)(b), 31(3)(a), and 31(3)(b) of the *Act* (p 40).

11. The *Act* should prescribe a mandatory form of Notice of Termination or Abandonment to be published specifying a date upon which a contract has been abandoned or terminated. (p 40).
12. Certificates of completion of subcontract should not be made mandatory (p 42).
13. The time period for perfection under section 36(2) of the *Act* should be increased to 90 days from the last day upon which that lien could have been preserved (p 46).
14. The 2 year time period under section 37 of the *Act* should not be changed (p 48).
15. Section 35 of the *Act*, which imposes penalties for exaggerated claims, should be amended to replace the concept of “grossly inflated” liens with the concept of “wilfully exaggerated” liens, refocussing the threshold at a more sensitive level. As well, the court should be given the discretion to discharge a claim for lien in whole or in part if on a balance of probabilities it is established that the claim is frivolous, vexatious, or an abuse of process (p 50).
16. The provision should further be amended to allow the court to find, where there is wilful exaggeration, that the lien claimant is liable for any damages incurred as a result of the exaggerated claim, including bond premiums, costs, and, where the court considers it just, the lien amount should be reduced by an amount up to the amount of the difference between the wilfully exaggerated amount and the actual amount of the lien claim; provided that a defence of good faith should be available to the lien claimant (p 50).
17. After registration, the common elements in condominium buildings should have a single PIN that is subject to a lien, and the interests of all owners should be subject to this lien (p 54).
18. Notice of lien should be given to the condominium corporation and the unit owners by way of a prescribed form (p 54).
19. Condominium unit owners should be able to post security proportionate to their share of the lien to have the lien vacated (p 54).
20. Section 20(2) should be removed from the *Act* and liens should not be required to be preserved on a lot-by-lot basis (p 57).
21. For improvements to leasehold properties, claims for lien should attach to the interests of the tenant named in the lease and to the interest of the landlord if the landlord funded the improvement through a cash allowance or otherwise required the improvement; provided that the landlord’s liability should be limited to an amount equal to any deficiency in the holdback (p 61).

22. Section 39 of the *Act* should be amended to allow lien claimants to obtain from landlords, tenants, and secured lenders all relevant information about the lease, the lender's security, the funding available from the landlord and lender, and the state of accounts (p 61).

Holdback and Substantial Performance

23. The amount of holdback should remain at the current amount of 10% of the value of the services, materials and equipment actually supplied to the improvement (p 65).
24. Section 2(1) of the *Act* should be amended to provide that a contract is substantially performed when the improvement or a substantial part thereof is ready for use or is being used for the purposes intended and if it is capable of completion at a cost of no more than 3 percent of the first \$1,000,000.00 of the contract price, 2 percent of the next \$1,000,000.00 of the contract price, and 1 percent of the balance (p 68).
25. Section 2(3) of the *Act* should be amended to provide that "a contract shall be deemed to be completed and services or materials shall be deemed to be last supplied to the improvement when the price of completion, correction of a known defect or last supply is not more than the lesser of (a) 1 percent of the contract price; and (b) \$5,000" (p 68).
26. The finishing holdback provisions of the *Act* should remain unchanged (p 71).
27. The *Act* should be amended to provide for the mandatory release of holdback, but **not** the mandatory early release of holdback; that is to say, "may" should be revised to "shall" in sections 26 and 27 of the *Act*. The owner should be required to publish a notice of non-payment/set-off to interdict the obligation to pay where the owner, in good faith, intends to assert a set-off in relation to the contract (as further provided for in Chapter 8 – Promptness of Payment) (p 77).
28. We recommend that the *Act* should be amended to permit partial release of holdback on either a phased or annual basis, if provided for in the construction contract entered into by the parties, subject to a significant monetary and time-based threshold in the case of annual release (p 85).
29. We also recommend that the *Act* should be amended to allow for the segmentation of holdback for projects involving clearly separable improvements, particularly for AFPs (p 85).
30. We recommend that there be no provision for mandatory early release of holdback for design consultants in respect of services supplied up to the commencement of construction; but the *Act* permit the designation of a design phase for the purposes of phased release of holdback (p 85).
31. We recommend that the *Act* should be amended to allow for deferral agreements to be entered into between owners and contractors provided that such agreements are for the purpose of allowing certification and publication of substantial performance, subject to an appropriate threshold (p 87).

32. The *Act* should not be amended to provide for a statutory deficiency holdback; nor should it be amended to restrict the deficiency holdback provisions that parties may negotiate between themselves in their contracts (p 89).
33. We recommend that the current scheme should be supplemented by allowing the replacement of cash holdback with a Letter of Credit or a demand-worded Holdback Repayment Bond (p 91).

Summary Procedure

34. The requirement to seek leave of the court to bring motions under section 67(2) should be removed from the *Act*, but, as noted below, construction lien actions should be case managed (p 99).
35. The requirement to seek leave of the court to conduct oral examinations for discovery and examination of documents under section 67(2) should be removed from the *Act*, but, as noted, lien actions should be case managed so that production of documents and examinations for discovery can be appropriately streamlined, applying the principle of proportionality (p 100).
36. The use of discovery plans should be at the discretion of the case management judge (p 100).
37. The requirement to seek leave of the court to bring third party claims under section 56.2 should be removed from the *Act* (p 100).
38. The prohibition of appeals from interlocutory orders under section 71(3) should be amended to allow appeals from interlocutory orders with leave of a judge of the Divisional Court (p 100).
39. The prohibition on joinder of lien claims and trust claims under section 50(2) should be removed from the *Act*, subject to a motion by any party that opposes joinder on the grounds of undue prejudice to other parties (p 102).
40. Lien actions should become subject to case management in all regions (p 107).
41. Regarding small lien claims, including most home renovation claims, of an amount less than \$25,000, the *Act* should be revised to require such lien claims to be referred to the Small Claims Court for a report on liability, amounts owing, and the allocation of holdback by a Deputy Judge, with a Superior Court judge retaining ultimate jurisdiction (p 113).
42. Regarding claims between \$25,000 and \$100,000, the *Act* should be revised to provide for a simplified procedure with limited examinations for discovery and a summary trial procedure (p 113).

Construction Trusts

43. 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 (p 148):
- 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.
44. We recommend the identification of a pilot project for project trust accounts utilizing a representative number of projects in the public sector. Over a period of two years, the selected pilot projects should be evaluated based on appropriate metrics in relation to their effectiveness and cost. After two years, the performance of project trust accounts on the pilot projects should be published and industry consultation conducted regarding their general adoption in the private and public sectors (p 149).
45. We recommend that, in order to adequately protect suppliers of labour and materials from the risk of contractor insolvency on public projects, all public sector projects be required by the *Act* to be surety bonded, adopting the *Miller Act* and *Little Miller Act* approach to the protection of subcontractors and suppliers from the risk of contractor insolvency on public projects (p 151).
46. Accordingly, the Province should enter into a dialogue with the Surety Association of Canada to agree on standard form surety bonds to be incorporated into the *Act* by regulation. As well, such regulations should include a protocol for investigation and payment, as discussed in Chapter 10 – Surety Bonds (p 151).

Promptness of Payment

47. We recommend that a prompt payment regime be legislated in Ontario and that it be applied to both the public and private sectors. Prompt payment should be implemented by creating a statutory scheme to be implied into all construction contracts that do not contain equivalent terms (p 192).

48. We recommend that the prompt payment regime should apply at the level of the owner-general contractor, general contractor-subcontractor, and downwards, and that the legislation provide a mechanism for general contractors to notify subcontractors of non-payment by owners, with reasonable particulars, and to undertake to commence or continue proceedings necessary to enforce payment so as to defer their payment obligations (p 194).
49. We recommend that the trigger for payment should be the delivery of a proper invoice; provided that certification for payment (if there is certification for payment provided in the contract) must follow submission (p 196).
50. We recommend that (p 197):
 - As between owner and general contractor a **28 day** payment period be applied, that is triggered by the submission of a proper invoice.
 - As between general contractor and subcontractor, a further **7 days** from receipt of payment from the owner would be permitted.
51. We recommend that parties be free to contract in respect of payment terms, but that if they fail to do so, monthly payments should be implied (i.e. every 28 days) (p 197).
52. We recommend that payers be permitted to deliver a notice of intention to withhold payment within **7 days** following receipt of a purported proper invoice and that the notice of intention to withhold 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. Also, the right to withhold should relate only to the contract at issue (p 199).
53. We recommend that a payer continue to be able to set off all outstanding debts, claims or damages but that the right of set off not extend to set-offs for debts, claims and damages in relation to other contracts (p 199).
54. Mandatory non-waivable interest should be required to be paid on late payments at a rate of the greater of the pre-judgment interest rate in the *Court of Justice Act* or the contractual rate of interest (p 200).
55. A right of suspension should arise after an adjudication determination has been rendered and a payer has refused or failed to comply with the adjudicator's determination (p 200).
56. We do not recommend that financial disclosure be included in Ontario's prompt payment regime; provided that the *Act* should require disclosure to all subcontractors that they are bidding on a project with a milestone-based payment mechanism (p 201).

Adjudication

57. We recommend that adjudication be implemented as a targeted interim binding dispute resolution method available as a right to parties to construction contracts and subcontractors in both the public and private sectors in Ontario (p 230).
58. In conjunction with our recommendations in Chapter 8 – Promptness of Payment in relation to prompt payment, we recommend that the *Act* allow the parties the freedom of contract to agree on provisions to be included in their contract for both promptness of payment and adjudication so long as such provisions are consistent with the *Act*. Should such provisions not be consistent with the provisions of the *Act*, a statutory default scheme should be implied into the contract (as further discussed below) (p 230).
59. The statutory default scheme should be set out in a regulation to the *Act* (p 230).
60. Any party to a construction contract or subcontract should be given the right to adjudicate disputes arising under that contract or subcontract (p 232).
61. Back-to-back adjudications should be permitted at the owner-general contractor and general contractor-subcontractor levels (p 232).
62. Multi-issue adjudication should be permitted only through consensual contractual arrangements (p 232).
63. We recommend that the Ministries select a first tranche of eminently qualified individuals based in key centres such as Ottawa, Toronto, London and Windsor, with a distinct set of criteria (similar to those set out below) to act as the group of initial adjudicators until the training and qualification system described below is fully implemented (p 233).
64. We recommend that an Ontario adjudicator should (p 233):
 - be a natural person;
 - not be a party to the disputed construction contract and have no legal conflict of interest (or disclose any conflict of interest and obtain the express prior consent of the participating parties);
 - be a member in good standing of a self-governing professional body, such as engineer, architect, accountant, lawyer, or quantity surveyor;
 - have at least 7 years of relevant working experience serving the Ontario construction industry;
 - have successfully completed a standardized Ontario training course and thereafter have received a certificate of authorization to adjudicate from the relevant body governing the *Act* (i.e. the Ministry or prescribed authorized nominating

authority), renewable periodically upon proof of continuing education and a clear record; and

- not be otherwise disqualified (i.e. by reason of bankruptcy, criminal conviction or for any other prescribed unsuitability).
65. An adjudicator should be nominated after a dispute has arisen, not at the outset of a Project (p 235).
66. An adjudicator should be named in the Notice of Adjudication by the party delivering the notice (p 235).
67. The parties should have two (2) Business Days after delivery of the Notice of Adjudication to agree on an adjudicator, failing which either party would request that the Adjudicator Nominating Authority appoint an adjudicator within five (5) Business Days (p 235).
68. We recommend the creation of a single official Authorized Nominating Authority that will administer the appointments, certification and training of all adjudicators in Ontario to be administered either by the Ministry of the Attorney General or by a private entity designated by the Ministries as an Adjudicator Nominating Authority (p 235).
69. Adjudicators should have immunity from liability in relation to their decisions and should not be compelled to give evidence in civil proceedings (p 235).
70. We recommend that parties to a construction contract or subcontract be entitled to refer a dispute to adjudication that flows from a proper invoice under a construction contract or subcontract (being a claim for payment under a contract or a subcontract in relation to an improvement) including (p 238):
- The valuation of work, services, materials and equipment supplied to an improvement and claimed as part of a proper invoice;
 - Other monetary claims made in accordance with the provisions of the construction contract (that had been claimed in a proper invoice), including the change orders and proposed change orders;
 - A claim in relation to any security held by a party under the construction contract;
 - Set offs and deductions (i.e. for deficiencies) against amounts due under a proper invoice as set out in the notice of intention to withhold or otherwise; and
 - Delay issues as they relate to claims for payment.
71. We recommend that for disputes valued at under \$25,000, parties can refer such disputes to adjudication or to the small claims court (p 238).

72. If the parties do not agree on an adjudication process that meets the minimum standards of the new Ontario legislation, minimum standards for adjudication set out in a default scheme (under a regulation to the *Act* as noted above) should be implied with respect to: notice of adjudication, appointment of adjudicators, timetables for an adjudication, powers of an adjudicator (including the ability to draw inferences based on conduct of the parties), the adjudicator's duties, allowing an adjudicator to establish a process (with appropriate limitations), and providing that the decision is binding on an interim basis (p 239).
73. In terms of the amount of the adjudicator's fees, the parties should be free to agree on the fees of the adjudicator and if they cannot agree, the ANA should determine the fees of the adjudicator. The general rule should be that the fees of the adjudicator will be apportioned equally (p 241).
74. In terms of the parties' own costs, including legal fees, the general rule should be that each party should bear its own costs (p 241).
75. However, the adjudicator should be given the ability to depart from: 1) an equal apportionment of the adjudicator's fees/expenses; and 2) the principle that each party should bear its own legal fees and costs, **if** the parties have acted in bad faith or there has been frivolous, or vexatious conduct (p 241).
76. We recommend that the decision of an adjudicator should be binding on the parties and they should comply with the decision until either: a) the dispute is finally determined by legal proceedings (including lien proceedings) or arbitration (if provided for under the contract or the parties agree to arbitrate); or b) by agreement by the parties that the decision of the adjudicator is finally binding (p 243).
77. We recommend the adjudication decisions be enforced, if necessary, by way of application to the Superior Court of Justice, in a manner similar to that employed in respect of the awards in domestic arbitrations under the *Arbitration Act, 1991* (i.e. issuing a notice of application, on notice to the person against whom enforcement is sought, attaching an affidavit and the adjudication decision or a certified copy, within two years of the decision) (p 243).
78. We recommend that parties maintain their lien rights such that, if a party wants to have a dispute finally determined through a lien proceeding, they can proceed to preserve and perfect a lien and proceed with a lien action (p 244).

Surety Bonds

79. The *Act* should be amended to require broad form surety bonds to be issued for all public sector projects, the form of such surety bonds should be developed in consultation with the Surety Association of Canada, and once finalized they should become Forms under the *Act* (p 258).

80. The *Act* should be amended to require sureties to pay all undisputed amounts within a reasonable time from the receipt of a payment bond claim (p 258).
81. A Regulation to the *Act* should be promulgated to embody a surety claims handling protocol, and that such surety claims handling protocol be developed in consultation with the Surety Association of Canada (p 258).
82. No change should be made in respect of the third party beneficiary rule, or default insurance. The adjudication issue is addressed in Chapter 9 - Adjudication above (p 258).

Technical Amendments

83. Clarify the Act to confirm that the following irregularities may be cured so long as no prejudice is caused to other parties (p 261).
 - Failure to correctly name the owner and or person to whom materials and services were supplied;
 - Minor errors in the legal description; and
 - Inserting an owner's name in the wrong part of a statement.
84. As the nature of each of these provisions and the intent differs, we recommend no change be made to the Act (Sections 60 and 61) but note that practice directions would be helpful (to be included in the Practice Directions described in Chapter 12 – Industry Education and Periodic Review) (p 262).
85. We recommend the implementation of separate forms (available electronically and physically). Specifically: one to release a lien, one to discharge a lien or certificate of action, and one to vacate the registration of a claim for lien or certificate of action (p 265).
86. There should be no amendment to add an additional remedy for unpaid electrical contractors and subcontractors that would allow them to seize machinery and equipment after installation (p 266).
87. We recommend that modifications be made to the requirements of section 32(2) of the *Act* to incorporate the legal description, including PINs and specific municipal address(es); and in the case of a lien to be given (i.e. where the lien does not attach to the land), the name and address of the person(s) to whom a claim for lien must be given (p 267).
88. We recommend that no change be made to the section 36(4) sheltering provisions under the *Act* (p 270).

89. The definition of “written notice of a lien” should be amended to provide further particulars as to service and a form of written notice of lien should be added to the regulations (p 272).
90. Section 44 should be amended to provide for the posting of security to vacate a written notice of lien (p 272).
91. The withdrawal of a “written notice of lien” should also be in a prescribed form (p 272).
92. We recommend that section 39 should be amended to clarify what type of information the person making the request is entitled to and, in particular, what constitutes a “state of accounts” under section 39(1)1.iii, and should include: the value of the work done, the amount paid, the amount held back pursuant to the *Act*, the balance owed, and the leasehold information described in Chapter 3 – Lienability (p 274).
93. We recommend that the amount of security that is to be posted to vacate a lien under section 44(1) should be amended to include the total of the full amount claimed as owing in the claim for lien and the lesser of 25% or \$250,000 of the amount of the lien claim as security for costs (p 280).
94. We recommend that Letters of Credit with reference to International Commercial Conventions should be accepted as security, provided the Letter of Credit is unconditional, the International Commercial Convention is written into the terms of the credit, and it is accepted by a bank listed under Schedule I of the *Bank Act*, S.C. 1991, c. 46. Sched. 1 operating in Ontario (p 280).
95. We make no recommendations with respect to procedural issues that are outside of our remit (i.e. in relation to the Rules of Civil Procedure), however, we suggest that the Ministries further investigate the procedural and resourcing issues identified that have caused issues in respect of members of the construction industry gaining access to the courts to vacate a lien; particularly outside of Toronto and Ottawa (p 280).
96. When a mortgagee makes a loan for the purpose of financing both land acquisition and the construction of an improvement, the mortgagee should be required to identify the amount intended for the acquisition of land and the amount intended for the improvement(s) to and/or on the land in mortgage documents. (p 282).

Industry Education and Periodic Review

97. We recommend that the Ministries provide education, awareness and support for industry participants who may wish to access any existing remedies under the *Act* or any of the remedies that are implemented as a result of this Report. In this regard, we recommend the implementation of a practice guide and interpretative bulletins to be provided following the enactment of any amendments to the *Act* (p 284).

98. We recommend that any practice guide and/or interpretation bulletins implemented should be updated periodically on a website designated by the Ministry of the Attorney General (p 284).
99. We recommend that the stakeholders should be proactive in educating and training their constituents on the recommendations from this report that are ultimately adopted by the Ministries and implemented under the *Act*, if any (p 284).
100. We recommend that an independent review of the *Act* to be conducted within 5 years of the enactment of the recommendations of this Report, and every 7 years thereafter (keeping in mind that the pilot project for project bank accounts will be subject to a much shorter review period, as described in Chapter 7 – Construction Trusts) (p 285).

We are grateful to have had the opportunity to conduct this review of the *Construction Lien Act*. As the *Act* was last holistically reviewed in the early 1980s it was more than time for a thorough reconsideration. In the course of the review, we have attempted to take into consideration the varying needs of the stakeholders and we have tried to strike a balance in relation to key values and objectives, including the fundamental tension between regulation versus freedom of contract, as well as taking into consideration the competing values of cash flow versus collateralization. In the result, we have proposed a solution which respects the nature of the existing lien regime, but incorporates the principles of promptness of payment and recommends a swift mode of dispute resolution in the form of adjudication. Looking to the future, we have also proposed a pilot project in respect of project bank accounts. We recognize that one size does not fit all, a message we received from many stakeholders, so we have attempted to craft recommendations that permit flexibility.

Importantly, we would like to conclude by thanking a number of people without whom the Report would not have been possible. To begin with, we would like to thank the Attorney General, the Honourable Madeleine Meilleur, and the Honourable Brad Duguid, Minister of Economic Development, Employment and Infrastructure, for entrusting us with this mandate. The opportunity to meet with them at the commencement of our mandate was very important to us, as it established the ethos of the Review as being inclusive, transparent and collaborative, and allowed us to report to the stakeholders that “the train is leaving the station” in the sense that the *Act* will be amended. In regards to the management of our solicitor-client relationship with the Ministries, our principle contact has been through Irwin Glasberg, the Assistant Deputy Attorney General, Policy & Innovation, and his team comprised of Andrea Strom and Sheryl Cornish, along with Jerry Khouri, Senior Policy Advisor to the Attorney General, to each of whom we are very grateful for their consistent support.

As well, we would like to thank our esteemed friend and colleague, the Honourable Dennis O’Connor QC, who generously drew upon his experiences in respect of the Walkerton and Maher Arar inquiries to assist us in designing the process for the Review. Dennis was an invaluable source of wisdom and advice throughout.

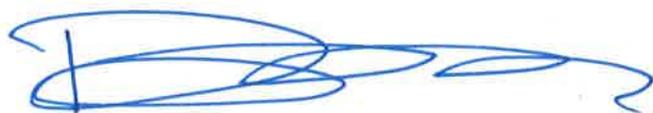
In addition, the subject matter experts who form the Advisory Group accepted great responsibility and invested a significant amount of their time and effort to assist us. As noted elsewhere, they are: Glenn Ackerley, Geza Banfai, Ray Bassett, Glenn Clarke, Marni Dicker, Derek Freeman, Duncan Glaholt, Howard Krupat, Tanya Litzenberger, Jeffery Long, Bernie McGarva, Jerry Paglia, and Howard Wise, to each of whom we extend our gratitude and respect. In particular, we would like to emphasize our debt of gratitude to our long-time colleague and competitor Duncan Glaholt, a leading expert in the field of construction liens and trusts and an early champion of adjudication in Canada, whose unflagging support and wise counsel was of great assistance to us throughout. We would also like to extend our thanks to the “friends” of the Review, each of whom is a leading international expert in construction law, including Sir Vivian

FOURTEEN CONCLUSION AND ACKNOWLEDGMENTS

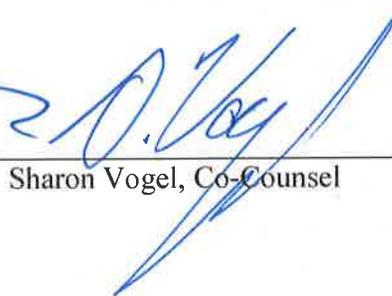
Ramsey, Doug Jones AO, Independent Arbitrator (London, Toronto, and Sydney), Steven GM Stein of Stein Ray LLP in Chicago, whose assistance with respect to our U.S. research was invaluable, Andrew Stephenson of Corrs Chambers Westgarth LLP in Melbourne, and Helmut Johannsen of Singleton Urquart LLP in Vancouver.

Finally, we would like to dedicate our work on this very important project to our families and to Kenneth W. Scott, Q.C.

All of which is respectfully submitted:



Bruce Reynolds, Counsel



Sharon Vogel, Co-Counsel

April 30, 2016

APPENDIX A LIST OF PARTICIPATING STAKEHOLDERS

- Association of Condo Managers of Ontario/Canadian Condominium Institute of Toronto
- Association of Municipalities of Ontario (AMO)
- Association of Ontario Land Surveyors
- Association of Registered Interior Designers of Ontario (ARIDO)
- Building Owners and Managers Association (BOMA)
- Canadian Bankers Association
- Canadian Construction Association
- Canadian Council for Public Private Partnerships
- Canadian Institute of Quantity Surveyors
- Canadian Manufacturers and Exporters
- City of Toronto
- Colleges Ontario
- Consulting Engineers of Ontario (CEO)
- Council of Ontario Construction Associations (COCA)
- Council of Ontario Universities (COU)
- Enbridge Gas Distribution Inc.
- Greater Toronto Sewer & Watermain Contractors Association
- Infrastructure Ontario
- International Union of Operating Engineers, Local 793
- International Brotherhood of Electrical Workers, Local 183 (Toronto Electrical Industry Benefit Administrative Services)
- Labour International Union of North America Local 183 represented by Cavalluzzo Shilton McIntyre Cornish LLP
- Metrolinx
- Ministry of Transportation
- National Trade Contractors Coalition of Canada
- Ontario Association of Architects (OAA)
- Ontario Association of Landscape Architects
- Ontario Association of School Business Officials (OASBO)
- Ontario Bar Association (Construction & Infrastructure Section) - Subcommittee on CLA Review
- Ontario Construction Lien Masters
- Ontario Construction Secretariat
- Ontario Dump Truck Association
- Ontario Electrical League (OEL)
- Ontario General Contractors Association (OGCA)
- Ontario Good Roads Association (OGRA)
- Ontario Home Builders Association (OHBA)
- Ontario Hospitals Association (OHA)
- Ontario Public Buyers Association
- Ontario Public School Board's Association (OPSBA)
- Ontario Public Works Association (OPWA)
- Ontario Road Builders Association (ORBA)
- Ontario Sewer & Watermain Contractors Association (OSWCA)
- Ontario Society of Professional Engineers (OSPE)
- Prompt Payment Ontario (PPO)
- Provincial Building and Construction

APPENDIX A LIST OF PARTICIPATING STAKEHOLDERS

- Metropolitan Plumbing & Heating Contractors Association
- Ministry of the Attorney General
- Ministry of Economic Development, Employment & Infrastructure
- Ministry of Education
- Ministry of Energy
- Ministry of Health and Long-Term Care
- Ministry of Municipal Affairs and Housing
- Trades Council of Ontario (PBCTCO)
- Residential Construction Council of Ontario (RESCON)
- Rural Ontario Municipal Association (ROMA)
- Surety Association of Canada
- The Advocates' Society
- Toronto Transit Commission
- Toronto Community Housing Corporation
- York Region

This appendix provides detailed answers to questions posed in the body of Chapter 8 – Promptness of Payment in relation to the global spread of prompt payment outside of the U.S. and the U.K. Specifically, we considered:

- What Types of Contracts does it apply to?
- In the Construction Pyramid, what Level of Contract does it apply to?
- What is the Trigger for Payment?
- What is the Payment Period?
- When is a contractor entitled to render an invoice?
- On What Basis Can a Payment be Withheld and When?
- What remedies are available in the event of non-payment?

All of our detailed recommendations in relation to these issues are set out in Chapter 8. For a detailed response to the types of contracts prompt payment (and adjudication) apply to, please see the charts in Section 1.2 of Appendix C.

1. New Zealand

New Zealand’s prompt payment regime is set out in the *New Zealand Act* and the associated *Construction Contracts Regulations 2003*¹³⁸⁷ (the “New Zealand Regulations”). The statutory regime is overseen by the Ministry of Business, Innovation & Employment.¹³⁸⁸

Section 3 of the *New Zealand Act* states that the purpose of the regime is to “reform the law relating to construction contracts and, in particular:

- (a) to facilitate regular and timely payments between the parties to a construction contract; and
- (b) to provide for the speedy resolution of disputes arising under a construction contract; and
- (c) to provide remedies for the recovery of payments under a construction contract.¹³⁸⁹

¹³⁸⁷ *Construction Contracts Regulations 2003* [“New Zealand Regulations”] <<http://www.legislation.govt.nz/regulation/public/2003/0030/latest/DLM183471.html>>.

¹³⁸⁸ Ministry of Business, Innovation & Employment, New Zealand, “Construction Contracts Act 2002”, December 2015, online: <<http://www.mbie.govt.nz/info-services/building-construction/current-work/review-of-the-construction-contracts-act-2002>> [“Construction Contracts Act 2002”].

¹³⁸⁹ *New Zealand Act* s 3.

The *New Zealand Act* and *New Zealand Regulations* came into force on April 1, 2003 and were last amended in 2015. A study paper prepared by the New Zealand Law Commission during the development of the New Zealand regime considered security of payment legislation in the U.K., New South Wales, and Queensland, but noted that the regime “most relevant to current New Zealand conditions is contained in the New South Wales statute”.¹³⁹⁰

An amending bill, the *Construction Contracts Amendment Bill*, was introduced on January 29, 2013 and passed by Parliament on September 22, 2015.¹³⁹¹ The bill enacted the *Construction Contracts Amendment Act 2015*, which received royal assent on October 22, 2015 and amended the *New Zealand Act*.¹³⁹² The *New Zealand Regulations* were similarly amended in 2015 by the *Construction Contracts Amendment Regulations 2015*¹³⁹³ (collectively, the “2015 NZ Amendments”).

(a) In the Construction Pyramid, what Level of Contract does it apply to?

As the *New Zealand Act* applies to a construction contract as defined above, it follows that the legislation applies to all levels of contract including subcontractors and suppliers.

The *New Zealand Act* prohibits “pay-when-paid” provisions or other such “conditional payment provisions”¹³⁹⁴ so a payer is not able to rely on such clauses in its payment schedule.

(b) What is the Trigger for Payment?

Under the *New Zealand Act*, parties are free to agree between themselves on a mechanism for determining the following: the number of payments; interval of payments; amount of payments; the date on which a payment becomes due.¹³⁹⁵ Should the parties fail to agree on such a mechanism the *New Zealand Act* provides a default scheme. Under the default scheme, a payment under a construction contract becomes due and payable 20 working days after a payment claim is served.¹³⁹⁶

(c) What is the Payment Period?

Under the default scheme, the *New Zealand Act* provides a payment period that commences on the day of the month when the construction work was first carried out under the construction

¹³⁹⁰New Zealand Law Commission, Study Paper 3 – “Protecting Construction Contractors: An Advisory Report to the Ministry of Commerce” (November 1999) at para 28, online: <<http://www.nzlii.org/nz/other/nzlc/sp/SP3/SP3.pdf>>.

¹³⁹¹Government Bill 97-3 – Construction Contracts Amendment Bill, online: <<http://www.legislation.govt.nz/bill/government/2013/0097/latest/versions.aspx>>.

¹³⁹²*Construction Contracts Amendment Act 2015*, online: <<http://www.legislation.govt.nz/act/public/2015/0092/latest/DLM4998107.html>>.

¹³⁹³*Construction Contract Amendment Regulations 2015*, online: <<http://www.legislation.govt.nz/regulation/public/2015/0256/latest/DLM6635901.html>>.

¹³⁹⁴*New Zealand Act*, s 13.

¹³⁹⁵*New Zealand Act*, s 14.

¹³⁹⁶*New Zealand Act*, s 18.

contract and ending on the last day of that month. This period is then followed by each month after the first period.¹³⁹⁷

(d) When is the contractor entitled to render an invoice?

A payee may serve a payment claim for a payment in the following circumstances: when the contract provides for it at the end of a relevant period; if the contract does not provide for it, at the end of the period specified under the default scheme; or if the contract does not provide for the matter in the case of a single agreed payment (i.e. lump sum), then following the completion of all construction work under the contract.¹³⁹⁸ The payment claim must meet several requirements (e.g. be in writing, contain sufficient details, identify the construction work, state the claimed amount, indicate the manner in which the payee calculated the claimed amount) and be accompanied by an outline of the process for responding to the claim and an explanation of the consequences of not responding or paying the amount.¹³⁹⁹

(e) On What Basis Can a Payment be Withheld and When?

When a payment claim is received, a payer has the right to respond by providing a payment schedule. The payment schedule must be in writing, identify the relevant payment claim and state a scheduled amount.¹⁴⁰⁰ If the scheduled amount is less than the amount claimed by the payee in the payment claim, the payment schedule must also include certain details including: the manner in which the payer calculated the scheduled amount; the payers reasoning for the difference in the amounts; and, in the case where the difference is due to withholding payment on any basis, the payer must provide reasons for withholding.¹⁴⁰¹ The payer becomes liable for payment on the due date for payment to which the payment complains if the payee had served the payment claim on the payer and the payer fails to provide the payment schedule within the time specified in the construction contract (or 20 working days if the contract does not provide a deadline).¹⁴⁰²

(f) What remedies are available in the event of non-payment?

In the event of non-payment when the payer fails to provide a payment schedule, the payee may recover (as a debt due to the payee) in any court, the unpaid portion of the claimed amount and the actual and reasonable costs of recovery awarded against the payer by that court. In addition, the payee may serve a notice on the payer of its intent to suspend the carrying out of construction

¹³⁹⁷ *New Zealand Act*, s 17.

¹³⁹⁸ *New Zealand Act*, s 20.

¹³⁹⁹ *New Zealand Act*, s 20(2) and (3).

¹⁴⁰⁰ *New Zealand Act* defines a scheduled amount at s 19 as “an amount of a payment specified in a payment schedule that the payer proposes to pay to the payee in response to a payment claim.”

¹⁴⁰¹ *New Zealand Act*, s 21.

¹⁴⁰² *New Zealand Act*, s 22.

work.¹⁴⁰³ These remedies are similarly available in the event of non-payment in accordance with a payment schedule.¹⁴⁰⁴

Further, and as discussed in Chapter 9 – Adjudication, any party to a construction contract under the *New Zealand Act* has a right to refer a dispute (i.e. a dispute over whether or not an amount is payable under the contract) to adjudication.¹⁴⁰⁵

The right of suspension under the *New Zealand Act* is triggered for a payee if the following circumstances apply: a) a claim amount is not paid in full, and no payment schedule is provided; b) a scheduled amount is not paid in full by the due date for payment even though a payment schedule given indicates a scheduled amount proposed to be paid; the payer has not complied with an adjudicator’s determination that it must pay an amount to the payee.¹⁴⁰⁶ In addition, the payee must service notice on the payer (as noted above) and the amount to be paid has not been paid, or the adjudicator’s determination has not been complied with within 5 working days after the date of such notice (i.e. within 5 days of the adjudicator’s decision).¹⁴⁰⁷

The right to suspend work ceases when the payer pays the amount in full or complies with an adjudicator’s determination.¹⁴⁰⁸

2. Ireland

In 2010, at a time when almost ten construction business failures occurred per week in Ireland, Senator Feargal Quinn introduced the Ireland *Construction Contracts Bill 2010* to Seanad Eireann (upper house of Oireachtas, the Irish Parliament) and explained that the objectives of the Bill were to:

Improve payment practices in the Construction Industry by providing clarity and transparency in the payment of monies due in construction contracts. This will improve crucial cash-flow to those sub-contractors working in the Industry, thus helping companies in the construction sector to survive and keep people in employment.¹⁴⁰⁹

¹⁴⁰³ *New Zealand Act*, s 23. The notice of suspension must state the grounds on which the proposed suspension is based and that the notice is given under the *New Zealand Act*.

¹⁴⁰⁴ *New Zealand Act*, s 24.

¹⁴⁰⁵ *New Zealand Act*, s 25.

¹⁴⁰⁶ *New Zealand Act*, s 24A(1).

¹⁴⁰⁷ *New Zealand Act*, s 24A(1).

¹⁴⁰⁸ *New Zealand Act*, s 24A(5).

¹⁴⁰⁹ Senator Feargal Quinn introducing the *Construction Contracts Bill 2010* in the Seanad on May 12, 2010, as quoted by Tony Cunningham, “Will The Construction Contracts Bill Improve Subcontractor Cash Flow?” (2013) *Other Resources*, Paper 10, online: <<http://arrow.dit.ie/beschreoth/10>>. See also Senator Feargal Quinn, Explanatory Memorandum to the *Construction Contracts Bill 2010*.

The *Ireland Act* was enacted by Seanad Eireann in July 2013 but is currently dormant, as it is subject to a Ministerial commencement Order from the Minister of Business and Employment. It was originally expected to be effective in the spring of 2015 but, to date, commencement has not yet occurred. On August 20, 2015, however, Minister Nash announced that the application process for appointment to the Ministerial Panel of Adjudicators had begun and that “(w)ork is continuing on the preparation for the full implementation of the Irish Act as soon as possible”.¹⁴¹⁰

(a) In the Construction Pyramid, what Level of Contract does it apply to?

The *Ireland Act* applies to contractors, subcontractors, suppliers and also services contracts that are ancillary to the construction contract.¹⁴¹¹

To ensure that the objectives of the legislation will not be circumvented, its application cannot be waived by contract provisions and conditional pay-when-paid provisions are expressly prohibited, except in the event of the payer’s insolvency.¹⁴¹²

(b) What is the Trigger for Payment?

The prompt payment scheme in the *Ireland Act* gives parties a certain level of flexibility in setting payment deadlines, provided that the minimum requirements with respect to subcontracts are met. Contracts must expressly identify the amounts and due dates of progress and final payments. Alternatively, they must provide for appropriate mechanisms to determine payment amounts and payment schedules,¹⁴¹³ failing which the Schedule to the *Ireland Act* will apply to the main contract and subcontracts (i.e. a series of default provisions under the *Ireland Act* will apply in lieu of contractual mechanisms).

The initial trigger under the Schedule is 30 days after the commencement date of the construction contract.¹⁴¹⁴

(c) What is the Payment Period?

If the parties do not agree on a payment period, then the Schedule of the *Ireland Act* applies. The Schedule provides that progress payments must be made every 30 days and 30 days after the date of final completion, unless the stipulated duration of the work is less than 45 consecutive

¹⁴¹⁰ “Minister Nash Announces Commencement of the Application Process for Appointment to the Ministerial Panel of Adjudicators under the Construction Contracts Act, 2013”, Ministry of Business and Employment, Department of Jobs, Enterprise and Innovation, Department News (August 20, 2015), online: <<https://www.djei.ie/en/News-And-Events/Department-News/2015/August/19082015.html>>.

¹⁴¹¹ *Ireland Act*, s 1.

¹⁴¹² *Ireland Act*, s 2(5)(b) and s 3(5).

¹⁴¹³ *Ireland Act*, s 3.

¹⁴¹⁴ *Ireland Act*, Schedule, s 1

days.¹⁴¹⁵ With respect to subcontracts, the parties may not agree to pay periods exceeding 30 days, otherwise the Schedule will be deemed to apply.¹⁴¹⁶

(d) When is the contractor entitled to render an invoice?

The payment claim date (i.e. the date on which a payment claim in relation to an amount due is required to be made) is provided by the construction contract. Failure to do so results in the applicability of the Schedule.¹⁴¹⁷

No later than 5 days after the payment claim date, the payee in the construction contract can deliver a payment claim notice relating to the claim.¹⁴¹⁸ If a payer intends to dispute a payment claim notice, it must deliver a notice to that effect, setting out the disputed amount, how it is calculated and the reasons why the claimed amount is disputed, with full particulars.¹⁴¹⁹

(e) On What Basis Can a Payment be Withheld and When?

The *Ireland Act* requires that a payer wishing to withhold or set-off from a payment claim must provide a response to a payment claim that sets out the proposed amount of payment as well as the reasons for the difference between the amount claimed and the amount being paid and the basis on the calculation for the proposed amount.¹⁴²⁰

(f) What remedies are available in the event of non-payment?

The *Ireland Act* provides that contractors and subcontractors are entitled to suspend their work where any amount due under the construction contract is not paid in full by the day that payment is due. The suspending party must deliver a notice in writing at least 7 days prior to the proposed suspension commencement but not before the date payment became due.¹⁴²¹

Work may not be suspended in two circumstances: 1) after payment by the payer of the amount due; or 2) after a notice of adjudication has been served in relation to the payment dispute.

Any party to a construction contract also has the right to refer a dispute related to payment to adjudication.¹⁴²²

¹⁴¹⁵ *Ireland Act*, Schedule, ss 1-2.

¹⁴¹⁶ *Ireland Act*, s 3(4).

¹⁴¹⁷ *Ireland Act*, s 3(2).

¹⁴¹⁸ *Ireland Act*, s 4.

¹⁴¹⁹ *Ireland Act*, s 4.

¹⁴²⁰ *Ireland Act*, s 4(3).

¹⁴²¹ *Ireland Act*, s 5.

¹⁴²² *Ireland Act*, s 6.

3. Singapore

The *Singapore Act* and the *Building and Construction Industry Security of Payment Regulations*¹⁴²³ (the “Singapore Regulations”) create a statutory adjudication regime but also address prompt payment.

The preamble to the *Singapore Act* states that the purpose of the regime is to “facilitate payments for construction work done or for related goods or services supplied in the building and construction industry, and for matters connected therewith.”¹⁴²⁴ According to the Building and Construction Authority, the purposes of the *Singapore Act* are:

- 1) to improve cash flow by “upholding rights of parties to seek progress payments”;¹⁴²⁵ and
- 2) to provide “quick and low-cost resolution of payment disputes through adjudication”.¹⁴²⁶

During the development of the regime in Singapore, the Building and Construction Authority conducted extensive consultations with industry and public agencies and reviewed security of payment regimes in Australia, the U.K. and New Zealand.¹⁴²⁷ The *Singapore Act* was passed on November 16, 2004.¹⁴²⁸ No major amendments have been made to the *Singapore Act* since it came into force in 2005.

- (a) In the Construction Pyramid, what Level of Contract does it apply to?

As the *Singapore Act* applies to written contracts where a person has carried out construction work or supplied goods, it is therefore understood that parties who can make payment claims under the *Singapore Act* include all levels of the construction pyramid. Specifically, according to Singapore’s Building and Construction Industry Security of Payment Act 2004 Information Kit, the persons who can make a payment claim are as follows:

- a) Main contractor claiming from project owner;
- b) Nominated / domestic subcontractors claiming from main contractors;
- c) Sub-subcontractors claiming from nominated / domestic subcontractors;
- d) Consultants claiming from project owners or main contractor, if engaged by the main contractor under a design & build arrangement;

¹⁴²³ *Building and Construction Industry Security of Payment Regulations*, online: <https://www.bca.gov.sg/publications/SecurityOfPayment/others/sop_regulations.pdf>.

¹⁴²⁴ *Singapore Act*, preamble.

¹⁴²⁵ SOP Act Briefing Slides, slide 5.

¹⁴²⁶ SOP Act Briefing Slides, slide 5.

¹⁴²⁷ SOP Act Briefing Slides, slides 3-4.

¹⁴²⁸ SOP Act Briefing Slides, slide 4.

- e) Suppliers, plant and equipment hirers or related service-providers claiming from nominated / domestic subcontractors, main contractors or owners.¹⁴²⁹

The *Singapore Act* prohibits pay-when-paid clauses.¹⁴³⁰ Section 9 of the *Singapore Act* was “s 9 of [*Singapore Act*] was designed to prevent the avoidance of payment obligations by contractors who took advantage of the imbalance inherent in the “pay when paid” provisions by withholding payments to subcontractors for reasons unrelated to the latter’s performance.”¹⁴³¹

- (b) What is the Trigger for Payment?

Where a construction contract under the *Singapore Act* provides a date on which a progress claim becomes due and payable, that progress payment is due and payable on the earlier of the date specified in the contract or the expiry of 35 days from the date a tax invoice is submitted to the respondent (if the claimant is a taxable person to the *Singapore Goods and Services Tax Act*) or the date on which a payment response (under section 11(1)) is due). When the construction contract does not provide for a date for progress payments, the payment is due 14 days after a tax invoice is submitted to the respondent or the date when the payment response is required.¹⁴³²

For a supply contract, if the contract provides a date for progress payment to become due and payable then it becomes due and payable on the earlier of the date in accordance with the contract or within 60 days from the date of a payment claim. If the contract does not provide a date for progress payments to become due and payable it becomes due and payable immediately after 30 days following a payment claim.¹⁴³³

- (c) What is the Payment Period?

As noted above, the payment period under the *Singapore Act* for a construction contract will be designated as the earlier of two time periods: 1) the period provided for under the construction contract or a period of 35 days from the date of receipt of a tax invoice.¹⁴³⁴

In cases where the construction contract provides no payment period, the payment period is 14 days from receipt of a tax invoice.¹⁴³⁵ As noted above, in both circumstances the tax invoice relates to the *Singapore Goods and Services Tax Act* (Cap. 117A).

¹⁴²⁹ Building and Construction Industry Security of Payment Act 2004 Information Kit at 4, online: <https://www.bca.gov.sg/securitypayment/others/sop_infokit.pdf> [Singapore Information Kit].

¹⁴³⁰ *Singapore Act* at s 9.

¹⁴³¹ *SKK (S) Pte Ltd v Management Corporation Strata Title Plan No 1166*, [2013] SGHCR 11 at para 23 citing *Singapore Parliamentary Debates, Official Report* (16 November 2004) vol 78, col 1116.

¹⁴³² *Singapore Act*, s 8(1) and (2).

¹⁴³³ *Singapore Act*, s 8(3) and (4).

¹⁴³⁴ *Singapore Act*, s 8(1) and (2).

¹⁴³⁵ *Singapore Act*, s 8(1) and (2).

(d) When is the contractor entitled to render an invoice?

A claimant under the *Singapore Act* is entitled to serve a payment claim within the period (i.e. the payment claim date) stated in the contract or mutually agreed in writing.¹⁴³⁶ If such a period is not agreed to or provided within the contract, a payment claim can be made at such intervals that a claimant elects (however such a claim may not be made more than one time per month).¹⁴³⁷

A respondent named in a payment claim is to respond to the claim (i.e. with a payment response as set out under section 11(3)) by the date specified in or determined within the terms of the contract (or within 21 days after a payment claim is served (whichever is earlier)) or if the contract does not provide such a date, within 7 days following a payment claim.¹⁴³⁸

(e) On What Basis Can a Payment be Withheld and When?

The respondent to a payment claim must specify any reasons for withholding payment according to section 11. The respondent may deduct or set-off any sum for which the claimant is or may be liable if allowed under the contract. As noted above, no pay-when-paid provisions are not permitted in relation to construction contracts or supply contracts by virtue of section 9 of the *Singapore Act*. As such, a respondent is expected to “value the claimant’s work or services separately and independently according to the work done or services supplied by the claimant”.¹⁴³⁹

(f) What remedies are available in the event of non-payment?

The unpaid amount of a progress payment that is due and payable accrues interest.¹⁴⁴⁰

As discussed further in Chapter 9 – Adjudication, the claimant who fails to receive payment in accordance with the provisions of the *Singapore Act* is entitled to make an adjudication application under section 13 of the *Singapore Act*.¹⁴⁴¹

4. Malaysia

The *Malaysia Act* does not contain a statement of purpose, but the full title of the *Malaysia Act* suggests the purpose of the regime is: “to facilitate regular and timely payment, to provide a mechanism for speedy dispute resolution through adjudication, [and] to provide remedies for the recovery of payment in the construction industry”.¹⁴⁴² According to the Kuala Lumpur Regional

¹⁴³⁶ Singapore Information Kit at 5; *Singapore Act*, s 10.

¹⁴³⁷ Singapore Information Kit at 5; *Singapore Act*, s 10.

¹⁴³⁸ *Singapore Act*, s 11.

¹⁴³⁹ Singapore Information Kit at 7.

¹⁴⁴⁰ *Singapore Act*, s 8(5).

¹⁴⁴¹ *Singapore Act*, s 12.

¹⁴⁴² *Malaysia Act*, full title.

Centre for Arbitration, the primary objective of the *Malaysia Act* is “to address cash flow problems in the construction industry”.¹⁴⁴³

The *Malaysia Act* grants a statutory right to, and default terms for, progress payments if not already provided for by the construction contract.¹⁴⁴⁴

(a) In the Construction Pyramid, what Level of Contract does it apply to?

The *Malaysia Act* applies to every party to a construction contract.¹⁴⁴⁵

(b) What is the Trigger for Payment?

Under the *Malaysia Act*, the parties may agree to payment terms under the construction contract with regards to the frequency and amounts of payments. Where the construction contract does not provide terms specifying the frequency and amount of payment, a default scheme is provided under the *Malaysia Act*. Under the default scheme, progress payments are to be made monthly,¹⁴⁴⁶ and payment for “the supply of construction materials, equipment or workers in connection with a construction contract” must be made within 30 days of the receipt of an invoice.¹⁴⁴⁷

If payment is not made pursuant to the terms of a construction contract, or, absent terms, the default terms under the *Malaysia Act*, the unpaid party may issue a “payment claim”.¹⁴⁴⁸ The payment claim must include: the amount claimed and the due date for payment, details to identify the cause of action including the provision in the construction contract to which the payment relates, description of the work or services to which the payment related, and a statement that it is made under the *Malaysia Act*.¹⁴⁴⁹

(c) What is the Payment Period?

The parties can set out payment terms in the contract. Under the default scheme, monthly progress payments are legislated for construction work and consulting services. Payment for the “supply of construction materials, equipment or workers in connection with a construction contract” must be made within 30 days of receipt of the invoice.¹⁴⁵⁰

¹⁴⁴³ Eversheds Summary at 1, citing Part III – “Guide to CIPA Act 2012, ‘Construction Industry Payment and Adjudication Act 2012’”, Kuala Lumpur Regional Centre For Arbitration (2013).

¹⁴⁴⁴ *Malaysia Act*, s 36.

¹⁴⁴⁵ *Malaysia Act*, s 5(1).

¹⁴⁴⁶ *Malaysia Act*, s 36(3)(a).

¹⁴⁴⁷ *Malaysia Act*, s 36(3)(a) and 36(4).

¹⁴⁴⁸ Eversheds Summary at 1, citing Part III – “Guide to CIPA Act 2012, ‘Construction Industry Payment and Adjudication Act 2012’”, Kuala Lumpur Regional Centre For Arbitration (2013).

¹⁴⁴⁹ *Malaysia Act*, s 5(2)

¹⁴⁵⁰ *Malaysia Act*, s 36(2).

(d) When is the contractor entitled to render an invoice?

A payment claim may be rendered by an unpaid party on a non-paying party for payment pursuant to a construction contract.¹⁴⁵¹ The payment claim must be in writing and include certain information such as: the amount claimed; due date for payment; details to identify the cause of action; description of the work and a statement that it is in relation to the *Malaysia Act*.¹⁴⁵²

If the construction contract does not provide terms for rendering an invoice, an invoice should be rendered at the end of the period specified in the default terms: once monthly for progress payments, or “upon the delivery of supply, for the supply of construction materials, equipment or workers”.¹⁴⁵³

(e) On What Basis Can a Payment be Withheld and When?

Payment can be withheld when there is a dispute with regards to the amount owing in relation to a payment claim. Within 10 days of receipt of a payment claim, a responding party that disputes a payment is to deliver a payment response.¹⁴⁵⁴ Should there be no dispute, the payment response with the whole amount claimed (or any amount admitted) is to be provided.

Reasons for withholding a payment are not otherwise enumerated in the legislation,¹⁴⁵⁵ however it is important to note that the *Malaysia Act* prohibits “conditional payment provision[s]”, meaning that any payment provisions where the obligation of one party to make payment is conditional “upon that party having received payment from a third party” or “the availability of funds or drawdown of financing facilities of that party” is void.¹⁴⁵⁶

(f) What remedies are available in the event of non-payment?

If a dispute arises as to payment, it can be referred to adjudication. The *Malaysia Act* does not provide for pre-adjudication remedies outside of the “payment claim” and “payment response” procedure. If, after adjudication, the non-paying party still does not pay, the unpaid party may “suspend performance or reduce the rate of progress of performance of any construction work” under a construction contract¹⁴⁵⁷ or seek payment from the “principal” – the party that is responsible for paying the non-paying party under a separate construction contract – if payment is owing from the principal to the non-paying party.¹⁴⁵⁸

¹⁴⁵¹ *Malaysia Act*, s 5(1).

¹⁴⁵² *Malaysia Act*, s 5(2).

¹⁴⁵³ *Malaysia Act*, s 36(3).

¹⁴⁵⁴ Under the *Malaysia Act*, a payment response refers to a document that a non-paying party who admits to the payment claim served against him (i.e. does not dispute it) provides to the payee in response to payment claim made under s 5.

¹⁴⁵⁵ *Malaysia Act*, s 6(3).

¹⁴⁵⁶ *Malaysia Act*, s 35.

¹⁴⁵⁷ *Malaysia Act*, s 29.

¹⁴⁵⁸ *Malaysia Act*, s 30.

5. Hong Kong (Proposed)

The Development Bureau of the Hong Kong Special Administrative Region Government (“Hong Kong Development Bureau”) has proposed security of payment legislation (“*Hong Kong SOPL*”) which would provide for prompt payment and adjudication with respect to construction contracts. Stakeholders were welcome to submit comments by August 31, 2015 with respect to the *Hong Kong SOPL*. The *Hong Kong SOPL* is expected to be introduced by 2017.¹⁴⁵⁹ For the purposes of this summary, it is important to note that the Hong Kong SOP is, at the time of publishing this Report, in the consultation stage and its provisions are subject to change.

The Hong Kong Development Bureau has published a Consultation Document and a Summary and Guide to the *Hong Kong SOPL*. As noted in the Consultation Document, the purpose of the *Hong Kong SOPL* is to “help main contractors, sub-contractors, consultants and suppliers receive payments on time for work done and services provided. It also provides a means to rapidly resolve disputes”.¹⁴⁶⁰

(a) In the Construction Pyramid, what Level of Contract does it apply to?

The *Hong Kong SOPL* will apply to all tiers in the construction pyramid for those contracts that are governed by the *Hong Kong SOPL*, as outlined above.¹⁴⁶¹ In that regard, “[w]hen the main contract is not covered by SOPL then sub-contracts will not be covered by SOPL regardless of tier or value.”¹⁴⁶²

It is important to note that the *Hong Kong SOPL* prohibits “pay when paid” and conditional payment clauses as they “have the potential to harm smaller sub-contractors and traders who are generally the parties least able to fund and withstand significant delays in payment”.¹⁴⁶³

(b) What is the Trigger for Payment?

The *Hong Kong SOPL* provides that parties are entitled to “Progress Payments but the parties to the contract will be free to agree [on] the number of Progress Payments, when they can be claimed and the basis for calculating amounts due”.¹⁴⁶⁴ Parties will also be able to agree that payment is only after completion. Therefore, the baseline trigger for payment is contractual. The Hong Kong Development Bureau noted these recommendations limited interference in freedom

¹⁴⁵⁹ Ian Cocking, Gilbert Kwok & Dennis Wong, “Security of Payment Legislation for the Construction Industry” (December, 2015), <<http://www.lexology.com/library/detail.aspx?g=ce8f2032-6a34-4280-ad4c-b5a27ff4ff7d>>.

¹⁴⁶⁰ Consultation Document, Proposed Security of Payment Legislation for the Construction Industry, Development Bureau of the Hong Kong Administrative Region Government (June, 2015) at 1 [Hong Kong Consultation Document].

¹⁴⁶¹ Hong Kong Consultation Document at 10-11.

¹⁴⁶² *Ibid* at 44, Appendix A: Proposed Model.

¹⁴⁶³ *Ibid* at 24.

¹⁴⁶⁴ *Ibid* at 18.

of contract; maintained flexibility of approach for procurement; and accords with the wide degree of freedom to agree with entitlements to payment seen in other jurisdictions.¹⁴⁶⁵

Where parties do not specify when payment can be claimed in their contract, it is anticipated that default provisions of the *Hong Kong SOPL* will apply.¹⁴⁶⁶

(c) What is the Payment Period?

While parties will be free to agree on the frequency and value of payments, payment periods cannot exceed “60 calendar days for interim Progress Payments and 120 calendar days for final Progress Payments”.¹⁴⁶⁷ Payment Period “refers to the period between a claim for payment being made and the date when the amount due has to be paid”¹⁴⁶⁸ and a Progress Payment refers to payments made to a party who has undertaken work or provides related services, materials or plant under a *Hong Kong SOPL* contract.¹⁴⁶⁹

According to the Hong Kong Consultation Document, “[i]f a paying party included a Payment Period longer than 60 or 120 calendar days in their contract then any adjudicator, court or arbitrator deciding a dispute under the contract would disregard the longer period and treat the contract as providing the 60 or 120 calendar day period as appropriate.”¹⁴⁷⁰ Similarly, if the *Hong Kong SOPL* default provisions apply, the Payment Period will be 60 calendar days (interim Progress Payments) or 120 calendar days (final Progress Payments) after receipt of a Payment Claim.¹⁴⁷¹

(d) When is the contractor entitled to render an invoice?

As noted above, the ability to ‘invoice’ under the *Hong Kong SOPL* will be a contractual right. IF the parties fail to agree to appropriate payment mechanisms in line with the *Hong Kong SOPL*, default provisions will apply. Under the default provisions, Payment Claims can be made monthly by any party “undertaking work or providing services, materials or plant”.¹⁴⁷² The Hong Kong Development Bureau noted the rationale for the default provisions was that they “bring certainty in situations where parties have failed to make any relevant agreements themselves either in writing or orally”.¹⁴⁷³

The term Payment Claim refers to a statutory claim for payment made under the proposed legislation that will require certain minimum criteria to be met (e.g. details of the amount claimed, the relevant work carried out and the basis of calculation). A claiming party is not

¹⁴⁶⁵ *Ibid* at 18.

¹⁴⁶⁶ *Ibid* at 21.

¹⁴⁶⁷ *Ibid* at 19.

¹⁴⁶⁸ *Ibid* at 17.

¹⁴⁶⁹ *Ibid*.

¹⁴⁷⁰ *Ibid* at 22.

¹⁴⁷¹ *Ibid* at 21.

¹⁴⁷² *Ibid*.

¹⁴⁷³ *Ibid*.

entitled to claim more than they would otherwise be entitled to under their contract through a Payment Claim nor can they claim amounts sooner than provided for by the contract.¹⁴⁷⁴

(e) On What Basis Can a Payment be Withheld and When?

The *Hong Kong SOPL* does not enumerate reasons why a payment can be withheld, other than proposing that “payers will have the right to defend Payment Claims in adjudication by arguing that amounts claimed are not due”.¹⁴⁷⁵

Upon receipt of a Payment Claim, a payer may serve a Payment Response within 30 days outlining how much, if anything, they will be paying under the payment claim. The Payment Response must also set out the amounts disputed (and reasons why) and any amounts intended to be set-off against amounts due (and the basis for the set-off).¹⁴⁷⁶

Failure to serve a Payment Response on time (i.e. within 30 calendar days (or earlier if contracted) of receipt of the Payment Claim) will not make the paying party “automatically liable for the full amount of the Payment Claim but they will not be able to raise any set off against amounts properly due against the Payment Claim”.¹⁴⁷⁷

(f) What remedies are available in the event of non-payment?

The *Hong Kong SOPL* would allow unpaid parties to “suspend all or part of their works or reduce the rate of progress in the event of non-payment.”¹⁴⁷⁸ The right of suspension “will only arise after either non-payment of an adjudicator’s decision or non-payment of an amount admitted as due in a Payment Response”.¹⁴⁷⁹

6. Australian Prompt Payment Legislation

In Australia, the objective of prompt payment legislation has been described as follows:

A common objective of all the legislation has been the eradication of unfair contractual provisions and practices with regard to payment. The aim is to get cash flowing in as fair a manner as possible down the hierarchical contractual chains that exist on most commercial construction projects.¹⁴⁸⁰

Another Australian commentator notes that in Australia, construction law was almost exclusively founded in the common law and freedom of contract prevailed until the provincial legislatures

¹⁴⁷⁴ *Ibid* at 17.

¹⁴⁷⁵ *Ibid* at 4.

¹⁴⁷⁶ *Ibid* at 17.

¹⁴⁷⁷ *Ibid* at 22.

¹⁴⁷⁸ *Ibid* at 26.

¹⁴⁷⁹ *Ibid* at 27.

¹⁴⁸⁰ Coggins and Donohoe, *supra* at 198.

were called upon to address systemic issues in the industry.¹⁴⁸¹ The legislature recognized that due to unequal bargaining power, subcontractors were unable to negotiate contract terms to protect their interests and needed some form of protection¹⁴⁸². As a result, Australian provinces enacted prompt payment statutes which “may impact on freedom of contract in respect of construction contracts, or may constrain the way in which work under construction contracts may be legally carried out”.¹⁴⁸³

Each state and territory in Australia¹⁴⁸⁴ has its own prompt payment legislation. One commentator explained that the objectives of the Australian legislatures when considering and drafting prompt payment legislation included “address[ing] the mischief of poor cash-flow” improving “the flow of cash in a swift manner down the hierarchical contractual chain on construction projects”.¹⁴⁸⁵ The various statutes have been grouped into two different models, the “East Coast” model and the “West Coast” model.¹⁴⁸⁶

6.1 Australia (East Coast)

The Australia (East Coast) model was first embodied in the *New South Wales Act* and was adopted in the *Victoria Act*, the *Queensland Act*, the *Tasmania Act*, the *South Australia Act* and the *Australian Capital Territory Act*. When it was enacted, the *New South Wales Act* introduced new statutory rights such as a right to progress payments even in the absence of payment terms in the contract, a right to interest on late payments, and a right to suspend work.¹⁴⁸⁷ The *New South Wales Act* also provided for a rapid adjudication procedure, which is discussed at Chapter 9 – Adjudication.

The *New South Wales Act* was amended in November 2013, in response to the New South Wales Government’s *Final Report of the Independent Inquiry into Construction Industry Insolvency* (also known as the “Collins Inquiry”), which examined ongoing high levels of insolvency in the construction industry and assessed the existing protections available for subcontractors.¹⁴⁸⁸ The

¹⁴⁸¹ Donald Charrett & Matthew Bell, “Statutory Intervention into the Common Construction Law of Australia – Progress or Regress?” (2012) J Can C Con Law [Charrett and Bell].

¹⁴⁸² Matthew Bell, “Beyond the Nutcracker Suite: International Harmonization of Construction Industry Payment Legislation” (2014) at 3, online: <<https://ogca.ca/wp-content/uploads/2015/08/Beyond-the-Nutcracker-Suite-.pdf>> [Bell].

¹⁴⁸³ Charrett and Bell, *supra*.

¹⁴⁸⁴ Australian Capital Territory, New South Wales, Victoria, Queensland, South Australia, West Australia, Tasmania, and Northern Territory.

¹⁴⁸⁵ Charrett and Bell, *supra*.

¹⁴⁸⁶ Coggins and Donohoe, *supra* at 199.

¹⁴⁸⁷ Economics References Committee, “*I just want to be paid*” - *Insolvency in the Australian Construction Industry*, The Senate (December 2015) at 122.

¹⁴⁸⁸ See news release - Finance, Services & Innovation, New South Wales Government, “Independent Inquiry into Construction Industry Insolvency” (January 2013), online: <<https://www.finance.NewSouthWales.gov.au/news-media/news/independent-inquiry-construction-industry-insolvency>>. The Report was completed in November 2012. During the 2011-12 financial year alone, there were 1,113 insolvencies in the New South Wales building and construction industry.

amendments to the *New South Wales Act* came into force on April 21, 2014 and included the following significant changes:

- the introduction of short maximum payment periods for progress payments, which override any inconsistent contractual provisions;¹⁴⁸⁹
- the inclusion of a supporting statement with payment claims made by contractors to owners/principals, declaring that all subcontractors and suppliers have been paid;¹⁴⁹⁰
- the creation of administrative offenses with monetary penalties of up to \$22,000 and in some cases up to three (3) months' imprisonment for failing to provide or knowingly providing a false supporting statement, or failing to comply with an information request or knowingly providing a false information to an authorized officer;¹⁴⁹¹ and
- the introduction of a trust mechanism, currently being used for the trial of a "Project Bank Account" process through which a bank deposits and allocates payments by the owner/principal (in the trials, the New South Wales government).¹⁴⁹²

Currently, the *New South Wales Act* provides that a progress payment claim may be served up to 12 months after the relevant work was carried out, that payment to a subcontractor must be made within 30 days after the payment claim is made while payment to a contractor must be made within 15 days.¹⁴⁹³ Among the Australia (East Coast) states and territories, the mandatory statutory time frames vary greatly. Interestingly, the time to serve a payment claim varies from 3 months after the relevant work was carried out to 12 months and the mandatory pay periods vary from 10 business days to 30 days after a payment claim is made.¹⁴⁹⁴

Although some commentators have argued that the *New South Wales Act* "effectively establishes a default entitlement to payment", they have also indicated that "on balance [it is] beneficial".¹⁴⁹⁵

Commentators have noted that, the implementation of the Australia (East Coast) model has assisted in improving the cash flow issues encountered by trades and suppliers, and expediting

¹⁴⁸⁹ Georgia Quick et al., Ashurst Australia, "Significant Changes to New South Wales Security of Payment Legislation" (April 22, 2014) at 1, online: <https://www.ashurst.com/doc.aspx?id_Content=10361>.

¹⁴⁹⁰ *Ibid* at 2.

¹⁴⁹¹ *Ibid* at 1-2.

¹⁴⁹² ProcurePoint, New South Wales Government, "Project Bank Accounts Trial", online: <[http://www.procurepoint.NewSouthWales.gov.au/policy-and-reform/New South Wales-procurement-reform/construction/project-bank-accounts-trial](http://www.procurepoint.NewSouthWales.gov.au/policy-and-reform/New%20South%20Wales-procurement-reform/construction/project-bank-accounts-trial)>.

See a comparison between the UK and Australian regimes at Stephen Cucus, Fenwick Elliot LLP, "Project Bank Accounts: A U.K. – Australian Comparison", (August 7, 2014) Mondaq, online: <<http://www.mondaq.com/x/330840/Building+Construction/Project+Bank+Accounts+A+U.K.Australian>>.

¹⁴⁹³ New South Wales Act, ss 13(4)(b), 10(1B) and 10(1A) respectively. See also the comparative table of statutory time frames to make progress payment claims and entitlement to be paid between all Australian jurisdictions in Economics References Committee, "I just want to be paid"- *Insolvency in the Australian Construction Industry*, The Senate, December 2015 at 128.

¹⁴⁹⁴ Economics References Committee, "I just want to be paid"- *Insolvency in the Australian Construction Industry*, The Senate, December 2015 at 128.

¹⁴⁹⁵ *Ibid* at 123.

resolution of progress payment claim disputes.¹⁴⁹⁶ Under the Australia (East Coast) model there is a progress payment claims statutory regime, which is not initially imposed on the parties but can be invoked by a claimant. Specifically, a claimant can serve a payment claim upon the respondent and “endorse” it as being made under the *New South Wales Act*.¹⁴⁹⁷ There is a concern that, under the Australia (East Coast) model, a claimant must make the choice of “endorsing” its payment claim, or not, and will often refrain from doing so for fear of being (in practice and not as a statutory remedy) “blacklisted” out of future work for being litigious.¹⁴⁹⁸

For the purpose of the following discussion, we have referred to provisions of the *New South Wales Act* as the leading jurisdiction on the Australia (East Coast) model. The other East Coast states generally followed this model.

(a) In the Construction Pyramid, what Level of Contract does it apply to?

The *New South Wales Act* applies to any construction contract as defined under the legislation, even if the contract is expressed to be governed by the law of a jurisdiction other than *New South Wales*.¹⁴⁹⁹ Accordingly, it applies to all level of contract so long as it meets the definition of “construction contract” under the *New South Wales Act*.

Importantly, the *New South Wales Act* expressly prohibits pay-when-paid clauses.¹⁵⁰⁰ The New South Wales Minister for Public Works and Services at the time, referred to pay-when-paid clauses as “inequitable” and “unAustralian”, because it’s “all too frequently the case that small subcontractors ... [are] not paid for their work.”¹⁵⁰¹

(b) What is the Trigger for Payment?

The trigger for payment under the *New South Wales Act* is the reference date (i.e. progress payment in this case). On and from each reference date, a person who has undertaken to carry out construction work or to supply related goods and services under the contract is entitled to a progress payment.

In this context, a reference date can be defined as: the date determined by contract as the date on which a claim for a payment may be made in relation to work carried out or undertaken to be carried out under the contract; or in cases where the contract does not expressly provide for such

¹⁴⁹⁶ Coggins and Donohoe, *supra* at 199.

¹⁴⁹⁷ Sections 13(1) and 13(2)(c) of the NSW Act.

¹⁴⁹⁸ Coggins J. et al, “Towards Harmonization of Construction Industry Payment Legislation: A Consideration of the Success Afforded by the East and West Coast Models in Australia” (2010) 10:3 Australasian J Construction Economics and Building 14 at 23.

¹⁴⁹⁹ *New South Wales Act*, s 7(1).

¹⁵⁰⁰ *New South Wales Act*, s 12.

¹⁵⁰¹ Robert McDougall, “The Court View of Security of Payment Legislation in Operation” (28 March 2012) at 1, online: <www.austlii.edu.au/au/journals/NSWJSchol/2005/12.pdf>.

a date, the last day of the month in which the construction work was first carried out and the last day of each subsequent month.¹⁵⁰²

(c) What is the Payment Period?

Progress payments under the *New South Wales Act* are to be payable in accordance with the terms of the applicable contract, subject to other requirements.¹⁵⁰³ The requirements include the following:

- A progress payment from principal to head contractor (i.e. owner to general contractor) are due and payable within 15 days from a payment claim or any earlier day provided by contract;
- A progress payment to be made to a subcontractor is to due and payable within 30 days after a payment claim or any earlier day provided by contract; and
- A progress payment in relation to an exempt residential construction contract is due and payable on the date determined by contract or, where there is no such provision in the contract, 10 days after a payment claim.¹⁵⁰⁴

(d) When is the contractor entitled to render an invoice?

A person entitled to a progress payment may serve a payment claim who, under the construction contract concerned, is or may be liable to make the payment.¹⁵⁰⁵ The payment claim must: identify the construction work to which the progress payment relates; indicate the amount of the progress payment that is claimed to be due; and in the case of an exempt residential construction contract, the payment claim must state that it is being made in relation to the *New South Wales Act*.¹⁵⁰⁶

A payment claim may only be served within the period set out under the construction contract or within the period of 12 months after the construction work to which the claim relates was last carried out (i.e. date of last supply in the Ontario context).¹⁵⁰⁷ Payment claims made by head contractors to principals (i.e. to owners) must be accompanied by supporting statements and must not be knowingly false or misleading.¹⁵⁰⁸ Failure to do so subjects the head contractor to a penalty.

¹⁵⁰² *New South Wales Act*, s 8(1) and (2).

¹⁵⁰³ *New South Wales Act*, s 11(1).

¹⁵⁰⁴ *New South Wales Act*, s 11 (1A),(1B),(1C).

¹⁵⁰⁵ *New South Wales Act*, s 13.

¹⁵⁰⁶ *New South Wales Act*, s 13(2).

¹⁵⁰⁷ *New South Wales Act*, s 13(4).

¹⁵⁰⁸ *New South Wales Act*, s 13(7) and (8).

(e) On What Basis Can a Payment be Withheld and When?

A person who receives a payment claim may reply by providing a payment schedule that identifies the payment claim to which it relates; and indicates the amount of payment (if any) that the respondent proposes to make.¹⁵⁰⁹ In cases where the payer proposes an amount (termed scheduled amount) that is less than the amount claimed in the payment claim, the payment schedule must indicate why that amount is less and provide reasons for withholding payment.¹⁵¹⁰

If the respondent receives a payment claim and does not provide a payment schedule within the time provided in the contract or within 10 days after the receipt of the payment claim (whichever is earlier), the respondent becomes liable to pay the claimed amount.¹⁵¹¹

(f) What remedies are available in the event of non-payment?

If a progress payment becomes due and payable, the claimant is entitled to exercise a lien in respect of the unpaid amount over any unfixed plant or materials supplied in connection with carrying out the construction work.¹⁵¹² In addition, interest is payable on the unpaid amount of a progress payment.¹⁵¹³

In the event that a respondent to a payment claim provides no payment schedule and fails to pay the payment claim, the claimant may do the following: a) recover the unpaid portion as a debt due to the claimant in any court of competent jurisdiction; or b) make an adjudication application.¹⁵¹⁴ The claimant may also serve a notice of intent to suspend carrying out construction work under the construction contract.¹⁵¹⁵ Similar remedies are available in circumstances where the respondent provides a payment schedule however fails to pay the whole or part of the proposed amount under the payment schedule.¹⁵¹⁶

A claimant may suspend the carrying out of construction work if at least 2 business days have passed since the claimant caused notice of intention to suspend to be given to the respondent. The right to suspend exists under 3 business days following the date the claimant receives payment for the amount payable to the respondent in accordance with the payment schedule or otherwise. The *New South Wales Act* also stipulates certain liabilities in relation to suspension (e.g. liabilities to the owner in relation to loss or damages suffered as a result of the removal by the respondent from the contract of any part of work or supply).¹⁵¹⁷

¹⁵⁰⁹ *New South Wales Act*, s 14(1) and (2).

¹⁵¹⁰ *New South Wales Act*, s 14(3).

¹⁵¹¹ *New South Wales Act*, s 14(4).

¹⁵¹² *New South Wales Act*, s 11 (3).

¹⁵¹³ *New South Wales Act*, s 11 (2).

¹⁵¹⁴ *New South Wales Act*, s 15(2).

¹⁵¹⁵ *New South Wales Act*, s 15(2).

¹⁵¹⁶ *New South Wales Act*, s 16(2).

¹⁵¹⁷ *New South Wales Act*, s 27.

6.2 Australia (West Coast)

The general purpose of the Australia (West Coast) model is to provide for timely payments between parties to construction contracts and provide for the rapid resolution of payment disputes under construction contracts.¹⁵¹⁸

The Australia (West Coast) model is different from the Australia (East Coast) model in that the Australia (West Coast) model does not override the ordinary course payment terms agreed to between the parties under the contract. The distinction between the two models, with respect to payment provisions has been summarized as follows:

The West Coast model adopts a more simplistic approach that attempts not to interfere with the contractual rights and obligations of the parties to a construction contract. That is, rather than establish new statutory rights that override the contract, the West Coast model operates by reference to the parties' own contractual arrangements.¹⁵¹⁹

Commentators have noted the significant challenge facing Australian contractors who operate in various states and territories, due to the differences between jurisdictions,¹⁵²⁰ for example in the “counting of days” provisions, matters to be included or not in payment claims under the legislation, and varying definitions which affect the scope of application of the statute.¹⁵²¹

Generally, the consensus among stakeholders across Australian jurisdictions is that, although underutilized, where the legislation is relied upon and is used by the intended parties, it has successfully made a positive impact on the flow of payments in the industry.¹⁵²²

(a) In the Construction Pyramid, what Level of Contract does it apply to?

The Australia (West Coast) model applies to all “contractors”, which is defined as a person that is obligated, under a construction contract, to carry out construction work, to supply goods in relation to the construction work, to provide professional services related to the construction work, or to provide on-site services that are related to the construction work.¹⁵²³

¹⁵¹⁸ *Construction Contracts (Security of Payments) Act*, NTCA, s 3 [*Northern Territory Act*].

¹⁵¹⁹ Economics References Committee, “*I just want to be paid*”- *Insolvency in the Australian Construction Industry*, The Senate, December 2015 at 125. In this paragraph, the Committee makes references to comments recorded in the *Proof Committee Hansard*, 26 October 2015 at page 1 and to the comments of Professor Philip Evans in Society of Construction Law Australia, *Report on Security of Payment and Adjudication in the Australian Construction Industry* (May 2014) at 15, online: <[http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Insolvency_construction/~media/Committees/economics_ctte/Insolvency_construction/report.pdf](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Insolvency_construction/~/media/Committees/economics_ctte/Insolvency_construction/report.pdf)>.

¹⁵²⁰ *Ibid.*

¹⁵²¹ Charrett and Bell, *supra*.

¹⁵²² Economics References Committee, “*I just want to be paid*”- *Insolvency in the Australian Construction Industry*, The Senate, December 2015 at 132.

¹⁵²³ *Northern Territory Act*, s 5(1); *Western Australia Act*, s 3.

Importantly, the Australia (West Coast) model also renders pay-when-paid and pay-if-paid provisions inoperative.¹⁵²⁴

(b) What is the Trigger for Payment?

The trigger for payment under the Australia (West Coast) model is contractual by default; however, in the absence of contractual provisions on contractor's obligations under a contract, the Australia (West Coast) model will imply default provisions (e.g. contracts that do not provide for an amount due, how such amounts are calculated, entitlement, variations of obligations, or how payment claims are made).¹⁵²⁵

When the parties fail to provide for a payment regime by way of contract and the default provisions apply, payment is triggered upon service of a payment claim, which, when served by a contractor must: be in writing; be addressed to the party to which the claim is made; state the name of the claimant; state the date of the claim; state the amount claimed; in the case of a claim by the contractor — itemise and describe the obligations that the contractor has performed and to which the claim relates in sufficient detail for the principal to assess the claim; in the case of a claim by the principal — describe the basis for the claim in sufficient detail for the contractor to assess the claim; be signed by the claimant; and be given to the party to which the claim is made.¹⁵²⁶

(c) What is the Payment Period?

The Australia (West Coast) model allows parties to contract for payment periods, however, for contracts that require payment to be made more than 50 days after payment is claimed, the contractual provision will be read down to require payment to be due within 50 days after it is claimed under the *Western Australia Act* and within 28 days after it is claimed under the *Northern Territories Act*.¹⁵²⁷

(d) When is the contractor entitled to render an invoice?

A payment claim may be made in the Australia (West Coast) model “at any time after the contractor has performed any of its obligations”.¹⁵²⁸

(e) On What Basis Can a Payment be Withheld and When?

A payment can be withheld under the Australia (West Coast) model if the paying party either “believes the claim should be rejected because the claim has not been made in accordance with” the contract, or “disputes the whole or part of the claim”.

¹⁵²⁴ *Northern Territory Act*, s 12; *Western Australia Act*, s 9.

¹⁵²⁵ *Northern Territory Act*, s 16-24; *Western Australia Act*, s 13-22.

¹⁵²⁶ *Northern Territory Act*, Schedule, Division 4, s 5(1); *Western Australia Act*, Schedule 1 Division 5, s 5(1).

¹⁵²⁷ *Northern Territory Act*, s 5; *Western Australia Act*, s 5.

¹⁵²⁸ *Northern Territory Act*, Division 3, s 4(1); *Western Australia Act*, Division 3, s 4(1).

According to the default provisions of the Australia (West Coast) model, the paying party must give the claimant a “notice of dispute” within 14 days of receiving the claim outlining its objection. The notice of dispute must: be in writing; be addressed to the claimant; state the name of the party giving the notice; state the date of the notice; identify the claim to which the notice relates; if the claim is being rejected under subclause (1)(a) — state the reasons for the belief that the claim has not been made in accordance with this contract; if the claim is being disputed under subclause (1)(b) — identify each item of the claim that is disputed and state, in relation to each of those items, the reasons for disputing it; and be signed by the party giving the notice.¹⁵²⁹

(f) What remedies are available in the event of non-payment?

If interest provisions are not stipulated in the construction contract, the Australia (West Coast) model provides for interest on overdue payments. Interest will begin to accrue on the day after the amount is due. The rate of interest is determined by the *Civil Judgments Enforcement Act 2004* under the Western Australia Act and by the *Supreme Court Act* under the *Northern Territories Act*.¹⁵³⁰

Contractors also have a right of suspension that arises if they are not paid according to an adjudicator’s determination.¹⁵³¹

¹⁵²⁹ *Northern Territory Act*, Division 5, s 6; *Western Australia Act*, Division 5, s 7.

¹⁵³⁰ *Northern Territory Act*, s 21, Division 6, s 7; *Western Australia Act*, s 19, Division 6, s 8.

¹⁵³¹ *Northern Territory Act*, Division 5, s 44; *Western Australia Act*, Division 5, s 42.

State	Application	Statute(s)	Owner to Prime		Prime to Subcontractors	
			Entitlement/ payment claim	Pay Period	Entitlement	Pay Period
Alabama	Public	Ala. Code §§ 41-16-3. [Enacted or consolidated 1984; revised 1996]	Full execution of contractual obligations.	Progress Payment: not specified. Final Payments: 30 days after completion and submission of a proper invoice.	Upon full execution of contractual obligations.	Within 7 days after receipt of payment from upstream entity unless otherwise agreed in the contract.
	Private	Ala. Code §§ 8-29-1 to 8-29-8. [Enacted 1995; § 8-29-3 revised 2011]	Performance in accordance with the contract.	30 days after receipt of the pay request or invoice or in accordance with the contract.	Performance in accordance with the contract.	Within 7 days after receipt of payment from upstream entity unless otherwise agreed in the contract.
Alaska	Public	Alaska Stat. §§ 36.90.200 - 36.90.290. [§§ 36.90.200 and 36.90.200 enacted 1990]	Performance in accordance with the contract.	30 days from the date of receipt of a payment request that complies with the contract (or 21 days from the date of receipt of a payment request or receipt of grant funds, whichever is later, if using grant or federal funds). 21 days from completion of any remedial work.	Satisfactory performance of the contract.	Within 8 working days after receipt of payment from upstream entity and retainage within. 8 working days after correction of any deficiencies.
	Private	N/A				
Arizona	Public	Ariz. Rev. Stat. §§ 34-221; 41-2576; 41-2576 to 41-2580; 28-6924 (highway) [§ 34-221 enacted or consolidated 1989; revised 1991; 1999, 2003, 2006, 2015 § 41-2576 enacted or consolidated 1989; revised 1991, 2000, 2005 § 41-2577 enacted or consolidated 1989; revised 1991, 2000, 2001, 2015]	Progress Payment: certified and approved estimate of work, for projects exceeding 90 days. Final Payment: completion and acceptance of each separately-priced element of contract.	Progress Payment: 14 days after the estimate of the work is certified and approved. Final Payment: 60 days after completion or filing of notice of completion of the contract.	Performance in accordance with the contract.	Within 7 days after receipt of payment from upstream entity.
	Private	Ariz. Rev. Stat. §§ 32-1129 to 32-1129.06. [§ 32-1129 enacted or consolidated 1989; revised 2000, 2010. § 32-1129.02 revised 2000, 2001, 2010, 2011]	Progress Payment: Submission of billing or estimate of work, for projects exceeding 60 days. Final Payment: i) submission of billing or estimate for final payment; ii) completion and acceptance of each separately-priced element of contract.	Progress Payment: within 7 days after the date the estimate is certified and approved. The estimate is deemed approved 14 days after receipt unless certification or approval is denied in writing within that time. Final Payment: Within 7 days of approval and certification of all the work.	Performance in accordance with the contract.	Within 7 days after receipt of payment from upstream entity.

State	Application	Statute(s)	Owner to Prime		Prime to Subcontractors	
			Entitlement/ payment claim	Pay Period	Entitlement	Pay Period
Arkansas	Public	Ark. Code §§ 19-4-1411; 22-9-601 to 22-9-604. [§ 19-4-1411 enacted or consolidated 1973; revised 1977, 1979, 2001, 2003; §§ 22-9-601 to 22-9-603 enacted or consolidated 1977; revised 1979. § 22-9-601 enacted or consolidated 1977; revised 1977, 2007, 2009, 2015]	In accordance with the contract or: 1) Completion of work. 2) Properly prepared request for payment of completed work.	5 working days or in accordance with the contract, to a maximum of 90 days following presentation of a properly prepared request for payment.	N/A	N/A
	Private	N/A				
California	Public	Cal. Bus. & Prof. Code § 7108.5; Civil Code §8802; Pub. Cont. Code §§7107, 10261.5 to 10262.5, 10853. [Pub. Cont. Code §7107 effective 1999; § 10261.5 enacted 1990].	In accordance with the contract or upon proper submission of undisputed payment request.	Within 30 days of receipt of a properly submitted undisputed payment request.	Upon prime contractor's receipt of progress payment from agency.	Within 7 days of receipt of payment from upstream entity, absent a good faith dispute over amount owed. Within 21 days of receipt of payment from public utility.
	Private	Cal. Bus. & Prof. Code § 7108.5; Cal. Civil Code §§ 3260-3260.1. (7/1/12, cite Civ. Code §§ 8800-8802, 8810-8822) [Cal. Civil Code §§ 8800; 8810 effective 2011]	Demand for payment in accordance with the contract.	In accordance with the contract or within 30 days from receipt of demand for payment.	Following receipt of progress payments, or per contract.	Within 10 days of receipt of payment from upstream entity.
Colorado	Public	Colo. Rev. Stat. § 24-91-101 to 24-91-104; 109 to 110. [Enacted 1979. § 24-91-101 revised 1992. § 24-91-102 and § 24-91-103 revised 2014]	1) Contractor is "satisfactorily performing" under the contract. 2) Progress Payment: no notice required. Final Payment: Written request and approval from surety.	Progress Payment: at the end of each calendar month or as soon thereafter as practicable. Final Payment: within 60 days after completion and acceptance.	1) Subcontractor is "satisfactorily performing" under the contract. 2) Subcontractor submits a list identifying the subcontractor's suppliers, subcontractors, and labourers.	Within 7 days of receipt of payment from upstream entity.
	Private	N/A				
Connecticut	Public	Conn. Gen. Stat. § 4a-71 to 4a-75, 49-41c [§ 4a-71 to § 4a-73 enacted 1984; § 4a-71 revised 2005 § 4a-74 enacted 1975; revised 2011 § 4a-75 enacted 1949; revised 2000 § 4a-41c enacted 1983; revised 1986]	1) Entitlement per contract; and 2) properly completed claim submitted.	Later of: 1) the date specified in the contract; or 2) within 45 days of receiving a properly completed claim for goods or services.	In accordance with the subcontract terms.	Within 30 days of receipt of payment from the state for work performed by or materials furnished by subcontractor.

State	Application	Statute(s)	Owner to Prime		Prime to Subcontractors	
			Entitlement/ payment claim	Pay Period	Entitlement	Pay Period
	Private	Conn. Gen. Stat. § 42-158i to 42-158r [§ 42-158i enacted 1999; revised 2004 § 42-158j enacted 1999; revised 2009 § 42-158k-r effective 2004]	1) Substantial performance according to the terms of the contract. 2) Written request for payment.	30 days maximum after receipt of a written submission for payment, or payment may be due earlier in accordance with the contract.	Arises upon substantial performance according to the terms of the contract.	Within 30 days after the date the contractor receives payment from upstream entity.
Delaware	Public	Del. Code, Title 29, § 6516(f) [Enacted 1921; revised 2002]	Progress payment: i) monthly for contracts of 90 days or more; ii) submission of estimate. Final Payment: i) after completion or filing notice of completion of the work; ii) filing of notice of completion.	Progress payment: i) on or before 21 days after certification and approval of the work covered by the estimate; or ii) within 10 days of a required federal agency's approval. Final Payment: i) within 60 days after completion or filing notice of completion; or ii) within 30 days of required federal agency's final approval.	Subcontractor's "satisfactory performance" and per contract.	Within 21 days of receipt of each progress payment from upstream entity, or per contract.
	Private	Del. Code, Title 6, § 2301, 3501 to 3509 [§ 2301 date of enactment unknown; revised 2012 § 3501 enacted 1933; revised 2004 § 3502 - § 3505 enacted 1933; revised 1943 (date of most recent amendment unavailable) § 3506 enacted 1996; revised 2004 § 3507 enacted 2002; revised 2012 § 3508 enacted 2002; revised 2004 § 3509 enacted 2002; revised 2004]	Progress Payment: i) due at the end of billing period; ii) Contractor must deliver invoice. Final Payment: i) due as specified in contract or if not specified, when work is fully completed; ii) must deliver invoice.	Progress Payment: within 30 days after the end of the billing period or 30 days after delivery of the invoice. Final Payment: within 30 days after end of billing period or delivery of final invoice.	Progress payments due at the end of billing period. Final payment is due as specified in contract or if not specified, when the work is fully completed.	Within 15 days after receipt of payment from upstream entity unless otherwise agreed.
	Public	Fla. Stat. §§ 255.0705 et seq., 215.422 [§ 255.0705 enacted 2005 § 215.422 enacted 1974; revised 2006]	Submission of payment request and receipt, and inspection and approval of the goods or services provided. State agency must submit request to state payment officer for payment within 20 days after receipt of request.	Within 30 days after receipt of pay request. State payment officer must approve payment of invoice within 10 days of submittal by state agency.	Once claimant has submitted proper payment request, contractor has been paid by owner and claimant has submitted all requisite affidavits or waivers.	Later of 30 days after subcontractor's services were rendered or within 10 days of receipt of payment from upstream entity.

State	Application	Statute(s)	Owner to Prime		Prime to Subcontractors	
			Entitlement/ payment claim	Pay Period	Entitlement	Pay Period
Florida	Public	Localities: §§ 218.70 et seq. FDOT: § 337.141 and year [Localities § 218.70 enacted 1989/revised 2005 FDOT § 337.141 enacted 1970; revised 1995]	As specified in contract, proper payment request and provided required affidavits/ waivers (approval by designated agent may be required).	Pay within 20 business days of date a request is received; within 25 days if pay application is conditioned upon approval by an agent for the agency.	Contractor receives payment for the labour furnished by such subcontractor.	Within 10 days from receipt of payment from the upstream entity.
	Private	Fla. Stat. §§ 713.346, 715.12 [§ 713.346 enacted 1988; revised 1990 § 715.12 enacted 1992; revised 1993]	When entitled under contract, submitted proper pay request and affidavits/waivers.	14 days after receipt of pay application.	When entitled under contract, submitted proper pay request and affidavits/waivers, and prime contractor has been paid.	Within 14 days from receipt of pay application.
Georgia	Public	Ga. Code §§ 13-11-1 to 13-11-11. [Enacted 1994; no revisions listed]	Entitlement upon: 1) performance in accordance with the contract; 2) satisfaction of the contract conditions precedent to payment; and 3) submission of pay request.	15 days after receipt of pay request.	Entitlement upon: 1) performance in accordance with the contract; and 2) satisfaction of the contract conditions precedent to payment.	Within 10 days from receipt of payment from upstream entity.
	Private	Same as above.	Same as above.	Same as above.	Same as above.	Same as above.
Hawaii	Public	HRS §§ 103-10 to 103-10.5. HB 3036 [§ 103-10 enacted in 1967; multiple amendments from 1977-2004; §10.5 enacted in 1983; §2 amended in 2000 and 2006]	Satisfactory delivery of the goods or performance of the services.	30 days after receipt of invoice.	Upon meeting all terms & conditions of subcontract. Upon meeting conditions for retainage or other withheld payments, if relevant.	Within 10 days from receipt of payment from upstream entity.
	Private	HRS §§ 444-1 and 444-25. [§ 444-1 enacted in 1957; multiple amendments from 1969-2000 § 444-25 enacted in 1969; §1 amended in 1971 and §2 amended in 2012]	N/A	N/A	60 days after receipt of proper statement that goods were delivered and services were performed.	Within 60 days from receipt of invoice, but may be contingent on receipt of funds held in escrow or trust if disclosed on bid solicitation.
Idaho	Public	Idaho Code §67-2302. [Last amended in 1986]	N/A	60 days after receipt of invoice unless otherwise agreed.	N/A	N/A
	Private	Idaho Code Ann. § 29-115 [Last amended in 1998]	N/A	N/A	N/A	N/A
	Public	Title 50 ILCS505/1 -505/9 (localities); Title 30 ILCS 540/0.01-540/7 (state). [505/9 last amended in 2007]	N/A	60 days after receipt of invoice (30 days to approve the invoice and then 30 days to pay).	In proportion to the work completed and materials supplied, less any retention, absent a contractor's or higher-tiered subcontractor's "reasonable cause" to withhold payment.	Within 15 days from receipt of payment from upstream entity.

State	Application	Statute(s)	Owner to Prime		Prime to Subcontractors	
			Entitlement/ payment claim	Pay Period	Entitlement	Pay Period
Illinois	Private	Title 815 ILCS 603/1-603/99. [603/99 last amended in 2007]	Performance in accordance with contract and payment application has been approved by owner/owner's agent.	40 days after receipt of invoice (25 days to approve, 15 days to pay after approved). Payment deemed approved 25 days after receipt of application unless Owner is withholding.	Performance in accordance with contract and work accepted by owner, owner's agent, or contractor.	Within 15 days from receipt of payment from upstream entity.
Indiana	Public	Ind. Code §§ 5-17-5-1 to 5-17-5-5, 5-16-5.5-1 to 5-16-5.5-8. [Amendments to several sections between 1972 and 2007: § 5-17-5-1 last amended 1997; § 5-17-5-4 last amended 1996; § 5-16-5.5-1 last amended 2006; § 5-16-5.5-3.5(a) last amended 2007; § 5-16-5.5-5 last amended 1985; § 5-16-5.5-6 last amended 1972]	For contracts with the state (Titles 4 and 5) or local government entity (Title 36): after substantial completion of contract .	State: 35 days after receipt of invoice for progress payments. 61 days following the date of substantial completion for final payment. Localities: at least 45 days after receipt of invoice.	For state public works contracts (Title 4 and 5): upon the prime contractor's receipt of payment from the state.	Within 10 days from receipt of any payment by state agency.
	Private	N/A .				
Iowa	Public	Iowa Code §§ 573.12 and 573.14. [Last amended in 2005]	N/A	Progress Payments: on the basis of a monthly estimate of work performed: 14 days of approval of the estimate (unless the contract provides for longer a period, not exceeding 30 days). Final payments: 40 days (but up to 50 days if otherwise agreed to in the contract after completion and acceptance).	Upon "satisfactory performance".	Within 7 days from receipt of payment from upstream entity.
	Private	N/A				
Kansas	Public	Kan. Stat. §§ 75-6401 to 75-6407 and 16-1901 to 16-1908. [In 2010, §§ 16-1902 and 16-1904 were amended and the existing sections repealed]	KPPA: upon government's receipt of goods/services (receipt deemed when completely delivered and finally accepted). KFPCCA: depends on contract.	Unless otherwise agreed, within 30 days after receipt of request for payment or up to 45 days in case of extenuating circumstances.	KPPA: upon government's receipt of goods/services (receipt deemed when completely delivered and finally accepted). KFPCCA: depends on contract.	Within 7 days from receipt of payment from upstream entity.
	Private	Kan. Stat. 16-1801 to 16-1807. [Enacted in 2005 §§ 16-1802 and 16-1804 amended in 2010 (repealing existing sections) § 16-1803 amended in 2009]	N/A	30 days after receipt of timely, completed, and undisputed request for payment.	Depends on contract.	Within 7 business days from receipt of payment from upstream entity.

State	Application	Statute(s)	Owner to Prime		Prime to Subcontractors	
			Entitlement/ payment claim	Pay Period	Entitlement	Pay Period
Kentucky	Public	KRS 371.400 to 371.425: §§ 45.451 - 45.458 (prompt payment by government in general). [Enacted in 1984 § 45.453 amended in 1997 § 45.454 amended in 1998]	KFCA: depends on contract, and after submitting a “timely, properly completed, undisputed request for payment” Ch. 45: N/A	KFCA: Within 30 business days from receipt of request for payment; contractor must give notice of nonpayment after 25 business days; Ch. 45: Within 45 business days from receipt of payment request for progress payments by post-secondary institutions and board of education; final payment 30 days after substantial completion.	KFCA: depends on contract terms, and after submitting a “timely, properly completed, undisputed request for payment”.	Within 15 business days from receipt of payment from upstream entity.
	Private	Same as above.	Same as above.	Same as above.	Same as above.	Same as above.
Louisiana	Public	La. Rev. Stat. §§ 9:2784, 38:2191, 48:251.5 (highway). [§ 9:2784 last amended in 1987]	N/A	Progress payments per contract; final payment within 45 days from receipt of “clear lien certificate.” Highway contracts: 30 days after receipt of invoice for progress payments and 45 days after substantial completion for final payments.	Upon receipt of payment, absent “reasonable cause” not to pay.	Within 14 days from receipt of payment from upstream entity.
	Private	N/A				
Maine	Public	10 M.R.S.A. § 1111 et seq. (Me. Rev. Stat., Title 10, §§ 1111 et seq.; cf. Title 5, §§ 1551 et seq. (prompt payment by government in general). [Enacted in 2015]	Payment to be made strictly in accordance with the terms of the contract.	Progress payments strictly in accordance with the terms of the contract. If not specified in contract, then 20 days after receipt of invoice or end of billing period whichever is later; final payment 30 days after final acceptance.	Strictly in accordance with the terms of the contract.	As agreed. Notwithstanding any contrary agreement, within 7 days from receipt of payment from upstream entity or invoice, whichever is later. Final payments: 30 days after final acceptance.
	Private	Same as above.	Same as above.	Same as above.	Same as above.	Same as above.
Maryland	Public	Md. State Fin. & Proc. §§ 15-101 to 15-108, 15-226. [§§ 15-101 to 15-108 enacted or consolidated 1988 § 15-104 amended 1993, 1996; § 15-105 amended 1996; § 15-108 amended 2000, 2005]	N/A	30 days after payment comes due under contract or within 30 days from agency's receipt of invoice.	Depends on contract.	Within 10 days from receipt of payment from upstream entity.
	Private	Md. Code, Real Property, §§ 9-301 to 9-304. [§§ 9-301 to 9-303 enacted in 1989 § 9-304 enacted in 2008]	N/A	Progress Payment: as agreed. Final payment: 30 days after occupancy permit granted or within 30 days after owner takes possession unless otherwise agreed. If final payment otherwise agreed, final payment must be within 7 days of the date specified in the contract.	Depends on contract.	Within 7 days from receipt of payment from upstream entity.

State	Application	Statute(s)	Owner to Prime		Prime to Subcontractors	
			Entitlement/ payment claim	Pay Period	Entitlement	Pay Period
Massachusetts	Public	Mass. Gen. Laws ch. 30, §§ 39G, 39J, 39K. [Enacted 1982 per secondary source, information on amendments not readily available]	Progress Payment: work during preceding month and/or for materials not incorporated into work but delivered and stored onsite or at another location that is mutually agreed upon in writing. Final Payments: The earlier of: a) substantial completion (with only 1% of contract value outstanding upon consultant's certificate.) b) occupancy by the owner.	Progress payment: within 15 days after receipt of invoice but 30 days in the case of the commonwealth, including local housing authorities; Final Payment: within 65 days of receipt of periodic estimate requesting full payment.	Amount paid to the general contractor for the labour performed by and materials furnished by that subcontractor, less any amount specified in court proceedings and less any amount claimed due from the subcontractor by the general subcontractor.	Progress payments: due immediately after receipt of payment from upstream entity. Final Payments: 65 days after substantial completion of that subcontractor's work.
	Private	Mass. Gen. Laws ch. 149 § 29E(a), (c), (d) & ch. 254 § s. 2. [Enacted 1982]	N/A	Invoice must be given within 30 days beginning with the end of 1st calendar month at least 14 days after performance commenced; Invoice must be approved or rejected within 15 days; and payment must be made within 45 days after approval.	N/A	Prime to Sub: Same as owner to prime, except that the prime contractor has 22 days (15+7) to approve/reject invoice. Subs to lower tiers: Same, except the subcontractor has 29 days (22+7) to approve/reject invoice.
Michigan	Public	Mich. Comp. Laws § 125.1561; 1562; 1563, 1564 [Enacted in 1980; came into effect in 1983]	Entitlement in accordance with the parties' contract and the common law.	Later of 30 days after owner agent approves invoice, or 15 days after agency's receipt of public funds from another agency.	N/A	N/A
	Private	N/A				
Minnesota	Public	Minn. Stat. §15.72; 16A.124; 16A.1245; 16B.01 [§ 15.72 enacted in 1980 § 16A.124 enacted in 1980, various amendments in 1984, 1985, 1992, 1994, 1995, 1996, 1997, 2009, and 2014 § 16A.1245 enacted in 1990 § 16B.01 enacted in 1994; amendments in 1984, 1994, 1996, and 2014]	State Contracts: entitled to payment based upon estimates of work completed as approved by the public contracting agency. Local Government Contracts: N/A	Mandatory monthly progress payments, unless otherwise agreed; for localities, 35 (localities with regularly scheduled monthly meetings) or 45 days (localities without regularly scheduled monthly meetings) after receipt of invoice or receipt of service whichever is later unless otherwise agreed.	N/A	Within 10 days from receipt of payment from upstream entity.
	Private	Minn. Stat. § 337.10; § 514.02 [§ 337.10 enacted in 1997; amendments in 1998, 1999, 2007, and 2009 § 514.02 enacted in 1915; amendments in 1965, 1971, 1984, 1986, 2000, and 2007]	N/A	Monthly progress payments unless otherwise agreed.	N/A	A building and construction contract requires payment within 10 days from receipt of payment from upstream entity.

State	Application	Statute(s)	Owner to Prime		Prime to Subcontractors	
			Entitlement/ payment claim	Pay Period	Entitlement	Pay Period
Mississippi	Public	Miss. Code Ann. §§ 31-5-25 & 31-25-27 §§ 31-5-25 originally from 1942; enacted in 1972; amendments in 1985, 1994, 2002, and 2006 § 31-25-27 enacted in 1972; amendment in 1985]	Partial/progress/interim payments paid when due and payable under contract. Final payment due and payable on earliest of (i) (substantial) completion; (ii) owner beneficially occupies or uses project; (iii) project is certified as being completed by architect or engineer authorized to do so or (iv) the contracting authority.	Progress Payment: as agreed, but must be paid within 45 days or subject to interest. Final Payment: 45 days after substantial completion, certification, or use by owner.	Payment must be made in proportion to percentage of work completed. If less than full payment received, must be disbursed pro rata to subcontractors.	Within 15 days from receipt of payment from upstream entity.
	Private	Miss. Code Ann. §§ 87-7-3 & 87-7-5. [§ 31-5-25 originally from 1942; enacted in 1972; amendments in 1985, 1994, 2002, and 2006 § 31-25-27 enacted in 1972; amendment in 1985]	Partial/progress/payments paid when due and payable under contract. Final payment due and payable on earliest of (i) (substantial) completion; (ii) when owner beneficially uses or occupies project; (iii) on certification of completion by authorized architect or engineer If project is bonded, final payment not due until written consent of contractor's surety delivered to proper contracting authority.	Progress payment: as agreed; Final payment: 30 days after substantial completion, certification, or use by owner.	A sub is entitled to payment in proportion to the percentage of work it completes. If less than full payment, then entitled to pro rata share.	Within 15 days from receipt of payment from upstream entity.
Missouri	Public	Mo. Rev. Stat. §§ 34.057.1; 34.057.4; 34.057.5; 34.057.6 [Enacted 1990; amendment in 2014]	Determined by contract. If not a lump sum contract, payment based on periodic estimates prepared by the project architect or engineer.	Progress Payment: Within 30 days of latter of: (a) date of delivery; (b) date on which invoice is duly delivered; (c) date on which contractor delivers notice of approval of public owner's estimate Final Payment: Within 30 days of earliest of: (1) completion and filing with owner; (2) certification by architect or engineer; (3) certification by contracting authority	Determined by contract. If not a lump sum contract, payment based on periodic estimates prepared by the project architect or engineer.	Within 15 days from receipt of payment from upstream entity, less any retention not to exceed 10%. If received less than full payment due, distribute on pro rata basis.
	Private	Mo. Rev. Stat. § 431.180 & §§ 436.300, 303, 306, 309, 312, 315, 318, 321, 324, 327, 330, 333, 336. [§ 431.180 enacted in 1995; amended in 1999 §§ 436.300, 303, 306, 309, 312, 315, 318, 321, 324, 327, 330, 333, 336 enacted in 2002]	N/A	N/A	Determined by contract.	Determined by contract.

State	Application	Statute(s)	Owner to Prime		Prime to Subcontractors	
			Entitlement/ payment claim	Pay Period	Entitlement	Pay Period
Montana	Public	<p>Mont. Code §§ 17-8-241 to 17-8-244 (public)</p> <p>Mont. Code Ann. §§ 28-2-2101 - 2107, 2110, 2111, 2115-2117.</p> <p>[Mont. Code Ann. §§ 28-2-2101 - 2107, 2110, 2111, 2115-2117 all enacted 1999 except 2110 enacted 2001, amended 2005; 2111, 2115 - 2117 enacted 2003.</p> <p>§§ 28-2-2101 amended 2003; 2102, 2103 amended 2003; 2104 amended 2005, 2009; 2105, 2106, 2107 amended 2001]</p>	<p>Upon performance of contract obligations and delivery of a billing statement or estimate for work performed or material supplied as required by contract.</p> <p>Contract must provide for monthly billing cycle or meet notice requirements in Act to establish different billing cycle.</p>	<p>7 days after approval of payment request; payment request is considered approved 21 days after receipt of request unless owner is withholding payment.</p>	<p>Upon performance of contract and submission of billing statement or estimate for work performed or material supplied as required by contract.</p>	<p>Within 7 days from receipt of payment from upstream entity.</p>
	Private	Same as above.	Same as above.	Same as above.	Same as above.	Same as above.
Nebraska	Public	<p>Neb. Rev. Stat. §§ 81-2401 to 2408; <i>Neb. Rev. Stat.</i> §§ 45-1201 to 45-1210.</p> <p>[§§ 81-2401 to 2408 all enacted 1988</p> <p>§§ 81-2401, 2402 amended 2010; 2403, 2404 amended 1992; 2405 to 2408 amended 2012</p> <p>§§ 45-1201 to 45-1210 enacted 2010; amended 2014]</p>	<p>NPPA: entitled to payment for goods delivered or services rendered.</p> <p>NCPA: on performance of work in accordance with provisions of contract.</p>	<p>NPPA: Within 45 calendar days of receipt of the goods or services or the date of receipt of an invoice.</p> <p>NCPA: Within 30 days after the owner's receipt of a payment request made pursuant to the contract.</p>	<p>NCPA: When work performed in accordance with the provisions of a subcontract and all conditions precedent to payment contained in the subcontract have been satisfied.</p>	<p>NCPA: Within 10 days from receipt of payment from upstream entity.</p>
	Private	<p>Nebraska Construction Prompt Pay Act, Neb. Rev. Stat. §§ 45-1201 to 45-1210</p> <p>[Enacted 2010; amended 2014]</p>	<p>NCPA: on performance of work in accordance with provisions of contract.</p>	<p>NCPA: Within 30 days after the owner's receipt of a payment request made pursuant to the contract.</p>	<p>NCPA: When subcontractor has performed work in accordance with the provisions of a subcontract and all conditions precedent to payment contained in the subcontract have been satisfied.</p>	<p>NCPA: Within 10 days from receipt of payment from upstream entity.</p>

State	Application	Statute(s)	Owner to Prime		Prime to Subcontractors	
			Entitlement/ payment claim	Pay Period	Entitlement	Pay Period
Nevada	Public	Nev. Rev. Stat. §§ 338.400, 415, 420, 425, 430, 435, 455, 460, 510, 515, 520, 525, 530, 535, 550, 555, 560, 565, 570, 590, 595, 600, 605, 610, 630, 635, 640, 645. §§ 338.400 amended 2005 §§ 338.415 to 435, §§ 338.455, 460, 510, 515 added to NRS by 1973; amended 1977, 1983, 1985, 1999, 2003, 2007 §§ 338.520, 525 amended 2005 §§ 338.530, 535, 550, 555 added to NRS by 1987; amended 1999; §§ 338.560 to 600 amended 2003 §§ 338.605 to 645 added to NRS by 1999]	No statutory provisions. Determined by contract and common law.	Progress bills must be submitted at least once a month. Progress and final payments must be made within 30 days of receipt of a bill.	N/A	Within 10 days from receipt of payment from upstream entity.
	Private	Nev. Rev. Stat. § 624.029 & 108.22188; §624.607. § 624.029 added 2005 § 108.22188 added to NRS by 2003 § 624.607 added by 2001; amended 2005]	N/A	Progress Payment: per contract; or within 21 days after date prime submits a request for payment. Final Payment: within 30 days after occupancy or use of work; or availability of work for intended use if provided to owner.	N/A	Within 10 days from receipt of payment from upstream entity or on or before date payment is due, whichever is earlier.
New Hampshire	Public	N/A				
	Private	N/A				
New Jersey	Public	N.J. Stat. §§ 2A:30A-1, 30A-2; 40A:11-16.2 (localities), 52:32-40, 52:32-41. §§ 2A:30A-1, 30A-2 enacted 1991, amended 2006 §§ 40A:11-16.2 enacted 1971, amended 1975, 1979, 1975, 1987, 1997, 1999, 2009 and 2012 § 52:32-40, 52:32-41 enacted 1991 (older law not repealed).]	Performance in accordance with provisions of the contract and billing approved by owner. Prime contractor must certify that its subs and suppliers have been paid any amounts due.	Not more than 30 days after billing date.	Performed under its contract and work has been accepted by the owner or prime contractor.	Within 10 days from receipt of payment from upstream entity unless otherwise agreed.
	Private	Same as above.	Same as above.	Same as above.	Same as above.	Same as above.

State	Application	Statute(s)	Owner to Prime		Prime to Subcontractors	
			Entitlement/ payment claim	Pay Period	Entitlement	Pay Period
New Mexico	Public	N.M. Stat., §§ 57-28-1, 2, 5, 7, 8. N.M. Stat., §§ 57-28-1, 2, 5, 7, 8 enacted 2001 § 57-28-2 amended 2007 § 57-28-5 amended 2007 § 57-28-7, 8 amended 2007]	No statutory provisions. Determined by contract and common law.	Progress Payment: 21 days if there is no error in the invoice. Final Payment: 10 days after a certification of completion. If grant money is source of funding, a local public body has 45 days.	N/A	Within 7 days from receipt of payment from upstream entity.
	Private	Same as above.	Same as above.	Same as above.	Same as above.	Same as above.
New York	Public	N.Y. State Fin. Law §§ 139-f, 179-f (pt. of Art. 11-A); Pub. Auth. Law § 2880; Gen. Mun. Law § 106-b; Hwy. Law § 3 8; NYC Procurement Policy Board Rules § 4-06. [N.Y. State Fin. Law § 139-f enacted or consolidated 1978; amended 1981 - 1995, 2008 § 179-f enacted or consolidated 1984, sections amended 1988, 1989, 2015 Pub. Auth. Law § 2880 enacted or consolidated 1987, multiple amendments 1988 to 1990 Gen. Mun. Law § 106-b enacted or consolidated 1978, sections amended 1981, 1983, 1992, 1995, 2008]	State Agencies: Contract governs if invoice is proper, unless contract requires payment at intervals. Municipal Agencies: Prompt payment of progress payments. Public Authorities: Payment upon proper invoice unless contract specifies otherwise.	Progress Payment: 30 days after receipt of invoice for public agencies, authorities and corporations; 75 days after receipt of invoice for highway; NYC rules: 30 days after receipt of invoice. Final Payment: 60 days after receipt of invoice for changes, 60 days after receipt of invoice. For municipalities, 45 days after receipt of invoice.	Statutory rate: Pro rata share of any payment in proportion to materials/work, if approved. Municipal Agencies: Entitled to the proceeds from the municipal agency's payment for work. Public Authorities: N/A	Within 15 days from receipt of payment from upstream entity. For Municipalities, within 7 days from receipt of payment from upstream entity.
	Private	N.Y. Gen. Bus. Law §§ 756 et seq [Added 2002, amended 2009.]	Duly approved invoice for work performed or materials supplied during billing cycle, in strict accordance with parties' contract.	Progress Payment: 42 days to pay (12 days to approve invoice plus 30 days to pay) unless otherwise agreed. Final Payment: 30 days after final approval for final payment. Owner gets time extension if lender fails to disburse loan and lender is legally required to do so.	Performance in accordance with the contract and duly approved invoice for work performed and material supplied during the billing cycle, in strict accordance with the terms of the parties' contracts unless Act provides otherwise.	Invoices must be approved or disapproved within 12 business days; payment must be made 7 days from receipt of payment from upstream entity providing invoices approved.
North Carolina	Public	N.C. Gen Stat. §§ 143-134 to 143-134.1, 143.135. [§§ 143-134 to 143-134.1 enacted or consolidated 1959, sections amended 1967, 1983, 2007]	N/A	Progress Payment: per contract. Final Payment: 45 days after acceptance or occupancy whichever is first.	N/A	Within 7 days from receipt of payment from upstream entity.

State	Application	Statute(s)	Owner to Prime		Prime to Subcontractors	
			Entitlement/ payment claim	Pay Period	Entitlement	Pay Period
	Private	N.C. Gen. Stat. §§ 22C-1 to C-6. [§§ 22C-1 to C-6 enacted or consolidated 1987, no revisions listed.]	N/A	N/A	Performance in accordance with contract.	Within 7 days from receipt of payment from upstream entity.
North Dakota	Public	N.D. Cent. Code §§ 13-01.1-01 to 06 and 48- 01.2 (public improvement bids and contracts) §§ 13-01.1-01 to 06 enacted or consolidated 1985 § 48-01.2 enacted or consolidated 2007, sections amended 2011, 2015]	Complete delivery of item of property or services, and delivery of invoice.	Progress payment: per contract. Partial payment estimates should be received and considered monthly. Final Payment: 45 days after receipt of invoice or per contract.	Performance in accordance with contract.	Within 45 days from receipt of payment from upstream entity.
	Private	N/A				
Ohio	Public	Ohio Rev. Code §§ 126.30. [Effective date 2000; no revisions indicated.]	Contract governs: a full, accurate, and detailed estimate of the various kinds of labour performed and materials furnished since the prior estimate for the owner to approve must also be provided.	Per contract, but when the rate of work and amounts are large and either the owner or contractor consider it advisable, estimates and payments should be made twice a month. Payment on approved estimate filed with owner should be made within 30 days of approval.	Same as below.	Same as below.
	Private	Ohio Rev. Code §§ 4113.61. [Effective date 1993; revised 2007.]	N/A	N/A	Per contract, and following submission of application, payment request or invoice in sufficient time to allow the contractor or higher-tiered subcontractor to include that amount in its payment request.	Within 10 days from receipt of payment from upstream entity.
Oklahoma	Public	Okla. Stat., Title 61, §§ 221-227; Title 61, §§ 113.1-113.3 (retainage generally); 62, §§ 41.4a -41.4d (prompt payment by government generally). [§ 61-221-227 enacted 2004; no revisions indicated § 61-13.1-13.3 enacted 1977; revised 1983, 1995, 2006, and 2011 § 62-41.4a-d enacted 1983; no revisions indicated.]	Performance of work in accordance with contract and submission of a proper invoice.	Progress Payment: Within 30 days after receipt of invoice. Final Payment: 21 days after substantial completion.	Performance in accordance with contract.	Within 10 days from the receipt of payment from the owner or upstream entity.
	Private	15 Okl. Stat. § 820. [Enacted 2010; no revisions indicated]	N/A	Per contract or, if contract silent, within 28 calendar days after receipt of billing, paid monthly.	N/A	Within 10 days from receipt of payment from upstream entity or per contract.

State	Application	Statute(s)	Owner to Prime		Prime to Subcontractors	
			Entitlement/ payment claim	Pay Period	Entitlement	Pay Period
Oregon	Public	Or. Rev. Stat. §§ 279C.320, .505, .515, .570, .580. [Enacted 2003; revised in 2005 and 2013]	Contractors are entitled to monthly progress payments based on the estimates of work that are approved by the contracting agency.	Earlier of 30 days after invoice for progress payments; 15 days after approval of invoice.	Subcontractors and suppliers are entitled to payment for satisfactory performance out of amounts paid to the contractor or subcontractors as appropriate.	Within 10 days from receipt of payment from upstream entity.
	Private	Or. Rev. Stat. §§ 701.620 et seq. SB 384 [Enacted 1989; SB 384 effective as of 2012. Note: Sections 701.620 to 701.645 were enacted into law by the Legislative Assembly but were not added to or made a part of ORS chapter 701 or any series therein by legislative action.]	Contractors entitled to progress payments unless project is anticipated to take less than 60 days (unless contract permits progress in that case). Progress payments are generally on a 30-day billing cycle. Billing or estimate required for payment.	Progress Payment: Within 14 days after billing submitted unless notice requirements met. Final Payment: Within 7 days after approval and completion of project, unless otherwise stated by the owner on drawings.	Entitled to payment if performance in accordance with contract. Lien waivers must also be provided if required by contract. Invoice required for payment.	Within 7 days from receipt of payment from the owner or upstream entity.
Pennsylvania	Public	62 Pa. Con. Stat. §§ 3931 et seq. [Enacted 1998; No revisions indicated.]	Performance in accordance with contract, submission of payment application or per contract.	45 days of receipt of payment application unless otherwise agreed to; within 45 days of inspection for final payments.	Performance in accordance with contract.	14 days from receipt of progress payment from upstream entity. In the absence of sufficient reasons, within 20 days of receipt of retainage payment.
	Private	73 Pa. C.S. §§ 501-516. [Enacted 1995; no revisions indicated]	Performance in accordance with contract.	Progress Payment: Within 20 days after end of billing period or delivery of invoice (whichever is later) unless otherwise agreed. Final Payment: Within 30 days after final acceptance for final payment.	Payment for work completed or service provided under subcontract and submission of invoice.	Within 14 days from receipt of payment from upstream entity or receipt of invoice, whichever is later.
Rhode Island	Public	R.I. Gen. Laws §§ 42-11.1-1 to 42-11.1-16, 37-13-5. [§ 37-13-5 enacted 136; most recently revised in 1965 §§ 42-11.1-1 to 42-11.1-16 enacted in 1987, selected sections revised in 1993]	Submission of a proper invoice unless not required by contract. Otherwise determined by contract and common law.	Within 30 days of receipt of proper invoice or per contract.	Submission of a proper invoice unless not required by contract. Otherwise determined by contract and common law.	Within 10 days from receipt of payment from upstream entity. Within 90 days for payment of trucking or furnishing charges of materials for use of contractor/sub.
	Private	N/A				
South Carolina	Public	S.C. Code §§ 29-6-10 et seq. [Enacted 1990; no revisions indicated.]	Performance in accordance with contract and submission of pay request.	Per contract, or within 21 days following receipt of any pay request.	Performance in accordance with contract.	Within 7 days from receipt of payment from upstream entity.
	Private	Same as above.	Same as above.	Same as above.	Same as above.	Same as above.
South Dakota	Public	S.D. Codified Laws §§ 5-26-1 to 5-26-8. [Enacted or consolidated 1984; revised 1985, 1988]	Complete delivery of property and services.	Within 45 days of receipt and written acceptance of property and services, and invoice covering same, or per contract.	Performance in accordance with contract.	Within 30 days from receipt of payment from agency.
	Private	N/A				

State	Application	Statute(s)	Owner to Prime		Prime to Subcontractors	
			Entitlement/ payment claim	Pay Period	Entitlement	Pay Period
Tennessee	Public	Tenn. Code §§ 12-4-701 to 12-4-707. [Enacted or consolidated 1985 § 12-4-702 amended 1986, 1988]	N/A	Within 45 days following receipt of invoice.	N/A	30 days of receiving payment from agency.
	Private	Tenn. Code §§ 66-34-101 to 66-34-703 HB 3068. [Enacted or consolidated 1991 except § 66-34-104 enacted or consolidated 1975 with various amendments from 1985 to 2012. § 66-34-103 amended 2008, 2012 § 66-34-202; 66-34-302 amended 2006 § 66-34-203 and 204; 66-34-303 amended 2007 § 66-34-601 amended 2000]	Payment should be made upon: 1) performance in accordance with the provisions of a written contract; and 2) submission of application of payment in accordance with schedule for payments established by contract.	Within 30 days following submission of application for payment, and in accordance with contract.	Payment should be made upon: 1) performance in accordance with the provisions of a written contract; and 2) submission of application of payment in accordance with schedule for payments established by contract.	Within 30 days from submission of application for payment, and in accordance with contract.
Texas	Public	Tx. Govt. Code §§ 2251.001 - 251.043. [Added 1993; some provisions amended by Acts 1993, 1995, 1997, 1999, 2001, 2003, 2007. For example: § 2251.025 amended by Acts 1997, 2001, 2003 § 2251.027 amended by Acts 1997, 2001 § 2251.030 amended by Acts 1999, 2001]	N/A	Within 30 days following the later of: 1) the date the agency receives goods or service is completed; or 3) the date the governmental entity receives an invoice for the goods or services. If the contract is with a political body meeting once a month or less, payment due on 45th day following above events.	N/A	Within 10 days from receipt of payment from agency.
	Private	Tex. Prop. Code §§ 28.001 to 28.010. [§§ 28.001 to 28.008 added by Acts 1993, some sections amended by Acts 1999. §§ 28.009 to 28.010 added by Acts 1999; no amendments listed.]	N/A	Within 35 days following receipt of the request for payment. Up to 60 days following receipt of request, by contractual modification and for single-family residences only.	N/A	Within 7 days from receipt of payment from owner or upstream entity.

State	Application	Statute(s)	Owner to Prime		Prime to Subcontractors	
			Entitlement/ payment claim	Pay Period	Entitlement	Pay Period
Utah	Public	Utah Code §§ 13-8-1 to 13-8-5, 15-6-1 to 15-6-6. [§§ 13-8-1 to 13-8-5 enacted 1997 except § 13-8-2 enacted 1988; § 13-8-6 enacted 2011; § 13-8-4 to § 13-8-5 amended 2012. §§ 15-6-1 to 15-6-2 enacted or consolidated 1983, § 15-6-3 to § 15-6-5 enacted 1989; no amendments listed.]	N/A	Per contract or within 60 days following receipt of invoice.	N/A	30 days from receipt of payment from agency.
	Private	Utah Code §§ 13-8-5, 58-55-601 to 58-55-605. [§ 13-8-5 see above. § 58-55-601 to § 58-55-603 enactments not readily available; select provisions amended 1994, 1999. § 58-55-604 amended 2008 § 58-55-605 enacted 2014, no amendments listed]	N/A	N/A	N/A	Within 30 days from receipt of payment from upstream entity.
Vermont	Public	Vt. Stat., Title 9, §§ 4001-4009, Title 12, § 2903. [§§ 4001-4009 added 1991 except § 4005a added 2007 § 4002 amended 1993]	In strict accordance with the contract, or by submission of invoice at the end of the calendar month within which the work was performed or upon full completion of the work.	20 days following the end of the billing period or 20 days following the delivery of the invoice, whichever is later.	Performance in accordance with the contract.	Within 7 days from receipt of each progress or final payment from upstream entity or after receipt of subcontractor's invoice, whichever is later.
	Private	Same as above.	Same as above.	Same as above.	Same as above.	Same as above.
Virginia	Public	Va. Code §§ 2.2-4347 to 2.2-4356. [Enacted or consolidated 1982; last revised 2001]	Goods and services that are completely delivered by the required payment date.	Per the required payment date. If not specified by contract, the later of: 1) State agency: 30 days following receipt of invoice or 30 days following receipt of goods and services; and 2) Local government: 30 days following receipt of invoice or 30 days following receipt of goods or services.	Entitled to payment received from a state agency or local government for its proportionate share of work, absent stated reason for non-payment.	Within 7 days from receipt of payment for work performed by the subcontractor.
	Private	N/A				

State	Application	Statute(s)	Owner to Prime		Prime to Subcontractors	
			Entitlement/ payment claim	Pay Period	Entitlement	Pay Period
Washington	Public	Wash. Rev. Code §§ 39.76.010 to 39.76.40, 39.04.250. [§§ 39.76.010 to 39.76.40 enacted or consolidated 1981, except § 39.76.011 enacted or consolidated 1992 § 39.76.020 amended 2009 § 39.04.250 enacted or consolidated 1992, no listed amendments]	Not specified. Per contract and common law.	Per contract or 30 days following receipt of proper invoice, or receipt of goods or services, whichever is later.	Not specified. Per contract and common law.	Within 10 days from receipt of payment from agency.
	Private	N/A				
Washington D.C. [District of Columbia]	Public	D.C. Code §§ 2-221.01 to 2-221.06. [Enacted or consolidated 1985; sections amended 1992, 1997, 1998, 1999.]	Submission of proper invoice or per contract.	30 days, excluding legal holidays, after invoice unless otherwise agreed by contract.	N/A	Within 7 days from receipt of payment from owner or upstream entity.
	Private	D.C. Code § 27-131 to § 27-136 [Enacted 2013; no amendments listed]	Submission of payment request.	15 days from the earlier of: a) the grant of occupancy permit; b) owner's agent taking possession; c) receipt of payment request, unless otherwise agreed by contract. 7 days from the date specified in the contract.	N/A	Within 7 days from receipt of payment from upstream entity.
West Virginia	Public	W. Va. Code §§ 7-5-7 (county), 8-13-22d (municipality). [§ 7-5-7 amended and reenacted 1995 § 8-13-22d enacted 1995]	Submission of legitimate invoice.	Within 60 days of receipt of legitimate uncontested invoice.	N/A	N/A
	Private	N/A				
Wisconsin	Public	Wis. Stat. §§ 16.528 (state); 16.53(2) (rejection of invoice); 66.0135 (local). [§ 16.528 (state) enacted or consolidated 1985; amended periodically from 1987 to 1999, 2009, 2011, 2013, 2015 § 66.0135 enacted or consolidated 1989, revised 1999]	N/A	Within 30 days following receipt of invoice or receipt and acceptance of services, whichever is later.	N/A	Within 7 days from receipt of payment from upstream entity.
	Private	N/A				
Wyoming	Public	Wyo. Stat. §§ 16-6-601 to 16-6-602. [Enacted or consolidated 1983]	Satisfactory performance of contract and submission of correct notice of amount due.	Within 45 days following receipt of correct notice of amount due.	N/A	N/A
	Private	N/A				

Chart 2 - Comparison of Notice, Withholding and Other Provisions in Prompt Payment Legislation in the United States

APRIL 30, 2016

State	Application	Statute(s)	Grounds to withhold payment	Notice Obligations for Withholding Payment	Interest	Legal Fees Provision	Exclusions	Pay-if-Paid / Pay-When-Paid	Other Notes
Alabama	Public	Ala. Code §§ 41-16-3. [Enacted or consolidated 1984; revised 1996]	Bona fide dispute over one or more of: 1) unsatisfactory job progress; 2) defective construction not remedied; 3) disputed work; 4) third party claims; 5) failure to make timely payments to subs/suppliers; and 6) evidence the contract cannot be completed for the unpaid balance of the contract. Owner, contractor or subcontractor may withhold up to two times the disputed amount.	Agency to Prime: written notice of dispute within 15 days of receipt of request for payment. Prime to Sub: written notice within 5 days from receipt of disputed request for payment.	Current statutory rate.	N/A	N/A	N/A	N/A
	Private	Ala. Code §§ 8-29-1 to 8-29-8. [Enacted 1995; § 8-29-3 revised 2011]	Bona fide dispute over one or more of: 1) unsatisfactory job progress; 2) defective construction not remedied; 3) disputed work; 4) third party claims; 5) failure to make timely payments to subs/suppliers; and 6) evidence the contract cannot be completed for the unpaid balance of the contract. Owner, contractor or subcontractor may withhold up to two times the disputed amount.	Agency to Prime: written notice within 15 days from receipt of disputed request for payment. Prime to Sub: written notice within 5 days from disputed request for payment.	1% per month.	The court <u>shall</u> award interest and reasonable fees to the prevailing party.	1) Contracts under \$10,000 or 2) Residential projects under 16 units 3) Contracts with local governments and the state of Alabama.	All contracts between parties must specify a date of payment. [Ala. Code 8-29-2] Pay-if-Paid clauses enforced if explicit. Pay-When-Paid clauses should specify a date for payment.	N/A
Alaska	Public	Alaska Stat. §§ 36.90.200 - 36.90.290. [§§ 36.90.200 and 36.90.200 enacted 1990]	All or part of payment may be withheld for: 1) unsatisfactory performance; 2) payment request non-compliant with contract.	Within 8 working days' written notice setting out: amount to be withheld, reasons for withholding, and required actions to cure. Contractor may withhold from the subcontractor upon notice as described above; with service of copy to the agency.	Current statutory rate.	N/A	N/A	Pay-if-Paid clauses enforced if explicit. Pay-if-Paid and Pay-When-Paid clauses not distinguished.	Alaska Stat. § 36.90.210 sets out required contractual terms. No waiver permitted of public construction contract provisions, including required contractual terms.
	Private	N/A							

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APRIL 30, 2016

State	Application	Statute(s)	Grounds to withhold payment	Notice Obligations for Withholding Payment	Interest	Legal Fees Provision	Exclusions	Pay-if-Paid / Pay-When-Paid	Other Notes
Arizona	Public	Ariz. Rev. Stat. §§ 34-221; 41-2576; 41-2576 to 41-2580; 28-6924 (highway) [§ 34-221 enacted or consolidated 1989; revised 1991; 1999, 2003, 2006, 2015 § 41-2576 enacted or consolidated 1989; revised 1991, 2000, 2005 § 41-2577 enacted or consolidated 1989; revised 1991, 2000, 2001, 2015]	Amounts sufficient to cover reasonably expected costs of correcting deficiencies set forth in writing.	Written finding of reasons justifying retention longer than 60 days after final completion.	1% per month.	N/A	Separate regime exists for schools.	Pay-if-Paid clauses enforced if explicit. Pay-When-Paid clauses suggest time for payment.	A subcontractor or supplier shall notify registrar and purchasing agency of any payment less than the approved amount. In 2012, provision awarding reasonable fees to successful party removed.
	Private	Ariz. Rev. Stat. §§ 32-1129 to 32-1129.06. [§ 32-1129 enacted or consolidated 1989; revised 2000, 2010. § 32-1129.02 revised 2000, 2001, 2010, 2011]	Dispute over one or more of the following: 1) unsatisfactory job progress; 2) defective construction not remedied; 3) disputed work; 4) third party claims; 5) failure to make timely payments to subs/suppliers; and 6) evidence the contract cannot be completed for the unpaid balance of the contract. Prime contractors may also withhold amounts from subs for the above reasons, up to amount withheld by owner.	Owner: refusal to certify and approve billing or estimate. Contractor/sub: written statement containing reasons within 14 days from receipt of the estimate.	1.5% per month or higher rate per contract	Successful party <u>shall</u> be awarded reasonable fees and costs.	N/A	Pay-if-Paid clauses enforced if explicit. Pay-When-Paid clauses suggest time for payment.	If a contract stipulates a longer pay period, it must be reflected as "Notice of Extended Payment Provision" on <u>all</u> pages of <u>all</u> contract documents and specifications.

Chart 2 - Comparison of Notice, Withholding and Other Provisions in Prompt Payment Legislation in the United States

APRIL 30, 2016

State	Application	Statute(s)	Grounds to withhold payment	Notice Obligations for Withholding Payment	Interest	Legal Fees Provision	Exclusions	Pay-if-Paid / Pay-When-Paid	Other Notes
Arkansas	Public	Ark. Code §§ 19-4-1411; 22-9-601 to 22-9-604. [§ 19-4-1411 enacted or consolidated 1973; revised 1977, 1979, 2001, 2003; §§ 22-9-601 to 22-9-603 enacted or consolidated 1977; revised 1979. § 22-9-601 enacted or consolidated 1977; revised 1977, 2007, 2009, 2015]	No statutory grounds listed for "contested payment"; contract or common law. For contractors required to furnish a performance bond, the agency shall retain 10% of any progress payment until 30 days after completion.	Notification and reasons within the 5 working days processing period from receipt of prime's properly prepared request for payment.	8% per year. 10% per year if contract provides for payment upon completion and payment not made within 90 days of claim.	N/A	Contracts entered into by the State Highway Commission for the construction or maintenance of public highways, roads, or streets. [A.C.A. §19-4-1403].	Pay-if-Paid clauses enforced if explicit. Pay-if-Paid and Pay-When-Paid clauses not distinguished.	No contracting around statutory payment provisions for contractors. In 2009, performance bond holdback increased from 5% of any progress payment to 10%.
	Private	N/A							
California	Public	Cal. Bus. & Prof. Code § 7108.5; Civil Code §8802; Pub. Cont. Code §§7107, 10261.5 to 10262.5, 10853. [Pub. Cont. Code §7107 effective 1999; § 10261.5 enacted 1990].	No specific grounds stipulated by statute. In the event of a dispute over amount due, agency may retain up to 150% of disputed amount. Retentions must be released within 60 days (125-150% of disputed amount retained) or 90 days (up to 125% of disputed amount retained) of completion. In the event of good faith dispute over amount due, prime contractor may withhold up to 150% from subcontractor.	Any payment request not deemed a proper request must be returned within 7 days of receipt, with written reasons.	Current statutory rate. 2% per month on late payments to subcontractor.	Prevailing party shall be entitled to attorney's fees and costs.	N/A	Pay-When-Paid clauses suggest time for payment.	Waiver of any provisions dealing with release of retention not permitted. In 2011, pay periods changed from 10 days to 7 days.

Chart 2 - Comparison of Notice, Withholding and Other Provisions in Prompt Payment Legislation in the United States

APRIL 30, 2016

State	Application	Statute(s)	Grounds to withhold payment	Notice Obligations for Withholding Payment	Interest	Legal Fees Provision	Exclusions	Pay-if-Paid / Pay-When-Paid	Other Notes
	Private	Cal. Bus. & Prof. Code § 7108.5; Cal. Civil Code §§ 3260-3260.1. (7/1/12, cite Civ. Code §§ 8800-8802, 8810-8822) [Cal. Civil Code §§ 8800; 8810 effective 2011]	If bona fide dispute over amount due exists, owner may withhold up to 150% of disputed amount. Prime contractor may withhold up to 150% from subcontractor on same grounds.	N/A	2% per month for any progress payments or retention wrongfully withheld.	Prevailing party may recover reasonable fees and costs.	N/A	Statute prohibits enforcement of Pay-if-paid clauses as applied to mechanic's liens.	Waiver of provisions dealing with release of retention not permitted. In 2011, pay periods changed from 7 days to 10 days. A prime contractor not paid amounts due from the owner within 35 days from the payment due date may serve a 10-day stop work order or notice upon the owner. A copy of this notice must be served on all subcontractors having a direct contract with the prime contractor. The owner must forward a copy of the notice to its construction lender.
Colorado	Public	Colo. Rev. Stat. § 24-91-101 to 24-91-104; 109 to 110. [Enacted 1979. § 24-91-101 revised 1992. § 24-91-102 and § 24-91-103 revised 2014]	Beyond "satisfactory performance", does not appear to explicitly identify grounds under which payment may be withheld. At least 95% of the value of any work completed shall be paid until the contract is completed satisfactorily and finally accepted by the public entity.	N/A	The higher of the contract rate or 15% per annum.	N/A	Regime does not apply to contracts for which a part of the price is to be paid for by federal funds or "some other source" with inconsistent requirements. Partial payments not required for contracts under \$150,000.	Pay-if-Paid clauses enforced if explicit. Pay-When-Paid clauses suggest time for payment.	N/A
	Private	N/A							

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State	Application	Statute(s)	Grounds to withhold payment	Notice Obligations for Withholding Payment	Interest	Legal Fees Provision	Exclusions	Pay-if-Paid / Pay-When-Paid	Other Notes
Connecticut	Public	Conn. Gen. Stat. § 4a-71 to 4a-75, 49-41c [§ 4a-71 to § 4a-73 enacted 1984; § 4a-71 revised 2005 § 4a-74 enacted 1975; revised 2011 § 4a-75 enacted 1949; revised 2000 § 4a-41c enacted 1983; revised 1986]	Agency to Prime: Good faith dispute exists if goods delivered or services rendered were: 1) of less quantity or quality than ordered or specified by contract; 2) faulty; 3) installed improperly; or 4) any other reason giving cause. Standard retainage rules for contracts which require a payment bond in the full amount; special rules for contracts with the Department of Transportation and a municipality. Prime to Sub: Bona fide reason for withholding.	Agency to Prime: Notice of dispute must be sent in accordance with contract, by certified mail, or personal delivery. Prime to Sub: Written notice of reasons within 30 day pay period, with copy to government agency.	Agency to Prime: Rate equal to the monthly effective yield for the Short Term Investment Fund. Prime to Sub: For public prime contracts valued at more than \$100,000 which require payment bonds, rate is 1% per month.	Agency to Prime: N/A Prime to Sub: If determined by court that the claimant substantially performed its work, general contractor must pay the claimant's attorney fees.	N/A	Pay-if-Paid clauses enforced if explicit. Pay-When-Paid clauses suggest time for payment.	N/A
	Private	Conn. Gen. Stat. § 42-158i to 42-158r [§ 42-158i enacted 1999; revised 2004 § 42-158j enacted 1999; revised 2009 § 42-158k-r effective 2004]	N/A No contract may provide for retainage in amount that exceeds 5% of the amount of a progress payment for the life of the contract.	N/A	1% per month 10 days after receipt of notice of non-payment (accrues at the beginning on the date notice is received).	Attorney's fees upon finding payment was "unreasonably withheld".	1) Contracts under \$25,000 between owner and contractor; 2) Residential projects of 4 or less units.	Contractor must pay subcontractor within 30 days of receipt of payment. No payment may be withheld from a subcontractor for work performed because of a dispute between the general contractor and another contractor or subcontractor. [Conn. Gen. Stat. § 42-158j (a)(1) and (c)]	Party found to have withheld payments in bad faith will be liable for 10% damages. If owner fails to pay contractor for labour supplied under a contract, that person has a direct right of action against the owner (limited to amount owed to the contractor by the owner for the work performed).

Chart 2 - Comparison of Notice, Withholding and Other Provisions in Prompt Payment Legislation in the United States

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State	Application	Statute(s)	Grounds to withhold payment	Notice Obligations for Withholding Payment	Interest	Legal Fees Provision	Exclusions	Pay-if-Paid / Pay-When-Paid	Other Notes
Delaware	Public	Del. Code, Title 29, § 6516(f) [Enacted 1921; revised 2002]	<p>Agency to Prime: May disapprove or decline to certify a billing or estimate for one or more of the following reasons:</p> <ol style="list-style-type: none"> 1) unsatisfactory job progress; 2) defective construction not remedied; 3) disputed work; 4) third party claims; 5) failure to make timely payments to subs/suppliers; and 6) evidence the contract cannot be completed for the unpaid balance of the contract. <p>5% of the value of work completed by the contractor under the contract shall be retained by the public agency. Up to 60% of retainage may be released upon completion of the work. Retainage not restricted.</p> <p>Contractor/Subs: Contractors or subs may also withhold amounts for the above reasons, up to amount withheld by owner.</p>	<p>Written finding of reasons:</p> <ol style="list-style-type: none"> i) within 21 days for disapproval of estimate; ii) within 10 days, for declining to certify billing. 	<p>Agency to Prime: Progress payments delayed by 21+ days and final payments delayed by 60+ days - rate not to exceed 2% above the prime interest rate set by Federal Reserve.</p> <p>Payments withheld on reasonable grounds do not bear interest as long as timely notification from the agency in writing.</p> <p>Contractor/Sub: Payment delayed 21+ days shall bear interest at 2% above the prime interest rate set by the Federal Reserve.</p>	N/A	N/A	N/A	N/A

State	Application	Statute(s)	Grounds to withhold payment	Notice Obligations for Withholding Payment	Interest	Legal Fees Provision	Exclusions	Pay-if-Paid / Pay-When-Paid	Other Notes
	Private	Del. Code, Title 6, § 2301, 3501 to 3509 [§ 2301 date of enactment unknown; revised 2012 § 3501 enacted 1933; revised 2004 § 3502 - § 3505 enacted 1933; revised 1943 (date of most recent amendment unavailable) § 3506 enacted 1996; revised 2004 § 3507 enacted 2002; revised 2012 § 3508 enacted 2002; revised 2004 § 3509 enacted 2002; revised 2004]	Retainage and good faith disputes.	Written notice of amount being withheld and reasons for withholding must be provided within 7 days of the date required for payment.	Interest owed at legal rate in effect at the time the obligation to pay a late payment interest penalty accrues (interest computed monthly).	Reasonable attorney's fees may be awarded if determined by court that payment was withheld in bad faith.		Any clause in a subcontract that makes payment by the owner a condition precedent to payment of subcontractor is void. [Del. Code. Ann. tit. 6 § 3507] Pay-When-Paid clauses are enforceable and should specify a time for payment.	Payments to a contractor are trust funds in the hands of the contractor and must first be applied to the payment of all monies due and owing to subcontractors and suppliers. Failure to pay in full or pro rata lawful claims of contractors who furnished labour within 30 days after receipt of moneys is prima facie evidence of violation of statute. Liability is a fine not more than \$1,000 or imprisonment not more than 3 years or both.
Florida	Public	Fla. Stat. §§ 255.0705 et seq., 215.422 [§ 255.0705 enacted 2005 § 215.422 enacted 1974; revised 2006]	Bona fide dispute as to payment. Agency to Prime: For contracts \$200,000 or more, if project less than 50% complete, may withhold up to 10% of each progress payment; more than 50% complete, may withhold up to 5% of each progress payment. Prime to Sub: If project less than 50% complete, may withhold up to 10% of each progress payment; more than 50% complete, may withhold up to 5% of each progress payment (may withhold more than 5% so long as determined on case-by-case basis and subcontractor notified in writing).	Agency to Prime: notice of dispute must be included with invoice submitted to state payment officer. Prime to Sub: written notice of retainage for amounts greater than 5%.	1% per month.	Reasonable fees and costs if court finds that payment withheld on unreasonable basis.	Local governments governed by separate regime.	No statutory provisions. Pay-if-Paid clauses enforced if explicit. Pay-When-Paid clauses suggest time for payment.	If a subcontractor is not paid within 30 days of the date due, it may file a sworn complaint with the court and an evidentiary hearing must be held upon 15 days notice to the owner. The only defences available are proof of a bonafide dispute and/or proof of material breach of contract.

Chart 2 - Comparison of Notice, Withholding and Other Provisions in Prompt Payment Legislation in the United States

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State	Application	Statute(s)	Grounds to withhold payment	Notice Obligations for Withholding Payment	Interest	Legal Fees Provision	Exclusions	Pay-if-Paid / Pay-When-Paid	Other Notes
		Localities: §§ 218.70 et seq. FDOT: § 337.141 and year [Localities § 218.70 enacted 1989/revised 2005 FDOT § 337.141 enacted 1970; revised 1995]	Good faith dispute as to the amount owed. Agency to Prime: For all contracts \$200,000 or more, if project less than 50% complete, may withhold up to 10% of each progress payment. If project more than 50% complete, may withhold up to 5% of each progress payment. Prime to Sub: If project less than 50% complete, may withhold up to 10% of each progress payment. If project more than 50% complete, may withhold up to 5% of each progress payment (may withhold more than 5% so long as determined on case-by-case basis and subcontractor notified in writing).	Subcontractor must be notified in writing of the amount in dispute and actions required to cure the dispute.	Greater of 1% per month or the rate specified in the contract.	Action to recover amounts under the Local Government Prompt Pay Act - award court costs and reasonable attorney's fees.	N/A	N/A	N/A
	Private	Fla. Stat. §§ 713.346, 715.12 [§ 713.346 enacted 1988; revised 1990 § 715.12 enacted 1992; revised 1993]	Contract may specify right to withhold for improper pay request, bona fide dispute, material breach of contract. Contract may specify that there is a right to withhold portion of each progress payment until project is substantially complete.	N/A	Greater of statutory judgment rate or the contract rate.	Does not appear to provide for payment of attorney fees.	N/A	No statutory provisions. Pay-if-Paid clauses enforced if explicit. Pay-When-Paid clauses enforceable and should specify a time for payment.	N/A

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Georgia	Public	Ga. Code §§ 13-11-1 to 13-11-11. [Enacted 1994; no revisions listed]	Payment may be withheld by Owner, contractor or sub for: 1) unsatisfactory job progress; 2) defective construction not remedied; 3) disputed work; 4) third party claims; 5) failure to make timely payments to subs/suppliers; 6) damage caused by contractor/sub; and 6) reasonable evidence the contract cannot be completed for the unpaid contract balance. Reasonable retainage may be withheld by owner, and by contractor or sub up to the amount retained by owner with respect to sub's work.	N/A	1% per month or per contract. Chargeable only if the person being charged interest has been notified at the time the request for payment was made. Acceptance of progress payment will release all claims for interest.	Prevailing party entitled to reasonable attorney's fees.	N/A	Pay-if-Paid clauses enforced if explicit. Pay-if-Paid and Pay-When-Paid clauses not distinguished.	Legislative provisions cover both public and private contracts. The Act does not modify remedies otherwise available by contract or statute.
	Private	Same as above.	Same as above.	Same as above.	Same as above.	Same as above.	Same as above.	Same as above.	N/A
Hawaii	Public	HRS §§ 103-10 to 103-10.5. HB 3036 [§ 103-10 enacted in 1967; multiple amendments from 1977-2004; §10.5 enacted in 1983; §2 amended in 2000 and 2006]	Haw. Rev. Stat. § 103-10 does not apply where delay is due to: 1) a bona fide dispute between State or any County and the contractor concerning the services or goods contracted for; 2) labour dispute; 3) power or mechanical failure; 4) fire; 5) Acts of God; or 6) any similar circumstances beyond the control of the State or any County. To receive retainage or other withheld payments, subcontractor must satisfactorily complete all work, provide a properly documented final payment request and: (i) provide contractor an acceptable performance & payment bond; or (ii) meet following criteria: (a) 90 days since last work done and no claim given to contractor and surety, and (b) provide contractor an acceptable release of retainage bond in an amount of not more than 2 times the amount being retained or withheld by contractor and any other bond acceptable to contractor; or any other form of acceptable collateral.	N/A	Interest at prime plus 2% for prime contractor, commencing the 30th day following receipt of invoice; subs get 1.5% per month if final payment is delayed by responsible party.	N/A	N/A	N/A	Nothing in the statute prevents the parties from negotiating additional terms and conditions to be met before a subcontractor is entitled to final payment.

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State	Application	Statute(s)	Grounds to withhold payment	Notice Obligations for Withholding Payment	Interest	Legal Fees Provision	Exclusions	Pay-if-Paid / Pay-When-Paid	Other Notes
	Private	HRS §§ 444-1 and 444-25. [§ 444-1 enacted in 1957; multiple amendments from 1969-2000 § 444-25 enacted in 1969; §1 amended in 1971 and §2 amended in 2012]	If a bona fide dispute exists concerning goods and services contracted for, contractor may withhold payment from subcontractor.	N/A	Interest at 1% per month beginning on the 60th day following receipt of the statement by the contractor.	N/A	Haw. Rev. Stat. § 444-2 exempts a number of people from the provisions of ch. 444, certain projects valued at < \$1000, and certain types of public & private projects.	If payment is contingent upon receipt of funds, the contractor shall clearly state this fact in the contractor's solicitation of bids. [HRS § 444-25] Pay-if-Paid enforced if explicit.	N/A
Idaho	Public	Idaho Code §67-2302. [Last amended in 1986]	No statutory provisions; presumably, parties' contract or common law principles will apply. Public bodies requiring a performance or payment bond greater than 50% of the total contract amount are not permitted to exceed 5% of the total amount payable as retainage. Contractors are not able to withhold more than 5% of the total amount payable to a subcontractor as retainage.	N/A	Interest at the midterm federal rate plus 2% for prime contractor.	State must pay any reasonable attorney fees to a prevailing vendor who brings "formal administrative action" or judicial proceedings to collect interest due under statute.	N/A	Pay-if-Paid clauses enforced if explicit. Pay-if-Paid and Pay-When-Paid clauses not distinguished.	N/A
	Private	Idaho Code Ann. § 29-115 [Last amended in 1998]	Maximum retainage that may be withheld from a contractor or subcontractor by the owner or contractor on a private work of improvement is 5% of the payment, unless contractor or subcontractor fails to provide a performance bond as requested by owner or contractor. Maximum retainage amounts do not apply to any contract for the performance of a private work of improvement to residential real property consisting of 1-4 units occupied or to be occupied by the owner.	N/A	N/A	N/A	N/A	N/A	Idaho does not appear to impose requirements on private owners as to contractors. Provisions in Code relating to retainage only. These provisions may not be waived.

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Illinois	Public	Title 50 ILCS505/1-505/9 (localities); Title 30 ILCS 540/0.01-540/7 (state). [505/9 last amended in 2007]	N/A	N/A	Interest at 1% per month for prime contractors; 2% per month for subs and sub-subs.	Depends on parties' agreement (and Illinois common law), or another applicable statute	N/A	N/A	A State official or agency may not request any vendor or contractor to waive his rights under the Act to recover a penalty for late payment as a condition of, or inducement to enter into, any contract for goods or services. If a Contractor fails to make payments to subcontractors and suppliers within 15 days after receipt of payment from owner, the subcontractor may file a complaint with the State official or agency. Within 15 days of receipt of the notice, the agency shall hold a hearing and make a determination. If the Contractor still fails to pay, it will be barred from entering into state construction contracts for 1 year.
	Private	Title 815 ILCS 603/1-603/99. [603/99 last amended in 2007]	N/A	Owner to provide written statement of any amount withheld and reason for withholding within 25 days of receiving payment application.	10% per annum, but this interest may not be duplicative of any interest charged under the Illinois Mechanics Lien Act.	Depends on parties' agreement (and Illinois common law), or another applicable statute.	Excludes projects of single family residences or multi-family residences with 12 or fewer units in a single building.	Pay-if-Paid: Unenforceable as applied to mechanics' liens [770 ILL. COMP. STAT. 60/21€]	N/A

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Indiana	Public	Ind. Code §§ 5-17-5-1 to 5-17-5-5, 5-16-5.5-1 to 5-16-5.5-8. [Amendments to several sections between 1972 and 2007: § 5-17-5-1 last amended 1997; § 5-17-5-4 last amended 1996; § 5-16-5.5-1 last amended 2006; § 5-16-5.5-3.5(a) last amended 2007; § 5-16-5.5-5 last amended 1985; § 5-16-5.5-6 last amended 1972]	For state public works contracts (Title 4): if (1) prime contractor fails to materially fulfill contractual obligations; (2) agency has received claims from subcontractors / suppliers under statute; or (3) prime contractor fails to furnish satisfactory evidence showing full payment of subcontractors & suppliers for performance of contract. For local public works contracts (Title 36) and for all other non-title 4 contracts with the state (Title 5): until contractor has paid (Title 5 has qualifier).	N/A	Interest at 1% per month which must be distributed to subcontractors if contractor was "unable to make timely payments".	N/A	Excludes contracts less than \$200,000. Some highway projects are subject only to highway dept. rules. Contracts with the Indiana Department of Transportation are governed by Title 8.	Pay-if-Paid provisions unenforceable as applied to mechanics' liens (Ind. Code § 32-28-3-18(c)).	N/A
	Private	N/A .							
Iowa	Public	Iowa Code §§ 573.12 and 573.14. [Last amended in 2005]	N/A	N/A	Interest rate depends on the state agency.	Court may award reasonable attorney's fees.	N/A	Pay-if-Paid clauses enforced if explicit. Pay-When-Paid clauses suggest time for payment.	N/A
	Private	N/A							

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Kansas	Public	Kan. Stat. §§ 75-6401 to 75-6407 and 16-1901 to 16-1908. [In 2010, §§ 16-1902 and 16-1904 were amended and the existing sections repealed]	N/A	N/A	Interest at 18% per year, compounded monthly, beginning 37 days after invoice.	KPPA: N/A KFPCCA: costs and fees for “prevailing party seeking enforcement of statutory provisions.	Highways excluded.	Contractors must pay subcontractors within 7 days of receipt of payment. [K.S.A. §§ 16-1803 (f) and 16-1903 (f)] Pay-if-Paid clauses enforced if explicit. Pay-When-Paid clauses suggest time for payment.	KPPA (Kansas Prompt Payment Act) applies to consulting, construction and other professional and personal goods / services with state and government agencies. KFPCCA (Kansas Fairness in Public Construction Contract Act) applies to all owners, contractors, and subcontractors who enter into a contract for public construction.

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State	Application	Statute(s)	Grounds to withhold payment	Notice Obligations for Withholding Payment	Interest	Legal Fees Provision	Exclusions	Pay-if-Paid / Pay-When-Paid	Other Notes
	Private	Kan. Stat. 16-1801 to 16-1807. [Enacted in 2005 §§ 16-1802 and 16-1804 amended in 2010 (repealing existing sections) § 16-1803 amended in 2009]	N/A	N/A	Interest at 18% per year; fees for "prevailing party." 16-1806.	Reasonable attorney's fees.	Excludes construction of single family and multifamily residential housing of 4 units or less.	Pay-if-Paid: Unenforceable as applied to mechanics' liens or bonds in private contracts (KAN. STAT. ANN. § 16-1803(c)). Any provision in a contract for private construction providing that a payment from a contractor/ subcontractor to subcontractor is contingent/ conditioned upon receipt of payment from any other private party is no defense to a claim to enforce a mechanic's lien or bond to secure payment of claims.	If undisputed amounts are not paid within 7 days of due date, upon 7 day notice the claimant is entitled to suspend performance until payment of principal and interest. Contract time will be extended accordingly.
Kentucky	Public	KRS 371.400 to 371.425: §§ 45.451 - 45.458 (prompt payment by government in general). [Enacted in 1984 § 45.453 amended in 1997 § 45.454 amended in 1998]	N/A	N/A	Interest at 12% per year.	KFCA: reasonable attorney's fees if losing party is deemed to have acted in bad faith. Ch. 45: N/A	Excludes residential construction and construction for regulated utilities.	Pay-if-Paid clauses enforced if explicit. Pay-When-Paid clauses suggest time for payment.	N/A
	Private	Same as above.	Same as above.	Same as above.	Same as above.	Same as above.	Same as above.	Same as above.	N/A

Chart 2 - Comparison of Notice, Withholding and Other Provisions in Prompt Payment Legislation in the United States

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Louisiana	Public	La. Rev. Stat. §§ 9:2784, 38:2191, 48:251.5 (highway). [§ 9:2784 last amended in 1987]	N/A	N/A	Highway primes entitled to legal rate of interest; other primes get no interest. Public entity subject to mandamus to compel payment of sums due. For prime to sub, 0.5% of the amount due per day, not to exceed 15% of the outstanding balance due.	Failure of public entity to make final payment: liable for reasonable attorney's fees. Failure of prime to make payment: Reasonable attorney's fees for collection of payments due; but for claims without merit, claimant subject to attorney's fees for defense. Department of Transportation & Development subject to specific provisions.	N/A	Pay-if-Paid Enforced If Explicit Pay-when-Paid Suggests Time for Payment La. C.C.P. Art. 423 require contractual obligations which depend on a suspensive provision, an occurrence of an uncertain event, to occur before a right accrues.	N/A
	Private	N/A							
Maine	Public	10 M.R.S.A. § 1111 et. seq. (Me. Rev. Stat., Title 10, §§ 1111 et seq.; cf. Title 5, §§ 1551 et seq. (prompt payment by government in general). [Enacted in 2015]	Include unsatisfactory job progress, defective construction or materials, disputed work and third party claims.	Notice must be given in writing within 10 days of receipt of the invoice if the invoice is incorrect or incomplete.	Interest at statutory rate, plus 1% per month penalty for the prevailing party.	Reasonable attorney's fees for substantially prevailing party. A contract term to the contrary will not prevail.	Excludes highway. Excludes contracts relating to the purchase of materials by a person who is performing work on his or her own property.	Pay-if-Paid enforced if explicit: contractor must disclose payment schedule from Owner before subcontract is agreed to or pay sub within 7 days of its invoice, notwithstanding any contrary agreement. [10 M.R.S. § 1114]	Legislative provisions cover both public and private contracts.
	Private	Same as above.	Same as above.	Same as above.	Same as above.	Same as above.	Same as above.	Same as above.	N/A

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Maryland	Public	Md. State Fin. & Proc. §§ 15-101 to 15-108, 15-226. [§§ 15-101 to 15-108 enacted or consolidated 1988 § 15-104 amended 1993, 1996; § 15-105 amended 1996; § 15-108 amended 2000, 2005]	Agency to Prime: If the public body reasonably believes it necessary to protect the public body's interest. Prime to Sub: If contractor / subcontractor determines subcontractor's performance under the subcontract provides reasonable grounds for withholding an additional amount.	N/A	Interest at 9% per year for prime beginning the 31st day after receipt; no provision on interest for subs.	Agency to Prime: Statutes silent; but if a claim is filed with the Appeals Board, the Appeals Board may award attorney's fees to the contractor if it finds that the unit personnel processing the claim acted in bad faith or without substantial justification. Prime to Sub: N/A	N/A	N/A	N/A
	Private	Md. Code, Real Property, §§ 9-301 to 9-304. [§§ 9-301 to 9-303 enacted in 1989 § 9-304 enacted in 2008]	N/A	N/A	Interest at the legal rate.	Attorneys' fees only awarded for "bad faith" failure to pay "undisputed amounts."	Contracts for the construction and sale of a single-family residential dwelling and other types of contracts as specified in Md. Rev. Stat. Ann. Real Property § 9-304	Pay-if-Paid clauses enforced if explicit. Pay-When-Paid clauses suggest time for payment Md. REAL PROPERTY Code Ann. § 9-113: Contingent payment clauses will not prevent collection from other sources, such as a property owner or a contractor's bond.	Section 2, ch. 23, Acts 2013, provides that "this Act shall be construed to apply only prospectively and may not be applied or interpreted to have any effect on or application to any construction contract awarded before the effective date of this Act [July 1, 2013]."

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Massachusetts	Public	Mass. Gen. Laws ch. 30, §§ 39G, 39J, 39K. [Enacted 1982 per secondary source, information on amendments not readily available]	<p>Agency to Prime: Government may not retain more than 5% of the approved periodic payment prior to substantial completion. However, additional amounts may be retained based upon the government's claims against the contractor. Following substantial completion the amount of retainage is reduced to 1% plus other applicable amounts.</p> <p>Prime to Sub: Amounts specified in court proceedings barring such payment amounts claimed. Contractor not forced to pay amounts withheld by the awarding authority as the estimated costs of completing the sub's incomplete or unsatisfactory work.</p>	N/A	<p>Agency to Prime: 3% over the rate charged by the Federal Reserve Bank of Boston.</p> <p>Prime to Sub: N/A</p>	N/A	N/A	Pay-if-Paid enforced if explicit; Pay-when-Paid suggests time for payment.	Subcontractor may be able to state a claim for direct payment from owner. <i>Mass Gen. Laws ch. 30, §39F</i>

State	Application	Statute(s)	Grounds to withhold payment	Notice Obligations for Withholding Payment	Interest	Legal Fees Provision	Exclusions	Pay-if-Paid / Pay-When-Paid	Other Notes
	Private	Mass. Gen. Laws ch. 149 § 29E(a), (c), (d) & ch. 254 § s. 2. [Enacted 1982]	N/A	N/A	General interest statute adds 12% to judgments in contract actions.	N/A	N/A	<p>Limitations on the enforceability of conditional payment clauses.</p> <p>On nearly all private projects worth over \$3,000,000, "pay-if-paid" clauses are unenforceable in all general and subcontracts (regardless of level), except where: (a) the party seeking payment has failed to perform; or (b) amounts are not received from a third person because of that person's insolvency; and (c) the party who wants to invoke pay-if-paid has filed a mechanic's lien before submitting its first requisition and taken all steps necessary to maintain that lien. [Mass. Gen. Laws ch. 149, § 29E]</p>	<p>Owner to Prime: The statute also mandates time sensitive approval requirements for change orders.</p> <p>General interest statute adds 12% to judgments in contract actions.</p>

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Michigan	Public	Mich. Comp. Laws § 125.1561; 1562; 1563, 1564 [Enacted in 1980; came into effect in 1983]	While the Michigan statutes do refer to withholding payments in relationship to retainage, beyond that, the Michigan statutes do not appear to specify additional grounds upon which payment may be withheld, so the contract will likely govern.	N/A	Reasonable interest on amounts past due in the next request for payment.	N/A	N/A	Pay-if-Paid clauses enforced if explicit. Pay-When-Paid clauses suggest time for payment.	Statute addresses dispute resolution procedures with regard to retention of progress payments. The Mason Contractors' Association and the American Subcontractors' Association - Southeastern Michigan Chapter have made previous efforts to pass prompt pay legislation applicable to subcontractors.
	Private	N/A							
Minnesota	Public	Minn. Stat. §15.72; 16A.124; 16A.1245; 16B.01 [§ 15.72 enacted in 1980 § 16A.124 enacted in 1980, various amendments in 1984, 1985, 1992, 1994, 1995, 1996, 1997, 2009, and 2014 § 16A.1245 enacted in 1990 § 16B.01 enacted in 1994; amendments in 1984, 1994, 1996, and 2014]	Agency to Prime: While the Minnesota statutes do refer to withholding payments in relationship to retainage, beyond that, the statutes do not appear to specify additional grounds upon which payment may be withheld, so the contract will likely govern. Prime to Sub: N/A	N/A	1.5% per month.	Agency to Prime State Contracts and Prime to Sub State/Local Contracts: mandatory for a vendor who prevails in a civil action to collect interest penalties. Agency to Sub Local Government Contracts: if municipality delays payment not in good faith, vendor may recover costs and attorney's fees.	N/A	N/A	Contracts with the Minn. Dept. of Transportation do not allow interest until 90 days after work is completed to the Dept.'s satisfaction. These rules do not apply if the delay is caused by the contractor or if the contract of over \$2 million specifically provides for a different period of time in which to make the final estimate.

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	Private	Minn. Stat. § 337.10; § 514.02 [§ 337.10 enacted in 1997; amendments in 1998, 1999, 2007, and 2009 § 514.02 enacted in 1915; amendments in 1965, 1971, 1984, 1986, 2000, and 2007]	N/A	N/A	Owner to prime: N/A Prime to Sub: 1.5% per month; minimum interest on unpaid balance greater than \$100 is \$10.	Owner to Prime: N/A Prime to Sub: Mandatory for a subcontractor that prevails in a civil action to collect interest penalties. A person injured by failure to use proceeds to pay for labour, skills, materials, and machinery contributed to the improvement as required may recover reasonable attorney's fees in action for damages.	N/A	Pay-if-Paid clauses enforced if explicit. Pay-When-Paid clauses suggest time for payment. Provisions requiring a contractor, sub, or supplier to waive the right to a mechanic's lien or to a claim against a payment bond before the person has been paid for the labour or materials or both that the person furnished are void and unenforceable. [Minn. Stat. § 337.10 (3)]	Choice of law/venue provision in favour of a state other than Minnesota is unenforceable.

State	Application	Statute(s)	Grounds to withhold payment	Notice Obligations for Withholding Payment	Interest	Legal Fees Provision	Exclusions	Pay-if-Paid / Pay-When-Paid	Other Notes
Mississippi	Public	Miss. Code Ann. §§ 31-5-25 & 31-25-27 §§ 31-5-25 originally from 1942; enacted in 1972; amendments in 1985, 1994, 2002, and 2006 § 31-25-27 enacted in 1972; amendment in 1985]	Agency to Prime: N/A Prime to Sub: On reasonable cause.	N/A	Agency to Prime: 1% per month if not paid within 45 calendar days that payment is due and payable; no interest charged if paid within 45 days, but interest charged for full late period if beyond 45 days. Prime to Sub: 0.5% per day of delinquency from expiration of 15 day period until fully paid, not to exceed 15%, absent reasonable cause for delay.	Agency to Prime: N/A Prime to Sub: In discretion of trial judge for reasonable amount in actions on a public works payment bond.	N/A	N/A	Owner to Prime: No exception for disputed amounts. Statutory prejudgment interest applies to qualifying amounts ultimately determined to be due and payable, even though legitimately contested. Prime to Sub: Contractors must submit monthly certification to project engineer or architect indicating payments to subcontractors on prior payment request.

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State	Application	Statute(s)	Grounds to withhold payment	Notice Obligations for Withholding Payment	Interest	Legal Fees Provision	Exclusions	Pay-if-Paid / Pay-When-Paid	Other Notes
	Private	Miss. Code Ann. §§ 87-7-3 & 87-7-5. [§ 31-5-25 originally from 1942; enacted in 1972; amendments in 1985, 1994, 2002, and 2006 § 31-25-27 enacted in 1972; amendment in 1985]	Owner to Prime: N/A Prime to Sub: On reasonable cause.	N/A	Owner to Prime: 1% per month from due date until fully paid if payment not made within 30 calendar days; no interest charged if paid within 30 days but if paid beyond 30 days, interest for full late period applies. Prime to Sub: 0.5% per day calculated from expiration of 15-day period, not to exceed 15% of outstanding balance due.	Likely governed by common law or other statute. For example, Mississippi's Construction Industry Arbitration Act authorizes arbitrators to award attorney's fees and costs to a prevailing party.	N/A	Pay-if-Paid enforced if explicit. Pay-When-Paid suggests time for payment.	N/A
Missouri	Public	Mo. Rev. Stat. §§ 34.057.1; 34.057.4; 34.057.5; 34.057.6 [Enacted 1990; amendment in 2014]	Includes, but is not limited to: liquidated damages; unsatisfactory job progress; defective construction work; etc.	N/A	1.5% per month from expiration of the 30-day period until fully paid.	Awarded to prevailing party if payment was not withheld in good faith for reasonable cause. If a claim is brought or defense asserted that is frivolous and in bad faith, such party will be required to pay the other party costs, reasonable expenses and reasonable attorney fees.	N/A	N/A	An agreement to waive lien rights in anticipation of or in consideration for the awarding of a contract or subcontract is void and against public policy. [Mo. Rev. Stat. § 429.005]

Chart 2 - Comparison of Notice, Withholding and Other Provisions in Prompt Payment Legislation in the United States

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State	Application	Statute(s)	Grounds to withhold payment	Notice Obligations for Withholding Payment	Interest	Legal Fees Provision	Exclusions	Pay-if-Paid / Pay-When-Paid	Other Notes
	Private	Mo. Rev. Stat. § 431.180 & §§ 436.300, 303, 306, 309, 312, 315, 318, 321, 324, 327, 330, 333, 336. [§ 431.180 enacted in 1995; amended in 1999 §§ 436.300, 303, 306, 309, 312, 315, 318, 321, 324, 327, 330, 333, 336 enacted in 2002]	N/A	N/A	1.5% per month from date payment was due. May also be applied to retainage if withheld in violation of Mo. Rev. Stat. §§436.300 to 436.336 at the same rate.	Failure to pay in accordance with the contract's terms may result in an award of reasonable attorney's fees. Attorney's fees may be awarded to the prevailing party in an action brought to enforce retainage provisions.	N/A	Pay-if-Paid clauses enforced if explicit. Pay-When-Paid clauses suggest time for payment. A "pay if paid clause" will not negate a mechanic's lien claim. [Mo. Rev. Stat. § 431.183]	

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State	Application	Statute(s)	Grounds to withhold payment	Notice Obligations for Withholding Payment	Interest	Legal Fees Provision	Exclusions	Pay-if-Paid / Pay-When-Paid	Other Notes
Montana	Public	<p>Mont. Code §§ 17-8-241 to 17-8-244 (public)</p> <p>Mont. Code Ann. §§ 28-2-2101 - 2107, 2110, 2111, 2115-2117.</p> <p>[Mont. Code Ann. §§ 28-2-2101 - 2107, 2110, 2111, 2115-2117 all enacted 1999 except 2110 enacted 2001, amended 2005; 2111, 2115-2117 enacted 2003.</p> <p>§§ 28-2-2101 amended 2003; 2102, 2103 amended 2003; 2104 amended 2005, 2009; 2105, 2106, 2107 amended 2001]</p>	<p>Payment may be withheld due to:</p> <ol style="list-style-type: none"> 1) unsatisfactory job progress; 2) failure to remedy defective construction work or materials; 3) disputed work or materials; 4) failure to comply with material provisions of the construction contract; 5) failure of a contractor to make timely payment for claims; 6) damage to the owner; or 7) existence of reasonable evidence that the construction cannot be completed for the unpaid balance of the contract sum. 	<p>Within 21 days of receipt of payment request, owner must provide written statement containing specific items that are not being approved.</p> <p>An owner must notify the subcontractor of a progress payment or final payment made to the general contractor upon the written request of a subcontractor who has not been paid for work.</p>	1.5% per month if delayed by more than 30 days.	Prevailing party in a civil action to enforce an obligation entitled to reasonable attorney's fees and costs. An arbitrator may award fees and costs.	Excludes residential projects of less than \$40,000.	<p>Pay-if-Paid and Pay-When-Paid clauses likely unenforceable.</p> <p>Performance entitles subcontractor to payment from contractor. [Mont. Code Anno., § 28-2-2102 (2)]</p> <p>Within 7 days after a contractor receives payment from an owner, the contractor shall pay the subcontractor. [Mont. Code Anno., § 28-2-2103 (2) (a)]</p> <p>"A construction contract may not contain provisions requiring a [party] to waive the right to a construction lien or ... payment bond before the [party] has been paid." [Mont. Code Anno., § 28-2-723]</p>	<p>Legislative provisions cover both public and private contracts.</p> <p>Remedies provided in statute are not exclusive of other remedies provided by law or contract.</p>
	Private	Same as above.	Same as above.	Same as above.	Same as above.	Same as above.	Same as above.	Same as above.	Same as above.

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Nebraska	Public	Neb. Rev. Stat. §§ 81-2401 to 2408; Neb. Rev. Stat. §§ 45-1201 to 45-1210. [§§ 81-2401 to 2408 all enacted 1988 §§ 81-2401, 2402 amended 2010; 2403, 2404 amended 1992; 2405 to 2408 amended 2012 §§ 45-1201 to 45-1210 enacted 2010; amended 2014]	NPPA: Likely governed by contract and/or . NCPA: May withhold a reasonable amount, if contract permits withholding, for: 1) reasonable evidence showing that contractual completion date will not be met due to unsatisfactory job progress; 2) third-party claims filed or reasonable evidence that such a claim will be filed with respect to work under the contract; or 3) failure of the contractor to make timely payments.	Interest under NCPA is only due after person charged the interest has been notified or provisions under <i>Neb. Rev. Stat.</i> § 45-1205.	NPPA: accrues on 31st calendar day after the later of (1) date of receipt of the goods and services or (2) date of receipt of the bill at rate specified in <i>Neb. Rev. Stat.</i> § 45-104.02. Highway or bridge contracts bear different rate. NCPA: 1% per month if payment delayed by more than 30 days.	Neither NPPA or NCPA provides for the award of attorney's fees.	NPPA does not apply to highway, or road construction, reconstruction or maintenance.	Provisions purporting to waive rights to file a claim against a payment or performance bond generally unenforceable by statute.	Some amendments to Neb. Rev. Stat. §§81-2402 made in 2010 to modify retainage and withholding, preserve certain contractor/subcontractor rights, and prevent contracting out of the regime via choice of law clause.
	Private	Nebraska Construction Prompt Pay Act, Neb. Rev. Stat. §§ 45-1201 to 45-1210 [Enacted 2010; amended 2014]	NCPA: May withhold a reasonable amount, if contract permits withholding, for: 1) reasonable evidence showing that contractual completion date will not be met due to unsatisfactory job progress; 2) third-party claims filed or reasonable evidence that such a claim will be filed with respect to work under the contract; or 3) failure of the contractor to make timely payments.	Interest under NCPA is only due after person charged the interest has been notified or provisions under <i>Neb. Rev. Stat.</i> § 45-1205.	NCPA: 1% per month if payment delayed by more than 30 days.	NCPA: does not provide for the award of attorney's fees.	Highway construction governed by Neb. Stat. § 39-1349.	Pay-if-Paid clauses enforced if explicit. Pay-When-Paid clauses suggest time for payment.	Private construction contracts and subcontracts are governed by NCPA.

Chart 2 - Comparison of Notice, Withholding and Other Provisions in Prompt Payment Legislation in the United States

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State	Application	Statute(s)	Grounds to withhold payment	Notice Obligations for Withholding Payment	Interest	Legal Fees Provision	Exclusions	Pay-if-Paid / Pay-When-Paid	Other Notes
Nevada	Public	<p>Nev. Rev. Stat. §§ 338.400, 415, 420, 425, 430, 435, 455, 460, 510, 515, 520, 525, 530, 535, 550, 555, 560, 565, 570, 590, 595, 600, 605, 610, 630, 635, 640, 645.</p> <p>§§ 338.400 amended 2005</p> <p>§§ 338.415 to 435, §§ 338.455, 460, 510, 515 added to NRS by 1973; amended 1977, 1983, 1985, 1999, 2003, 2007</p> <p>§§ 338.520, 525 amended 2005</p> <p>§§ 338.530, 535, 550, 555 added to NRS by 1987; amended 1999;</p> <p>§§ 338.560 to 600 amended 2003</p> <p>§§ 338.605 to 645 added to NRS by 1999]</p>	<p>Owner to Prime: Failure of the contractor to comply with the contract or applicable building code, law or regulation.</p> <p>Prime to Sub: (1) expenses contractor reasonably expects to incur as a result of failure by sub to comply with subcontract or building code/law/reg; (2) amount withheld pursuant to claim for wages against sub.</p> <p>Sub to sub-sub: Similar provisions apply, though amounts are not withheld by the public body based on claims for wages.</p>	<p>Owner to Prime Notice within 20 days of receipt of payment application specifying detailed reasons for withholding in compliance with the Act.</p> <p>Prime to Sub If withholding payment, the contractor must notify subcontractor or supplier in writing within 10 days of receipt of payment application stating amount to be withheld and reasons, in compliance with the Act.</p>	<p>Owner to Prime: Charged rate equal to rate quoted by at least three financial institutions as the highest rate paid on a certificate of deposit whose duration is approximately 90 days on the first day of the quarter if failure to pay within 30 days.</p> <p>Prime to Sub: Rate equal to lowest daily prime rate at the three largest banks or other financial institutions of the U.S. on the date the contract was executed + 2%, accruing on 10th day of delay.</p>	<p>Reasonable costs and attorney's fees to a contractor, subcontractor or supplier who is the prevailing party in a civil action or an arbitration proceeding to recover an amount owed to it. May also be governed by contract.</p>	<p>Does not apply to improvements to real property intended for residential purposes when the residence consists of no more than 4 residential units.</p>	N/A	<p>Definitions amended in 2015, to come into force in 2017.</p>

Chart 2 - Comparison of Notice, Withholding and Other Provisions in Prompt Payment Legislation in the United States

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State	Application	Statute(s)	Grounds to withhold payment	Notice Obligations for Withholding Payment	Interest	Legal Fees Provision	Exclusions	Pay-if-Paid / Pay-When-Paid	Other Notes
	Private	Nev. Rev. Stat. § 624.029 & 108.22188; §§624.607. § 624.029 added 2005 § 108.22188 added to NRS by 2003 § 624.607 added by 2001; amended 2005]	Owner to Prime: (1) work has not been performed or materials / equipment not furnished; (2) costs and expenses reasonably necessary to correct or repair any work materially not in compliance with agreement exceed 50% of the amount of retention; and (3) owner has paid or is required to pay pursuant to an official notice from a state agency, or employee benefit trust fund for which owner is liable. Prime to Sub: Amount contractor has paid or is required to pay pursuant to an official notice from a state agency or employee benefit trust fund for which the owner or higher-tiered contractor may be reasonably held liable.	Owner to Prime: Owner must give notice of any amounts withheld. Prime to Sub: Notice requirements listed in §624.624, which require written notice of amount withheld, explanation of reason, and include signature of an agent of the prime contractor.	Any money payable accrues interest on date due at a rate equal to the higher of: (1) rate agreed upon by the parties; (2) rate equal to prime rate at largest bank in Nevada immediately preceding time at which agreement was signed or if agreement was oral, time at which terms of the agreement were agreed plus 4% until date of payment.	Reasonable attorney's fees and costs for prevailing party.	N/A	Lien waiver and Pay-if-paid provisions unenforceable. [See Nev. Rev. Stat. Ann. §§ 624.624–626] Pay-when-Paid clauses suggest time for payment.	Subcontractor has right to stop work if not paid within 45 days of a request for payment, regardless of contractual provisions. [Nev. Rev. Stat. Ann. § 624.626(1)(b)] Certain provisions are required in NRS §§ 338.150, 153, 155. Limitations on ability to waive certain rights, obligations, and liabilities.
New Hampshire	Public	N/A							
	Private	N/A							
New Jersey	Public	N.J. Stat. §§ 2A:30A-1, 30A-2; 40A:11-16.2 (localities), 52:32-40, 52:32-41. §§ 2A:30A-1, 30A-2 enacted 1991, amended 2006 §§ 40A:11-16.2 enacted 1971, amended 1975, 1979, 1975, 1987, 1997, 1999, 2009 and 2012 § 52:32-40, 52:32-41 enacted 1991 (older law not repealed).]	No statutory provisions. Determined by contract and common law. No more than 2% may be withheld as retainage from any payment by a public body.	Prime contractor shall give written notice stating reasons for and amount of withholding from subcontractor.	Prime rate plus 1%.	Reasonable costs and fees for prevailing party.	N/A	Pay-if-Paid enforced if explicit. Pay-When-Paid suggests time for payment.	Legislative provisions cover both public and private contracts. New Jersey appears to have two Prompt Payment Acts. Statutes found at <i>N.J. Stat. Ann.</i> §§2A:30A-1 through 2A:30A-2 adopted more recently than §52:32-32.
	Private	Same as above.	Same as above.	Same as above.	Same as above.	Same as above.	Same as above.	Same as above.	N/A

Chart 2 - Comparison of Notice, Withholding and Other Provisions in Prompt Payment Legislation in the United States

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State	Application	Statute(s)	Grounds to withhold payment	Notice Obligations for Withholding Payment	Interest	Legal Fees Provision	Exclusions	Pay-if-Paid / Pay-When-Paid	Other Notes
New Mexico	Public	N.M. Stat., §§ 57-28-1, 2, 5, 7, 8. N.M. Stat., §§ 57-28-1, 2, 5, 7, 8 enacted 2001 § 57-28-2 amended 2007 § 57-28-5 amended 2007 § 57-28-7, 8 amended 2007]	Error in submitted invoice. Otherwise not specified in statute. The parties' contract will govern. Retainage not permitted by statute.	Owner must notify the sender of error in invoice within 7 days.	1.5% per month.	Successful party will be awarded reasonable fees and costs.	Excludes construction contracts for residential property containing 4 or fewer dwelling units.	Pay-if-Paid enforced if explicit.	Legislative provisions cover both public and private contracts.
	Private	Same as above.	Same as above.	Same as above.	Same as above.	Same as above.	Same as above.	Same as above.	N/A
New York	Public	N.Y. State Fin. Law §§ 139-f, 179-f (pt. of Art. 11-A); Pub. Auth. Law § 2880; Gen. Mun. Law § 106-b; Hwy. Law § 3 8; NYC Procurement Policy Board Rules § 4-06. [N.Y. State Fin. Law § 139-f enacted or consolidated 1978; amended 1981 - 1995, 2008 § 179-f enacted or consolidated 1984, sections amended 1988, 1989, 2015 Pub. Auth. Law § 2880 enacted or consolidated 1987, multiple amendments 1988 to 1990 Gen. Mun. Law § 106-b enacted or consolidated 1978, sections amended 1981, 1983, 1992, 1995, 2008]	State Agencies: 1) audit reveals reasonable cause; 2) statute/contract requires audit prior to payment; 3) state does not yet have authorization to make payment; 4) cash balance of fund from which payment is to be made is insufficient; 5) inspection by Fed. Govt. needed prior to payment; 6) conditions of contract not met; 7) required payment date modified by defects; 8) failure to submit proper document for final payments on highway contracts. Municipal Agencies: May withhold amount necessary to satisfy any claims, liens, or judgments outstanding against contractor. Public Authorities: Reduce payment by unpaid legally enforceable debt that is owed.	N/A	Statutory rate.	N/A	N/A	Pay-if-Paid clauses unenforceable. Pay-When-Paid clauses suggest time for payment. Any provision that conditions a subcontractor or supplier's right to file a claim or commence an action on a payment bond on exhaustion of another legal remedy, and any provision that waives a subcontractor's right to a lien is void. [NY General Obligations Law § 5-322.1; NY Lien Law § 34]	NY has several overlapping Prompt Payment legislation.

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	Private	N.Y. Gen. Bus. Law §§ 756 et seq [Added 2002, amended 2009.]	Owner may decline to approve invoice for: 1) unsatisfactory or disputed job progress; 2) defective work or material not remedied; 3) disputed work materials; 4) non-compliance with contract; 5) failure of contractor to make timely payments to subcontractors; 6) damage to owner; 7) reasonable evidence that the construction contract cannot be completed for the unpaid balance of the construction contract sum; 8) failure of the owner's architect to certify payment. Only an amount sufficient to pay the costs and expenses an owner reasonably expects to incur to cure the defect or correct any of the items set forth above may be withheld.	N/A	1%/month.	Highway construction contracts may have different provisions.	N/A	Same as above.	Any provision in an agreement in a private construction contract (except material supplier) that makes the contract subject to the laws of a state other than New York is void and unenforceable. [N.Y. General Business Law § 757]
North Carolina	Public	N.C. Gen Stat. §§ 143-134 to 143-134.1, 143.135. [§§ 143-134 to 143-134.1 enacted or consolidated 1959, sections amended 1967, 1983, 2007]	Owner or contractor may withhold for: 1) unsatisfactory job progress; 2) defective construction not remedied; 3) disputed work; 4) third-party claims against the owner or reasonable evidence that such claims will be filed; 5) failure to pay subs; 6) damage to contractor or other subs and reasonable evidence that the subcontract cannot be completed for the unpaid balance of the contract sum (grounds for contractor only). No retainage may be withheld where project costs are less than \$100,000. Maximum 5% retainage may be withheld where project value exceeds \$100,000.	N/A	1% per month.	N/A	Does not apply to contracts let by the Department of Transportation.	N/A	N/A

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	Private	N.C. Gen. Stat. §§ 22C-1 to C-6. [§§ 22C-1 to C-6 enacted or consolidated 1987, no revisions listed.]	Contractor may withhold payment for: 1) unsatisfactory job progress; 2) defective construction not remedied; 3) disputed work; 4) third-party claims against the owner or reasonable evidence that such claims will be filed; 5) failure to pay subs; 6) damage to contractor or other subs; and 7) reasonable evidence that the subcontract cannot be completed for the unpaid balance of the contract sum. Reasonable retainage permitted but may not exceed percentage retained by owner.	N/A	1% per month.	N/A	Does not apply to residential contractors or to certain improvements to real property intended for residential purposes.	Pay-if-Paid and Paid-When-Paid provisions are unenforceable. Payment by the owner to a contractor is not a condition precedent for payment to a subcontractor...and an agreement to the contrary is unenforceable. [N.C. Gen. Stat. § 22C-2] The contractor shall pay to his subcontractor...with in seven days of receipt by the contractor...of each periodic or final payment. [N.C. Gen. Stat. § 22C-3]	N/A
North Dakota	Public	N.D. Cent. Code §§ 13-01.1-01 to 06 and 48- 01.2 (public improvement bids and contracts) §§ 13-01.1-01 to 06 enacted or consolidated 1985 § 48-01.2 enacted or consolidated 2007, sections amended 2011, 2015]	No statutory provisions. Determined by contract and common law. Partial payment estimates should include retainage of 10% from each estimate until project is 50% complete; no further retainage permitted unless unsatisfactory progress or performance is documented.	N/A	Per contract or 1.75% per month.	N/A	N/A	N/A	N/A
	Private	N/A							

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Ohio	Public	Ohio Rev. Code §§ 126.30. [Effective date 2000; no revisions indicated.]	N/A Owner may retain 8% of each progress payment until job is 50% complete; no further funds may be retained after. Initial retained funds not to be disbursed until “there exists no other reason to withhold retainage” and a “major portion of the project” is (1) substantially complete and (2) occupied, in use or otherwise accepted.	N/A	Average of the prime rate established at the commercial banks in a city of over one hundred thousand population that is nearest the construction project. For subcontractors, late payments accrue interest at 18% per year.	N/A	N/A	N/A	
	Private	Ohio Rev. Code §§ 4113.61. [Effective date 1993; revised 2007.]	Contractor or sub may withhold amounts necessary to resolve disputed liens or claims involving the work, labour performed, or materials furnished by a subcontractor or material supplier.	N/A	18% per year.	In a court action to recover payments due plus interest, court <u>shall</u> award the prevailing party reasonable attorney’s fees and costs unless doing so would be inequitable. Court will consider good faith, amount recovered compared to amount demanded, and nature of / time expended in rendering services.	Does not apply to any construction or improvement of any single-, two-, or three-family detached dwelling houses.	Owner to Prime: Pay-if-Paid clause enforced if explicit; Pay-When-Paid clause suggests time for payment. Prime to Sub: Pay-if-Paid and Pay-When-Paid clauses not enforceable. Any attempt to establish payment periods longer or interest rates smaller than those specified for subcontractors in statutory regime will be unenforceable. [Id. § 4113.62(D)(2)]	N/A

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Oklahoma	Public	Okla. Stat., Title 61, §§ 221-227; Title 61, §§ 113.1-113.3 (retainage generally); 62, §§ 41.4a -41.4d (prompt payment by government generally). [§ 61-221-227 enacted 2004; no revisions indicated § 61-13.1-13.3 enacted 1977; revised 1983, 1995, 2006, and 2011 § 62-41.4a-d enacted 1983; no revisions indicated.]	An owner or prime contractor can only reduce a proper invoice of a prime contractor if reasons are delivered within the statutory timeline. Reduction may not be more than amount reasonable to correct the work, as set forth in writing. Retainage by owner, contractor or sub permitted, but may not exceed 10% of amount of payment due.	Owner must deliver reasons for withholding within 14 calendar days of receipt of the invoice. Contractor must deliver reasons within 7 days of receipt of the subcontractor's invoice.	Prime contractor entitled to statutory rate. Subs get 1.5% per month.	N/A	Highway construction, family dwelling construction for buildings with 1-4 units, and contracts less than \$25,000 excluded.	Pay-if-Paid enforced if explicit. Pay-When-Paid suggests time for payment.	Choice of law or choice of venue provision in favour of another state is void. Any provision disallowing or altering the rights of a contractor, subcontractor, or material are also void and unenforceable. [Okla. Stat. tit. 61, § 227(B)]
	Private	15 Okl. Stat. § 820. [Enacted 2010; no revisions indicated]	Owner may reduce progress payment or withhold payment as provided by contract.	N/A	N/A	N/A	Applies to private construction projects involving a bid process; does not apply to privately negotiated contracts.	Pay-if-Paid enforced if explicit. Pay-When-Paid suggests time for payment.	Prime contractor may suspend work if payment is delayed, and in accordance with statute. Certain contract clauses will be void against public policy and unenforceable. See Id. § 821(B)(1) (foreign forum selection clause); Id. 821(B)(2) (any clause which alters rights under the statute).

State	Application	Statute(s)	Grounds to withhold payment	Notice Obligations for Withholding Payment	Interest	Legal Fees Provision	Exclusions	Pay-if-Paid / Pay-When-Paid	Other Notes
Oregon	Public	Or. Rev. Stat. §§ 279C.320, .505, .515, .570, .580. [Enacted 2003; revised in 2005 and 2013]	Agency may withhold payment if: 1) the estimate of work completed is not approved by the contracting agency; 2) there is a good faith dispute; 3) there is a defect or impropriety in any submitted invoice. A contractor/sub can include contractual provision allowing them to retain 150% subject to a good faith dispute without incurring interest. A good faith dispute means a dispute concerning items 1,2,5-8 in list below.	If an incorrect invoice is submitted, the contracting agency must notify the contractor within 15 days and provide reasons; if the error is corrected within 7 days, payment must be made within the original timeframe.	Interest at statutory rate up to a maximum of 30% for progress payments to prime; 1.5% per month for final payment to prime; 9% per annum for prime to subs.	Whenever a contractor brings formal administrative or judicial action to collect interest due, the prevailing party is entitled to costs and reasonable attorney fees.	N/A	N/A	N/A
	Private	Or. Rev. Stat. §§ 701.620 et seq. SB 384 [Enacted 1989; SB 384 effective as of 2012. Note: Sections 701.620 to 701.645 were enacted into law by the Legislative Assembly but were not added to or made a part of ORS chapter 701 or any series therein by legislative action.]	An owner may withhold payment for: 1) unsatisfactory job progress; 2) defective work not remedied; 3) disputed work, materials or products; (owner only) 4) failure to comply with other material provisions of contract; (owner only) 5) third-party claims filed; 6) failure to make timely payments; 7) damage to the owner; and 8) reasonable evidence that the subcontract cannot be completed for the unpaid balance of the subcontract sum; or 9) other items as allowed under the contract. A contractor/sub may withhold payment for a documented dispute falling into one of the above categories.	N/A	1.5% per month for subcontractors and lower tiers	N/A	N/A	Pay-if-Paid enforced if explicit. Pay-When-Paid suggests time for payment. The original contractor must pay subcontractors within seven days of receipt of payment from the owner [Or. Rev. Stat. § 701.630].	N/A

State	Application	Statute(s)	Grounds to withhold payment	Notice Obligations for Withholding Payment	Interest	Legal Fees Provision	Exclusions	Pay-if-Paid / Pay-When-Paid	Other Notes
Pennsylvania	Public	62 Pa. Con. Stat. §§ 3931 et seq. [Enacted 1998; No revisions indicated.]	Agency or contractor entitled to withhold payments for 'deficiency items.' A deficiency item is defined as work that was not performed according to contract. Retainage permitted for no more than 10% of amount due until 50% of contractual completion (with some exceptions). At that point, half of the retainage shall be paid to the contractor provided 1) the architect and engineer approve the application for payment, 2) the contractor is making satisfactory progress, and 3) there is no specific cause for greater withholding.	If an agency or contractor withholds payment for a deficiency item, it shall notify the contractor/sub within the time period specified in the contract or 15 calendar days of the date that the application for payment is received.	Interest at statutory rate for overdue taxes; 6% per year for final payments due; 1% per month additional penalty for amounts "withheld in bad faith".	Attorney's fees may be awarded but only in cases of bad faith, defined as "arbitrary or vexatious" conduct.	Department of Transportation contracts under section 301(c)(1) (relating to procurement responsibility) excluded. Exceptions to progress payment obligations for certain situations.		A choice of law or choice of venue provision in favour of a State other than Pennsylvania is unenforceable. [62 Pa. Const. Stat. § 393] Once a contractor has made payment to the subcontractor in accordance with the provisions of the statute, future claims for payment against the contractor or the contractor's surety by parties owed payment from the subcontractor which has been paid shall be barred. [62 Pa. Const. Stat. § 3939(b)]

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State	Application	Statute(s)	Grounds to withhold payment	Notice Obligations for Withholding Payment	Interest	Legal Fees Provision	Exclusions	Pay-if-Paid / Pay-When-Paid	Other Notes
	Private	73 Pa. C.S. §§ 501-516. [Enacted 1995; no revisions indicated]	Owner, contractor and sub are entitled to withhold payment for deficiency items according to the terms of the contract.	If the owner/ contractor/sub withholds payment for a deficiency item, it must notify the contractor/sub of the deficiency within 7 calendar days of the day the invoice is received.	1% per month; additional penalty of 1% per month for amounts "wrongfully withheld".	Substantially prevailing party in any proceeding to recover any payment under the legislation shall be awarded a reasonable attorney fee.	Excludes improvements of real property consisting of 6 or fewer residential units under construction simultaneously or contracts for purchase of materials by a person performing work on their own property. Will not operate to prevent receipt of federal aid.	Pay-if-Paid clause enforced if explicit. Pay-When-Paid clause suggests time for payment. The subcontractor shall be paid the full or proportional amount received for each subcontractor's work and material 14 days after receipt of progress payment. [2 Pa. Cons. Stat. § 3933 (c)]	Choice of law or choice of venue provision in favour of a State other than Pennsylvania is unenforceable. [73 Pa. Stat. Ann. § 514]
Rhode Island	Public	R.I. Gen. Laws §§ 42-11.1-1 to 42-11.1-16, 37-13-5. [§ 37-13-5 enacted 136; most recently revised in 1965 §§ 42-11.1-1 to 42-11.1-16 enacted in 1987, selected sections revised in 1993]	Agency to Prime: 1) the state controller determines that there is reasonable cause to believe payment is not properly due; 2) audit required by contract or statute; 3) government has not yet authorized payment; 4) insufficient cash balance of fund from which payment is to be made; 5) a proper invoice must be examined by the federal government prior to payment; 6) noncompliance with contract; 7) the required payment date is modified in accordance with statute. Prime to Sub: Prime may set off payment to subcontractor for any legally enforceable debt owed. Otherwise, contract and statute governs.	Within 5 working days after receipt and to notify contractor of defects in any delivered goods, property or services.	Interest at prime rate as reported on money market page of Wall Street Journal published on first regular business day of each month. No provision for subs, must file notice of claim for interest to start accruing.	N/A	Certain provisions do not apply to contracts awarded by the Department of Transportation, contracts for public works, sewer, or water main construction, non-profit service providers.	Pay-if-Paid clause enforced if explicit.	N/A
	Private	N/A							

Chart 2 - Comparison of Notice, Withholding and Other Provisions in Prompt Payment Legislation in the United States

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State	Application	Statute(s)	Grounds to withhold payment	Notice Obligations for Withholding Payment	Interest	Legal Fees Provision	Exclusions	Pay-if-Paid / Pay-When-Paid	Other Notes
South Carolina	Public	S.C. Code §§ 29-6-10 et seq. [Enacted 1990; no revisions indicated.]	Owner, contractor or sub may withhold for: 1) unsatisfactory job progress; 2) defective construction not remedied; 3) disputed work; 4) third party claims filed; 5) failure of contractor or subcontractor to make timely payments; 6) damage to owner, contractor, or another subcontractor; 7) reasonable evidence that contract or subcontract cannot be completed for the unpaid balance of the contract or subcontract sum. Reasonable amount of progress payment permitted to be withheld by owner, contractor or sub for retainage. Amount not to exceed 3.5% of each payment.	N/A	Interest at 1% per month if notice and statutory cite are on the invoice; rate may be varied if rights under statute are specifically waived.	No specific provision, but if the payor fails to make a fair investigation or otherwise unreasonably refuses to pay a contractor/sub's claim or proper portion, he or she is liable for reasonable attorney's fees and interest at the judgment rate.	N/A	Payment by upstream entity cannot be a condition precedent to payment of a party lower in the chain. Any agreement to the contrary is unenforceable. [S.C. Code Ann. § 29-6-230] However, Pay-When-Paid clauses have been interpreted to merely establish a reasonable time for payment.	Legislative provisions cover both public and private contracts.
	Private	Same as above.	Same as above.	Same as above.	Same as above.	Same as above.	Statutes do not apply to residential homebuilders, real property improvements intended for residential purposes which consist of 16 or fewer units, and private persons or entities owning the improvements to real property when the improvements are not financed by a non-owner.	Same as above.	N/A

Chart 2 - Comparison of Notice, Withholding and Other Provisions in Prompt Payment Legislation in the United States

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State	Application	Statute(s)	Grounds to withhold payment	Notice Obligations for Withholding Payment	Interest	Legal Fees Provision	Exclusions	Pay-if-Paid / Pay-When-Paid	Other Notes
South Dakota	Public	S.D. Codified Laws §§ 5-26-1 to 5-26-8. [Enacted or consolidated 1984; revised 1985, 1988]	Payment may be withheld by agency: 1) where the amount due is disputed; or 2) where compliance with the contract is disputed. An amount necessary to complete the improvement shall be retained from the final payment until the contract is complete and final inspection is made. Retainage must be released within 30 days of completion of work as established by architect/ engineer's acceptance letter or by use of the improvement. Any retainage from contractor/sub would be contractual. No statutory provisions.	Within 10 days of receipt of an invoice, agency must give written notice to contractor of its disagreement with property or services provided, and give reasons for disagreement.	1.5% per month or per contract. Agency not required to pay interest if less than \$5.	N/A	N/A	N/A	N/A
	Private	N/A							
Tennessee	Public	Tenn. Code §§ 12-4-701 to 12-4-707. [Enacted or consolidated 1985 § 12-4-702 amended 1986, 1988]	Payment may be withheld if there is a dispute over the amount due or compliance with the contract. Retainage may not exceed 5% of contract amount and must be released within 90 days of substantial or full completion, whichever occurs first. Retainage held by contractor or sub must be released within 10 days of receipt from agency.	N/A	1.5% per month or per contract.	N/A	N/A	Pay-if-Paid clauses enforced if explicit. Pay-When-Paid clauses suggest time for payment.	

Chart 2 - Comparison of Notice, Withholding and Other Provisions in Prompt Payment Legislation in the United States

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State	Application	Statute(s)	Grounds to withhold payment	Notice Obligations for Withholding Payment	Interest	Legal Fees Provision	Exclusions	Pay-if-Paid / Pay-When-Paid	Other Notes
	Private	Tenn. Code §§ 66-34-101 to 66-34-703 HB 3068. [Enacted or consolidated 1991 except § 66-34-104 enacted or consolidated 1975 with various amendments from 1985 to 2012. § 66-34-103 amended 2008, 2012 § 66-34-202; 66-34-302 amended 2006 § 66-34-203 and 204; 66-34-303 amended 2007 § 66-34-601 amended 2000]	Payment may be withheld in accordance with contract. Retainage may not exceed 5% of contract amount and must be released within 90 days of substantial or full completion, whichever occurs first.	N/A	Interest rate per contract or, if no contractual rate, per statutory rate.	Attorney's fees may be awarded but only if the party has acted in bad faith.	Excludes construction of 4 single family units or less. Does not apply to any bank, savings bank, savings and loan association, industrial loan and thrift company, other regulated financial institution or insurance company.	Pay-if-Paid clauses enforced if explicit. Pay-When-Paid clauses suggest time for payment.	Notification of non-payment and intent to seek relief under the prompt pay statutes must be given to the non-paying party.
Texas	Public	Tx. Govt. Code §§ 2251.001 - 251.043. [Added 1993; some provisions amended by Acts 1993, 1995, 1997, 1999, 2001, 2003, 2007. For example: § 2251.025 amended by Acts 1997, 2001, 2003 § 2251.027 amended by Acts 1997, 2001 § 2251.030 amended by Acts 1999, 2001]	Payment may be withheld if: 1) bona fide dispute between the agency and the contractor/sub or supplier about the goods delivered or the services performed; 2) bona fide dispute between a contractor and sub or sub and supplier about goods delivered or services performed; 3) the terms of a federal contract, grant, regulation or statute prevent the agency from making a timely payment with federal funds; or 4) the invoice is not mailed to the person to whom it is addressed in strict accordance with any instruction on the purchase order relating to the payment. Retainage is generally per contract.	N/A Agency must notify contractor/sub of invoice error within 21 days.	Prime rate on the first weekday of the preceding July plus 1%.	Opposing party shall pay reasonable attorney fees of the prevailing party in a formal administrative or judicial action to collect an invoice payment or interest due. Subs not specifically included above but can recover reasonable attorney's fees under Tex. Civ. Prac. & Rem. Code § 38.001.	N/A	Pay-if-Paid clauses enforced if explicit. Pay-When-Paid clauses suggest time for payment.	A party may not waive any right or remedy granted by the prompt payment statutes. Any purported waiver is void. A contractor or sub has the right to suspend performance under a contract for non-payment following specific notice requirements. Highway-related contracts have specific provisions in Texas Code.

State	Application	Statute(s)	Grounds to withhold payment	Notice Obligations for Withholding Payment	Interest	Legal Fees Provision	Exclusions	Pay-if-Paid / Pay-When-Paid	Other Notes
	Private	<p>Tex. Prop. Code §§ 28.001 to 28.010.</p> <p>[§§ 28.001 to 28.008 added by Acts 1993, some sections amended by Acts 1999.</p> <p>§§ 28.009 to 28.010 added by Acts 1999; no amendments listed.]</p>	<p>Owner may withhold payment for:</p> <p>1) good faith dispute regarding amount owed or proper performance of work; or</p> <p>2) upon lender's failure to disburse funds, but payment must be made by 5th day following receipt of loan proceeds.</p> <p>Owner must retain 10% of contract price or value of completed work for 30 days after work is completed.</p> <p>Grounds for withholding and retainage for contractors/subs not specified; contract likely governs.</p>	N/A	1.5% per month.	Court may award equitable and just attorney's fees	Oil field service or mineral development agreements are exempt.	<p>Pay-if-Paid clause enforced if specific, but enforcement prohibited if:</p> <p>1) non-payment is not due to fault of claimant;</p> <p>2) claimant sends notice objecting to enforcement of clause in compliance with statute;</p> <p>3) sham relationship exists between owner and contractor, or</p> <p>4) enforcement would be unconscionable.</p> <p>[Tex. Bus. & Com. Code §56.001 et seq.]</p>	No provision of the Act may be waived, other than the permissible contractual extension of payment period for work done on single family home of 60 days following receipt of payment request.

Chart 2 - Comparison of Notice, Withholding and Other Provisions in Prompt Payment Legislation in the United States

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State	Application	Statute(s)	Grounds to withhold payment	Notice Obligations for Withholding Payment	Interest	Legal Fees Provision	Exclusions	Pay-if-Paid / Pay-When-Paid	Other Notes
Utah	Public	Utah Code §§ 13-8-1 to 13-8-5, 15-6-1 to 15-6-6. [§§ 13-8-1 to 13-8-5 enacted 1997 except § 13-8-2 enacted 1988; § 13-8-6 enacted 2011; § 13-8-4 to § 13-8-5 amended 2012. §§ 15-6-1 to 15-6-2 enacted or consolidated 1983, § 15-6-3 to § 15-6-5 enacted 1989; no amendments listed.]	Agency may withhold payment for: 1) dispute regarding amount owed or proper performance of work; or 2) contractor's default or breach of terms and conditions of contract (permits withholding of amount required to cure or if substantially complete, up to twice the fair market value of work not yet completed). Retainage may not exceed 5% of any given payment; total retainage may not exceed 5% of the total construction price.	Within 45 days from receipt of invoice, agency must describe in writing what portion of work was not properly completed.	2% above rate paid by Internal Revenue Service on refund claims. Late payments to subcontractors and suppliers from contractor subject to interest at 15.5% per year.	Successful party entitled to attorney's fees and other allowable costs in any action to collect retained proceeds withheld in violation of the statute.	Provisions do not apply to contracts involving federal funds, or mixed state and federal funds.	Pay-if-Paid clauses enforced if explicit. Pay-When-Paid clauses suggest time for payment.	Choice of venue provisions are void and unenforceable if one party to the construction contract is domiciled in Utah and the work is done for a Utah construction project. With specified statutory exceptions, indemnification provisions between any of the following parties are void: (i) a construction manager; (ii) a general contractor; (iii) a subcontractor; (iv) a sub-subcontractor; and (v) a supplier.
	Private	Utah Code §§ 13-8-5, 58-55-601 to 58-55-605. [§ 13-8-5 see above. § 58-55-601 to § 58-55-603 enactments not readily available; select provisions amended 1994, 1999. § 58-55-604 amended 2008 § 58-55-605 enacted 2014, no amendments listed]	Owner may withhold payment for: 1) dispute regarding amount owed or proper performance of work; or 2) contractor's default or breach of terms and conditions of contract (permits withholding of amount required to cure or if substantially complete, up to twice the fair market value of work not yet completed). Retainage may not exceed 5% of any given payment; total retainage may not exceed 5% of the total construction price.	N/A	Any party who knowingly and wrongfully withholds a retention will be subject to a charge of 2% per month in addition to any interest otherwise due.	Successful party entitled to attorney's fees and other allowable costs in any action to collect retained proceeds withheld in violation of the statute.	N/A	Pay-if-Paid provisions unenforceable by statute as applied to mechanics' liens, except in respect of contracts involving private construction work on residential property consisting of four units or less. [Utah Code Ann. § 13-8-4(3)(a)]	Construction liens available in Title 38, Chapter 1a of Statute.

Chart 2 - Comparison of Notice, Withholding and Other Provisions in Prompt Payment Legislation in the United States

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State	Application	Statute(s)	Grounds to withhold payment	Notice Obligations for Withholding Payment	Interest	Legal Fees Provision	Exclusions	Pay-if-Paid / Pay-When-Paid	Other Notes
Vermont	Public	Vt. Stat., Title 9, §§ 4001-4009, Title 12, § 2903. [§§ 4001-4009 added 1991 except § 4005a added 2007 § 4002 amended 1993]	Agency, contractor or sub may withhold payment in an amount equaling the value of any good faith claims, including claims arising from: 1) unsatisfactory job progress; 2) defective construction; 3) disputed work; or 4) third party claims. Retainage is per contract between owner, contractor and/or subs. Amounts retained during performance of the contract and due upon completion must be paid within 30 days of final acceptance of work and to subcontractors within 7 days of receipt from contractor/sub.	N/A	12% per year, per statutory rate. If a party is found through arbitration or litigation to have failed to comply with the terms of the Act, then an additional penalty of 1% per month on all sums wrongfully withheld will be awarded.	Attorneys fees and expenses—in an amount to be determined by a court or arbitrator— <u>shall</u> be awarded to the substantially prevailing party in any proceeding to recover payment under the Act.	N/A	Pay-if-Paid provisions unenforceable in contracts with subs. [Vt. Stat. tit. 9 § 4003(c)]	Legislative provisions cover both public and private contracts. If necessary to receive federal aid, the provision of this chapter may be varied by contract.
	Private	Same as above.	Same as above.	Same as above.	Same as above.	Same as above.	Does not apply to contracts for the purchase of materials by a natural person performing work on his or her own property.	Same as above.	Same as above.
Virginia	Public	Va. Code §§ 2.2-4347 to 2.2-4356. [Enacted or consolidated 1982; last revised 2001]	Not specified, other than for an improper invoice. Likely determined by reference to contract and common law. No more than 5% retainage to ensure faithful contract performance.	If the invoice is defective, the paying party must notify the payee within: 1) State agency: 15 day; and 2) Local government: 20 days.	State agency: per contract or at base rate assessed on corporate loans, as reported daily in Wall Street Journal. Local government: not to exceed 1% per month. Per contract or 1% per month for subcontractors.	N/A	Does not apply to the late payment provisions of any public utility tariff prescribed by the State Corporation Commission.	Pay-if-Paid clauses enforced if explicit. Pay-When-Paid clauses suggest time for payment.	"No damage for delay" clauses are void by statute, to the extent the delay is caused by acts or omissions of the public agency and due to causes within their control.
	Private	N/A							

Chart 2 - Comparison of Notice, Withholding and Other Provisions in Prompt Payment Legislation in the United States

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State	Application	Statute(s)	Grounds to withhold payment	Notice Obligations for Withholding Payment	Interest	Legal Fees Provision	Exclusions	Pay-if-Paid / Pay-When-Paid	Other Notes
Washington	Public	Wash. Rev. Code §§ 39.76.010 to 39.76.40, 39.04.250. [§§ 39.76.010 to 39.76.40 enacted or consolidated 1981, except § 39.76.011 enacted or consolidated 1992 § 39.76.020 amended 2009 § 39.04.250 enacted or consolidated 1992, no listed amendments]	Payment may be withheld if: 1) unsatisfactory performance (up to 30 days following remedy of defective work); 2) submission of an improper payment request (up to 30 days following submission of proper request); or 3) good faith dispute over all or a portion of the amount due (up to 150% of the disputed amount, and full payment to parties not involved in dispute) Either a bond or retainage is required, but retainage is not to exceed 5% of the money earned by the contractor.	If payment withheld for unsatisfactory performance or improper payment request, agency must notify contractor within 8 working days, in writing, specifying reason for withholding and remedial actions required.	1% per month, with certain exceptions. Subcontractors entitled to interest at highest rate allowed under Wash. Rev. Code §19.52.025. Also entitled to interest on payments withheld due to failure of prime contractor to comply with notice and payment provisions.	In an action to collect interest, prevailing party entitled to award of reasonable attorney's fees.	N/A	Pay-if-Paid clauses enforced if explicit. Pay-When-Paid clauses suggest time for payment.	"No damage for delay" clauses are void by statute where delay is caused by the acts or omissions of the contractee or persons acting for the contractee.
	Private	N/A							
Washington D.C. [District of Columbia]	Public	D.C. Code §§ 2-221.01 to 2-221.06. [Enacted or consolidated 1985; sections amended 1992, 1997, 1998, 1999.]	Payment may be withheld for any defect in the invoice or delivered goods, property or services or impropriety of any kind.	Notice of withholding must be given in writing within 15 days of receipt of invoice.	Interest at rate determined by regulation but computed at a rate not less than 1%.	N/A	N/A	Pay-if-Paid clauses enforced if explicit.	
	Private	D.C. Code § 27-131 to § 27-136 [Enacted 2013; no amendments listed]	N/A	N/A	1.5% per month or any part of a month on any undisputed amount not paid on time.	If a contractor or subcontractor prevails in a civil action to collect interest penalties, an award shall be made of costs and disbursements, including reasonable attorney's fees, incurred in bringing the action.	N/A	N/A	Conditions of payment to the subcontractor on receipt by the contractor of payment from the owner may not abrogate the subcontractor's right to: 1) Claim a mechanics' lien; or (2) Sue on a contractor's bond. [§ 27-134]

Chart 2 - Comparison of Notice, Withholding and Other Provisions in Prompt Payment Legislation in the United States

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State	Application	Statute(s)	Grounds to withhold payment	Notice Obligations for Withholding Payment	Interest	Legal Fees Provision	Exclusions	Pay-if-Paid / Pay-When-Paid	Other Notes
West Virginia	Public	W. Va. Code §§ 7-5-7 (county), 8-13-22d (municipality). [§ 7-5-7 amended and reenacted 1995 § 8-13-22d enacted 1995]	N/A	N/A	Statutory rate.	N/A	Contracts with the state are not covered by these provisions.	Pay-if-Paid enforced if explicit.	W. Va. Code §§ 5A-3-54 (state) repealed 3/2010. Legislature considered similar bill: "Prompt Pay Act of 2011" SB 462 (2011) and HB 3181 (2012). Appears that this bill was not successfully passed.
	Private	N/A							
Wisconsin	Public	Wis. Stat. §§ 16.528 (state); 16.53(2) (rejection of invoice); 66.0135 (local). [§ 16.528 (state) enacted or consolidated 1985; amended periodically from 1987 to 1999, 2009, 2011, 2013, 2015 § 66.0135 enacted or consolidated 1989, revised 1999]	Owner may withhold no more than 5% of payment on first 50% of project; no retainage on remaining 50% unless architect or engineer certifies that the job is not proceeding satisfactorily, in which case 10% may be retained. Retainage must be returned upon substantial completion. Retainage for contractors/sub not specified by statute.	N/A	12% per year, compounded monthly, except in certain circumstances.	Attorney's fees shall be awarded to prevailing party in an action to recover interest.	N/A	Pay-if-Paid provisions unenforceable: provisions requiring a person to waive a right to a construction lien, or making payment to a prime contractor a condition precedent to payment to a subcontractor are void. [Wis. Stat. § 779.135] Pay-When-Paid clauses suggest time for payment.	Parties cannot make the contract subject to the laws of another state or require that any litigation, arbitration or other dispute resolution process on the contract occur in another state.
	Private	N/A							
Wyoming	Public	Wyo. Stat. §§ 16-6-601 to 16-6-602. [Enacted or consolidated 1983]	Agency may withhold payment for good faith dispute with respect to all or a portion of amount due. Up to 10% of value of work may be withheld on first 50% of project; no retainage required if satisfactory progress being made on second half of project and approved by surety who furnished bonds but may also retain up to 10%.	N/A	1.5% per month.	N/A	Does not apply to projects partially funded by the federal government or some other source that has inconsistent requirements regarding retention of payments.	N/A	N/A
	Private	N/A							

This appendix provides detailed answers to questions posed in the body of Chapter 9 – Adjudication being:

- Who can require adjudication?
- Who can adjudicate a dispute and how is the adjudicator nominated?
- What types of disputes can be adjudicated?
- What is the adjudication process and how are costs dealt with? and
- How are adjudicated decisions enforced?

Following these charts, we have provided a detailed analysis of how adjudication should be adopted in Ontario, that is to say a “made-in-Ontario approach”. This analysis includes recommendations based on our views of the best modality in which to implement Adjudication in Ontario given: a) the views of the stakeholders; b) relevant experiences of international jurisdictions; and c) the interaction with the *Act*.

The Review has closely examined the differences in implementation of statutory adjudication in the U.K., New Zealand, Ireland, Singapore, Malaysia, Hong Kong and Australia:

Jurisdiction	Legislation Title
United Kingdom	<i>Housing Grants, Construction and Regeneration Act 1996</i>
New Zealand	<i>Construction Contracts Act 2002</i>
Ireland	<i>Construction Contracts Act 2013</i>
Singapore	<i>Building and Construction Industry Security of Payment Act 2004</i>
Malaysia	<i>Construction Industry Payment and Adjudication Act 2012</i>
Hong Kong	Act proposed, currently in consultation process
South Africa ¹⁵³²	Regulations proposed, currently seeking public comment
<i>Australian States</i>	
New South Wales	<i>Building and Construction Industry Security of Payment Act 1999</i>
Victoria	<i>Building and Construction Industry Security of Payment Act 2002</i>
Queensland	<i>Building and Construction Industry Payments Act 2004</i>
South Australia	<i>Building and Construction Industry Security of Payment Act 2009</i>
Tasmania	<i>Building and Construction Industry Security of Payment Act 2009</i>
Australian Capital Territory	<i>Building and Construction Industry (Security of Payment) Act 2009</i>
Western Australia	<i>Construction Contracts Act 2004</i>
Northern Territory	<i>Construction Contracts (Security of Payments) Act 2004</i>

¹⁵³² We note that South Africa is in the midst of seeking public comments in relation to Proposed Amendments to the Regulations of the Construction Industry Development Board Act No. 38 of 2000. South Africa is considering introducing mandatory prompt payment and adjudication applicable to construction contracts and related construction works. However, as of the time of the publishing of this Report, the consultation process was not sufficiently advanced and it was not clear what regulations, if any, will be brought into effect. For further detail, please see for example, Clyde & Co, “Adjudication and prompt payment regulations”, South Africa, April 10, 2016, online: <<https://www.lexology.com/library/detail.aspx?g=c8ddaaa-508f-4142-817b-318c6dd5cfa9>>.

1. Who can require adjudication?

Jurisdiction	Who can require adjudication?
U.K.	A party (i.e. any party) to a construction contract has the right to refer a dispute arising under the contract to adjudication. ¹⁵³³
New Zealand	Any party to a construction contract has the right to refer a dispute to adjudication. ¹⁵³⁴ This right may be exercised even though the dispute is the subject of proceedings between the same parties in a court or tribunal. Parties must consent to adjudication if the parties had previously contracted for arbitration. ¹⁵³⁵ Parties must also give consent if multiple disputes are to be dealt with in one adjudication proceeding. ¹⁵³⁶
Ireland	A party to a construction contract may refer “any dispute relating to payment arising under the construction contract” to adjudication. ¹⁵³⁷
Singapore	Any party who has carried out work or supplied goods or services under a construction contract (a “claimant”) may make an adjudication application in respect of a payment claim. ¹⁵³⁸
Malaysia	Either party may refer a “dispute arising from a payment claim” to adjudication. ¹⁵³⁹
Hong Kong	Both parties to a construction contract will be entitled to refer a dispute (limited to certain disputes including, for example, value of work, services, materials and plant supplied and claimed in a payment claim) to adjudication. ¹⁵⁴⁰
<i>Australia</i>	
NSW	A party who claims to be entitled to a progress payment (a “claimant”) may make an adjudication application in respect of a payment claim made against a party owing payment (the “respondent”). ¹⁵⁴¹
Victoria	A party who claims to be entitled to a progress payment (a “claimant”) may make an adjudication application in respect of a payment claim made against a party owing payment (the “respondent”). ¹⁵⁴²
Queensland	A party who claims to be entitled to a progress payment (a “claimant”) may make an adjudication application in respect of a payment claim made against a party owing payment (the “respondent”). ¹⁵⁴³
South Australia	A party who claims to be entitled to a progress payment (a “claimant”) may make an adjudication application in respect of a payment claim made against a party owing payment (the “respondent”). ¹⁵⁴⁴

¹⁵³³ *U.K. Construction Act*, s 108.

¹⁵³⁴ *New Zealand Act*, s 25-26.

¹⁵³⁵ *Ibid*, s 25(3).

¹⁵³⁶ *Ibid*, s 40.

¹⁵³⁷ *Ireland Act*, s 6(1).

¹⁵³⁸ *Singapore Act*, s 12.

¹⁵³⁹ *Malaysia Act*, s 7.

¹⁵⁴⁰ Hong Kong Consultation Document, at 33.

¹⁵⁴¹ *New South Wales Act*, ss 13(1) (defining “claimant”), 14(1) (defining “respondent”), and 17(1) (who may bring an adjudication application).

¹⁵⁴² *Victoria Act*, ss 14(1) (defining “claimant”), 15(1) (defining “respondent”), and 18(1) (who may bring an adjudication application).

¹⁵⁴³ *Queensland Act*, ss 17(1) (defining “claimant” and “respondent”) and 21(1) (who may bring an adjudication application).

APPENDIX C ADJUDICATION CONSIDERATIONS AND MECHANICS

Jurisdiction	Who can require adjudication?
Tasmania	A party who claims to be entitled to a progress payment (a “claimant”) may make an adjudication application in respect of a payment claim made against a party owing payment (the “respondent”). ¹⁵⁴⁵
ACT	A party who claims to be entitled to a progress payment (a “claimant”) may make an adjudication application in respect of a payment claim made against a party owing payment (the “respondent”). ¹⁵⁴⁶
Western Australia	Any party to a construction contract may apply to have the dispute adjudicated. ¹⁵⁴⁷
Northern Territory	Any party to a construction contract can unilaterally refer a “payment dispute” to adjudication. ¹⁵⁴⁸

¹⁵⁴⁴ *South Australia Act*, ss 13(1) (defining “claimant”), 14(1) (defining “respondent”), and 17(1) (who may bring an adjudication application).

¹⁵⁴⁵ *Tasmania Act*, ss 17(1) (defining “claimant”), 4 (defining “respondent”), and 21(1) (who may bring an adjudication application).

¹⁵⁴⁶ *Australian Capital Territory Act*, ss 15(1) (defining “claimant” and “respondent”) and 19(1) (who may bring an adjudication application).

¹⁵⁴⁷ *Western Australia Act*, s 25.

¹⁵⁴⁸ *Northern Territory Act*, s 27.

2. Who can adjudicate a dispute and how is the adjudicator nominated?

2.1 Who can adjudicate a dispute

Jurisdiction	Who can adjudicate a dispute?
U.K.	<p>Neither the <i>U.K. Construction Act</i> nor the <i>Scheme</i> specifically set out requirements for adjudicator eligibility.</p> <p>Some commentators have noted that adjudicators are typically those who understand the construction industry; understand how construction contracts work; and can apply that knowledge in producing decisions that parties can either accept as resolving their dispute or use as a basis for such resolution.¹⁵⁴⁹</p>
New Zealand	<p>In order to become an adjudicator, a person must meet the statutory eligibility criteria set out in section 34 of the <i>New Zealand Act</i>. Currently, the criteria are adjudication-specific, and require an adjudicator to:</p> <ul style="list-style-type: none"> • not be a party to the disputed construction contract; and • have no conflict of interest or disclose any conflict of interest and obtain consent from the participating parties.¹⁵⁵⁰ <p>Section 34(1) of the <i>New Zealand Act</i> permits additional criteria relating to qualifications, expertise and experience to be prescribed, but no additional criteria are provided in the current <i>New Zealand Regulation</i>.¹⁵⁵¹</p>
Ireland	<p>An adjudicator must be qualified as a barrister or solicitor; a fellow of the Chartered Institute of Arbitrators; a chartered member of the Institution of Engineers of Ireland; a registered professional “as defined in section 2 of the Building Control Act 2007”; or a person with equivalent qualifications “obtained in any other Member State of the European union”.¹⁵⁵²</p>
Singapore	<p>Adjudicators are required to:</p> <ul style="list-style-type: none"> • possess a degree or diploma in architecture, building studies, engineering, environmental studies, law, planning, real estate or urban design, or “such other qualification, as may recognized by the authorised nominating body”,¹⁵⁵³ • have at least 10 years’ work experience related to the “building and construction industry in Singapore”; and¹⁵⁵⁴ • complete the assessment and training course administered by the authorized nominating body.¹⁵⁵⁵ <p>In order to be appointed to a specific adjudication, the adjudicator must not be related to any party as an employee, director, partner, shareholder of the party or parent/subsidiary of the party; as a parent, spouse or sibling of the party; or as a person who has “assisted the party to prepare any document for, or has provided any advice to, the party in relation to the contract”.¹⁵⁵⁶</p>
Malaysia	<p>Adjudicators are required to:</p>

¹⁵⁴⁹ John L. Riches & Christopher Dancaster, *Construction Adjudication*, 2d ed (Blackwell Publishing, 2004) at 144 [Riches & Dancaster].

¹⁵⁵⁰ *New Zealand Act*, ss 34(2),(3).

¹⁵⁵¹ *New Zealand Act*, ss 34(1). *Construction Contracts Regulations 2003*, online: <<http://www.legislation.govt.nz/land/regulation/public/2003/0030/latest/DLM183471.html>>.

¹⁵⁵² *Ireland Act*, s 8(6)

¹⁵⁵³ *Building and Construction Industry Security of Payment Regulations*, s 11(1)(a) [Singapore Regulations] <https://www.bca.gov.sg/publications/SecurityOfPayment/others/sop_regulations.pdf>

¹⁵⁵⁴ Singapore Regulations, *supra* s 11(1)(a).

¹⁵⁵⁵ Singapore Regulations, *supra* at s 11(1)(b).

¹⁵⁵⁶ Singapore Regulations, *supra* at s 11(2).

APPENDIX C ADJUDICATION CONSIDERATIONS AND MECHANICS

Jurisdiction	Who can adjudicate a dispute?
	<ul style="list-style-type: none"> • have at least 7 years’ working experience in Malaysia’s building and construction industry or in any other fields recognized by the KLRCA; • hold a Certificate in Adjudication from a recognized institution such as the KLRCA; • not be an undischarged bankrupt; • not have been convicted of any criminal offence within or outside Malaysia.¹⁵⁵⁷ <p>An adjudicator must, at the time of appointment, declare in writing that they have no conflict of interest in respect of the appointment, that they will act “independently, impartially and in a timely manner and avoid incurring unnecessary expense”, that there are no circumstances “likely to give rise to justifiable doubts as to the adjudicator’s impartiality and independence”, and that they will comply with the principles of natural justice.¹⁵⁵⁸</p>
Hong Kong	Most adjudicators are expected to be experienced construction professionals such as surveyors, engineers and architects or construction lawyers. ¹⁵⁵⁹
<i>Australia</i>	
NSW	<p>An adjudicator must be a natural person, and have “such qualifications, expertise and experience as may be prescribed by the regulations”.¹⁵⁶⁰ A person may not act as an adjudicator to a particular contract if they are a party to the contract, or in any circumstances proscribed by regulation.¹⁵⁶¹ The New South Wales Regulations do not presently prescribe additional criteria.</p> <p>The <i>Authorized Nominating Authority Code of Practice</i> requires Authorized Nominating Authorities to determine the “necessary core competencies” of adjudicators; select, train and monitor adjudicators continuously; and to develop a “training, accreditation and pre-qualification scheme where necessary”.¹⁵⁶²</p>
Victoria	An adjudicator must be a natural person who meets any “qualifications, expertise and experience that may be prescribed”. ¹⁵⁶³ An adjudicator is not eligible to adjudicate a particular construction contract if they are a party to the contract, an employee of a party, or in other prescribed circumstances. ¹⁵⁶⁴
Queensland	<p>The Queensland Building and Construction Commission Adjudication Registry, consisting of the Adjudication Registrar and staff of the Registry, is responsible for receiving and determining applications for registration as an adjudicators.¹⁵⁶⁵ The Registrar may consider the following criteria in order to determine whether an application for registration should be granted:</p> <ul style="list-style-type: none"> • whether the applicant holds one of either adjudication qualification or another qualification that the Registrar considers to be equivalent;¹⁵⁶⁶ • whether the applicant held a previous or corresponding registration that was suspended or cancelled, or have been refused registration;¹⁵⁶⁷

¹⁵⁵⁷ *Construction Industry Payment and Adjudication Regulations 2014*, s 4 online: <<http://klrca.org/cipaa/#CONSTRUCTIONINDUSTRYPAYMENTANDADJUDICATIONREGULATIONS20143>> [Malaysia Regulations].

¹⁵⁵⁸ *Malaysia Act*, s 24(a)-(d).

¹⁵⁵⁹ Development Bureau, Hong Kong, “Proposed Security of Payment Legislation for the Construction Industry: Summary and Guide”, June 2015 at 5, online: <https://www.devb.gov.hk/filemanager/en/content_880/SOPL_Summary_and_Guide.pdf> [HK Summary and Guide].

¹⁵⁶⁰ *New South Wales Act*, s 18(1).

¹⁵⁶¹ *New South Wales Act*, s 18(2).

¹⁵⁶² NSW Fair Trading, “Authorized Nominating Authority Code of Practice”, April 8, 2015, online: <http://www.fairtrading.nsw.gov.au/biz_res/ftweb/pdfs/Tradespeople/Authorised_Nominating_Authority_Code_of_Conduct.pdf> at 7 (of PDF).

¹⁵⁶³ *Victoria Act*, s 19(1).

¹⁵⁶⁴ *Victoria Act*, s 19(2).

¹⁵⁶⁵ *Queensland Act*, s.58.

¹⁵⁶⁶ *Queensland Act*, s.60(1).

¹⁵⁶⁷ *Queensland Act*, s.60(2).

Jurisdiction	Who can adjudicate a dispute?
	<ul style="list-style-type: none"> • the “experience and qualifications” of the person,¹⁵⁶⁸ and • anything else “relevant” to the person’s ability to carry out the functions of an adjudicator.¹⁵⁶⁹ <p>The Registry has developed a qualification course and expects to have its first candidates in early to mid-2016.¹⁵⁷⁰ This represents a transfer of the functions formerly performed by authorized nominating authorities under the pre-December 2014 version of the <i>Queensland Act</i>.¹⁵⁷¹</p>
South Australia	<p>An adjudicator must be a “natural person” and have “such qualifications, expertise and experience” as may be prescribed by regulation.¹⁵⁷² In relation to a particular construction contract, a person is not eligible to be an adjudicator if they are a party to the contract; if the parties to the contract have nominated the person as an adjudicator; or under any other circumstances prescribed by regulation.¹⁵⁷³</p> <p>Under the <i>Building and Construction Industry Security of Payment Regulations 2011</i> adjudicators are required to:</p> <ul style="list-style-type: none"> • successfully complete a formal course of training of at least 2 days’ duration and pass a written examination; and • hold a university degree, diploma, or other qualification in architecture, building surveying, building, construction, law, project management or quantity surveying, or be eligible to be a member of certain listed professional bodies, or hold registration as a building work supervisor under the <i>Building Work Contractors Act 1995</i>.¹⁵⁷⁴
Tasmania	<p>The Security of Payments Official may authorize a nominating authority to select adjudicators.¹⁵⁷⁵ A person is eligible to serve as an adjudicator if they are a natural person with the “qualifications, expertise and experience” required of adjudicators by the Security of Payments Official.¹⁵⁷⁶</p> <p>An adjudicator is not eligible to make a decision on an adjudication application if they have a “material personal interest” in a “building or construction contract, dispute, or party to the contract, to which the application relates.”¹⁵⁷⁷ The adjudicator also may not be a party to the contract.¹⁵⁷⁸</p>
Australian Capital Territory	<p>In order to be appointed an adjudicator, a person must:</p> <ul style="list-style-type: none"> • be an individual; • have the “qualifications, expertise and experience” to perform adjudications; • successfully complete a relevant training course; • not be a party to the contract that is the subject of the adjudication;

¹⁵⁶⁸ *Queensland Act*, s.60(2)(c).

¹⁵⁶⁹ *Queensland Act*, s.60(2)(e).

¹⁵⁷⁰ Queensland Building and Construction Commission, “Apply to become an adjudicator” webpage. <<https://www.qbcc.qld.gov.au/get-help-getting-paid-bcipa/apply-become-adjudicator>>.

¹⁵⁷¹ QTenders, Queensland Government, “Adjudication Certificate Course Provider”, July 1, 2015, online: <<https://www.hpw.qld.gov.au/qtenders/tender/display/tender-details.do?id=15422&action=display-tender-details&returnUrl=%2Ftender%2Fsearch%2Ftender-search.do%3Faction%3Dadvanced-tender-search-closed-tender%26amp%3BorderBy%3DcloseDate%26amp%3BCSRFNONCE%3D0D8CB69EFE99E4CCA965A40E20C53985>>.

¹⁵⁷² *South Australia Act*, s 18(1).

¹⁵⁷³ *South Australia Act*, s 18(2).

¹⁵⁷⁴ *South Australia Building and Construction Industry Security of Payment Regulations 2011*, s 6(a)-(b).

¹⁵⁷⁵ *Tasmania Act*, s 31.

¹⁵⁷⁶ *Tasmania Act*, s 22.

¹⁵⁷⁷ *Tasmania Act*, s 35(1).

¹⁵⁷⁸ *Tasmania Act*, s 22(3).

Jurisdiction	Who can adjudicate a dispute?
	<ul style="list-style-type: none"> not be employed by or represent a building and construction industry organization; any other circumstances prescribed by regulation. Presently, no Regulations have been promulgated.¹⁵⁷⁹
Western Australia	<p>To become registered adjudicators, applicants must:</p> <ul style="list-style-type: none"> have a university or other tertiary degree in architecture, engineering, quantity or building surveying, building, construction, project management, or law; be a builder registered under the <i>Builders' Registration Act 1939</i> or be eligible for membership in one of the following professional institutions: The Royal Australian Institute of Architects, Institution of Engineers Australia, Australian Institute of Quantity Surveyors, Australian Institute of Building Surveyors, The Australian Institute of Building, The Institute of Arbitrators and Mediators of Australia, Australian Institute of Project Management; have at least five years' experience in the administration of construction contracts or dispute resolution relating to construction contracts; and have successfully completed a training course which qualifies the person for "the performance of the functions of an adjudicator under the <i>Western Australia Act</i>".¹⁵⁸⁰
Northern Territory	<p>In order to become a registered adjudicator, a person must:</p> <ul style="list-style-type: none"> not be disqualified (e.g. for bankruptcy, or other unsuitability); hold a tertiary degree (e.g. from a university) in architecture, building, building surveying, construction, engineering, law, project management, quantity surveying, or equivalent, or be eligible for membership in a construction industry-related regulatory body (including the Law Society Northern Territory), or be registered as a building contractor; have at least five years' experience in administering or dispute resolution relating to construction contracts; and have successfully completed a training course.¹⁵⁸¹

2.2 How are they nominated?

Jurisdiction	How are they nominated?
U.K.	<p>An adjudicator can be selected as follows:</p> <ol style="list-style-type: none"> the parties can agree on a person to act as an adjudicator (i.e. during the project, prior to a dispute); the appointment can be made by prior agreement (i.e. naming the adjudicator(s) in the construction contract; the appointment can be made when the dispute occurs by agreement; or a party may appoint an adjudicator unilaterally by referring the dispute to an adjudicator nominated by an Adjudicator Nominating Body ("ANB") of their choice.¹⁵⁸² <p>The nomination process for an adjudicator under the <i>Scheme</i> is as follows (subject to any agreement between the parties):¹⁵⁸³</p> <ol style="list-style-type: none"> Following the giving of the notice of adjudication, the referring party shall request the person

¹⁵⁷⁹ *Australian Capital Territory Act*, s 20(1)-(2).

¹⁵⁸⁰ Construction Contracts Regulations 2004, s 9(1)-(4) online: <http://www.slp.wa.gov.au/legislation/statutes.nsf/main_mrtitle_188_subsidary.html> [Western Australia Regulations].

¹⁵⁸¹ *Construction Contracts (Security of Payments) Regulations*, s 11 online: <<http://www.nt.gov.au/justice/policycoord/construction>> [Northern Territory Regulations].

¹⁵⁸² Riches & Dancaster, *supra* at 146.

¹⁵⁸³ *The Scheme for Construction Contracts (England and Wales) Regulations 1998*, SI 1998/649 as amended by *The Scheme for Construction Contracts (England and Wales) Regulations 1998 (Amendment) (England) Regulations 2011*, s 2(1) [Scheme].

Jurisdiction	How are they nominated?
	<p>(if any) specified in the contract to act as adjudicator.¹⁵⁸⁴</p> <ul style="list-style-type: none"> • Within 2 days of receiving the request, the person named as adjudicator must indicate whether or not they are able and willing to act.¹⁵⁸⁵ <p>b) If the person named as adjudicator in the contract is not able or willing to act or does not respond within the timeframe allotted, the referring party may request another person (if any) specified in the contract, or request the nominating body (if any) referred to in the contract to select an adjudicator, or request any other adjudicator nominating body to select a person to act.¹⁵⁸⁶</p> <ul style="list-style-type: none"> • Within 2 days, the person requested to act as adjudicator must indicate whether or not he or she is willing to act.¹⁵⁸⁷ <p>c) If no person is named in the contract, or the person named has indicated that they will not act, the referring party must refer the dispute to the nominating body specified in the contract, if any,¹⁵⁸⁸ or must request an adjudicator from an adjudicator nominating body of their choice.¹⁵⁸⁹</p> <ul style="list-style-type: none"> • Within 2 days, the person requested to act as adjudicator must indicate whether or not he or she is willing to act.¹⁵⁹⁰ • Within 5 days of receiving an appointment request, the nominating body must communicate the selection of an adjudicator to the referring party.¹⁵⁹¹ <p>d) Where a nominating body fails to comply with the timelines above, the referring party may agree with the other party to request a specified person to act as adjudicator, or request any other adjudicator nominating body to act as adjudicator.¹⁵⁹²</p> <ul style="list-style-type: none"> • Within 2 days, the person requested to act as adjudicator must indicate whether or not he or she is willing to act.
New Zealand	<p>An adjudicator can be selected as follows:</p> <ul style="list-style-type: none"> a) by consent of both parties; or b) by allocation by an authorized nominated authority.¹⁵⁹³ <p>The nomination process for an adjudicator is as follows:</p> <ul style="list-style-type: none"> a) As soon as practicable after the notice of adjudication is served, the claimant must request the person (if any) chosen by agreement between the parties to act as adjudicator.¹⁵⁹⁴ <ul style="list-style-type: none"> • Within 2 working days of receiving the request, a person requested to act as adjudicator must indicate whether he or she is able and willing to act.¹⁵⁹⁵ b) If the person named in the contract has indicated that they are unable or unwilling to act, as soon as practicable after the notice of adjudication is served, request any other person chosen

¹⁵⁸⁴ Scheme, s 2(1)(a).

¹⁵⁸⁵ Scheme, s 2(2).

¹⁵⁸⁶ Scheme, s 6(1).

¹⁵⁸⁷ Scheme, s 6(2).

¹⁵⁸⁸ Scheme, s 2(1)(b).

¹⁵⁸⁹ Scheme, s 2(1)(c).

¹⁵⁹⁰ Scheme, s 2(2).

¹⁵⁹¹ Scheme, s 5(1).

¹⁵⁹² Scheme, s 5(2).

¹⁵⁹³ *New Zealand Act*, s 33.

¹⁵⁹⁴ *Ibid*, s 33(1)(a) and 33(2)(a).

¹⁵⁹⁵ *Ibid*, s 35(1).

Jurisdiction	How are they nominated?
	<p>by agreement between the parties to act as adjudicator.¹⁵⁹⁶</p> <ul style="list-style-type: none"> • Within 2 working days of receiving the request, a person requested to act as adjudicator must indicate whether he or she is able and willing to act.¹⁵⁹⁷ <p>c) If no person is agreed upon, within 5 working days after the notice of adjudication has been served or any further period that the parties may agree, the claimant must request a nominating body chosen by agreement between the parties to select a person to act as adjudicator.¹⁵⁹⁸</p> <ul style="list-style-type: none"> • The nominating body has a duty to select a person and request that person to act as adjudicator as soon as practicable.¹⁵⁹⁹ • Within 2 working days of receiving the request, a person requested to act as adjudicator must indicate whether he or she is able and willing to act.¹⁶⁰⁰ <p>d) If no nominating body is chosen by agreement, within 2 to 5 working days after the notice of adjudication has been served or any further period that the parties may agree, the claimant must request an authorized nominating authority of their choice to select a person to act.¹⁶⁰¹</p> <ul style="list-style-type: none"> • The nominating authority has a duty to select a person and request that person to act as adjudicator as soon as practicable.¹⁶⁰² • Within 2 working days of receiving the request, a person requested to act as adjudicator must indicate whether he or she is able and willing to act.¹⁶⁰³ <p>An agreement about the choice of an adjudicator or a nominating body or authorized nominating authority is not binding on the parties if that agreement was made before the dispute between them arose.¹⁶⁰⁴</p>
Ireland	<p>An adjudicator can be selected as follows:</p> <ul style="list-style-type: none"> a) the parties may agree to appoint an adjudicator of their choice (who may accept or decline the appointment); or b) the parties may seek an adjudicator from the Construction Contracts Adjudication Panel appointed by the Minister (i.e. the default option).¹⁶⁰⁵ <p>The nomination process for an adjudicator is as follows:</p> <ul style="list-style-type: none"> a) Within 5 days beginning on the day on which notice of intention to refer the payment dispute for adjudication is served, the parties may agree to appoint an adjudicator of their choice or from the panel appointed by the Minister.¹⁶⁰⁶ <ul style="list-style-type: none"> • A person requested to accept an appointment following agreement of the parties shall respond to accept or decline within 2 days.¹⁶⁰⁷ b) Failing agreement, the adjudicator shall be appointed by the chair of the panel selected

¹⁵⁹⁶ *Ibid*, s 33(1)(b) and 33(2)(a).

¹⁵⁹⁷ *Ibid*, s 35(1).

¹⁵⁹⁸ *Ibid*, s 33(1)(c) and 33(2)(b).

¹⁵⁹⁹ *Ibid*, s 33(4).

¹⁶⁰⁰ *Ibid*, s 35(1).

¹⁶⁰¹ *Ibid*, s 33(1)(d) and 33(2)(c).

¹⁶⁰² *Ibid*, s 33(4).

¹⁶⁰³ *Ibid*, s 35(1).

¹⁶⁰⁴ *Ibid*, s 33(3).

¹⁶⁰⁵ *Ireland Act*, s 6(3)-(4).

¹⁶⁰⁶ *Ibid*, s 6(3).

¹⁶⁰⁷ *Ireland Draft Code*, s 13.

Jurisdiction	How are they nominated?
	<p>by the Minister.¹⁶⁰⁸</p> <ul style="list-style-type: none"> • The chair of the Minister’s panel must appoint an adjudicator and notify the parties within 7 days of receipt of a request, but no sooner than 5 days after the date of service of the notice of adjudication.¹⁶⁰⁹
Singapore	<p>An adjudicator will be selected by the Singapore Mediation Centre (SMC), presently the only authorized nominating body authorized by the Minister to appoint adjudicators and undertake related functions.¹⁶¹⁰</p> <p>The nomination process for an adjudicator is as follows:</p> <ol style="list-style-type: none"> a) Within 7 days after receipt of an adjudication application from the claimant, the authorized nominating body must serve a notice in writing confirming the appointment of an adjudicator.¹⁶¹¹ <ul style="list-style-type: none"> • Within this time, the authorised nominating body must refer the adjudication application to a person who is on the register of adjudicators and whom the authorised nominating body considers to be appropriate for appointment.¹⁶¹² • Within this time, such person(s) may agree or decline to determine the adjudication.¹⁶¹³
Malaysia	<p>An adjudicator can be selected as follows:</p> <ol style="list-style-type: none"> a) the parties may agree to appoint an adjudicator of their choice (who may accept or decline the appointment); or b) the parties may seek an adjudicator from the KLRCA.¹⁶¹⁴ <p>The nomination process for an adjudicator is as follows:</p> <ol style="list-style-type: none"> a) An adjudicator may be appointed by agreement of the parties in dispute within 10 working days from the service of the notice of adjudication by the claimant.¹⁶¹⁵ <ul style="list-style-type: none"> • Within 10 working days of being notified, the adjudicator shall propose and negotiate his terms of appointment and indicate acceptance.¹⁶¹⁶ • If the adjudicator rejects his appointment or fails to indicate acceptance within the period specified, the parties may proceed to appoint another adjudicator by agreement or by request to the Director of the KLRCA, and in the manner provided for under the legislation. b) An adjudicator may be appointed by the Director of the KLRCA upon the request of both parties or either party, if there is no agreement of the parties to appoint an adjudicator within 10 working days from service of the notice.¹⁶¹⁷ <ul style="list-style-type: none"> • Within 5 working days of receiving a request, the Director of the KLRCA shall appoint an adjudicator and notify the parties and adjudicator.¹⁶¹⁸ • Within 10 working days of being notified, the adjudicator shall propose and

¹⁶⁰⁸ Ireland Act, s 6(4).

¹⁶⁰⁹ Ireland Draft Code, s 14.

¹⁶¹⁰ Singapore Act, s 14; Pickavance at 508, s 26.4.1.

¹⁶¹¹ Ibid, s 14(3).

¹⁶¹² Ibid, s 14(1).

¹⁶¹³ Ibid, s 14(2).

¹⁶¹⁴ Malaysia Act, ss 21, 23.

¹⁶¹⁵ Ibid, s 21(a).

¹⁶¹⁶ Ibid, s 22(2).

¹⁶¹⁷ Ibid, s 21(b).

¹⁶¹⁸ Ibid, s 23(1).

Jurisdiction	How are they nominated?
	<p>negotiate his or her terms of appointment and indicate acceptance.¹⁶¹⁹</p> <ul style="list-style-type: none"> • If the adjudicator rejects his or her appointment or fails to indicate acceptance within the period specified, the parties or the Director of the KLRCA may appoint another adjudicator in the manner provided for under the legislation.¹⁶²⁰
Hong Kong	<p>An adjudicator may be agreed upon by the parties to the dispute, or may be appointed by an agreed-upon “adjudicator nominating body”. The HKIAC will be the default ANB where no adjudicator or nominating body is agreed upon.¹⁶²¹</p> <p>The nomination process for an adjudicator is expected to be as follows:</p> <ol style="list-style-type: none"> a) Within five working days of commencement of the adjudication, and regardless of the method of appointment, the adjudicator must be appointed.¹⁶²²
<i>Australia</i>	
NSW	<p>An adjudicator will be selected by an authorized nominating authority chosen by the claimant.¹⁶²³</p> <p>The nomination process for an adjudicator is as follows:</p> <ol style="list-style-type: none"> a) An authorized nominating authority has a duty to refer an application to an adjudicator as soon as practicable.¹⁶²⁴ b) An adjudicator may accept an adjudication application by causing notice of the acceptance to be served on the parties, but no required timeframe for doing so is specified by the legislation or regulations.¹⁶²⁵
Victoria	<p>An adjudicator will be selected by an authorized nominating authority chosen by the claimant,¹⁶²⁶ and if the construction contract to which the payment claim relates lists 3 or more authorized nominating authorities, the application must be made to one of the listed authorities chosen by the claimant.¹⁶²⁷</p> <p>The nomination process for an adjudicator is as follows:</p> <ol style="list-style-type: none"> a) An authorized nominating authority has a duty to refer an application to an adjudicator as soon as practicable.¹⁶²⁸ b) An adjudicator may accept an adjudication application by causing notice of the acceptance to be served on the parties, but no required timeframe for doing so is specified by the legislation or regulations.¹⁶²⁹ c) Within 10 business days of acceptance, an adjudicator must give a copy of a notice of acceptance to the authorized nominating authority.¹⁶³⁰
Queensland	<p>A claimant must make an adjudication application to the Queensland Building and Construction Commission Registrar, who will appoint an adjudicator.¹⁶³¹</p>

¹⁶¹⁹ *Ibid*, s 23(2).

¹⁶²⁰ *Ibid*, s 23(3).

¹⁶²¹ Hong Kong Consultation Document at 36.

¹⁶²² *Ibid* at 36.

¹⁶²³ *New South Wales Act*, s 17(3)(b).

¹⁶²⁴ *Ibid*, s 17(6).

¹⁶²⁵ *Ibid*, s 19(1).

¹⁶²⁶ *Victoria Act*, s 18(3)(b).

¹⁶²⁷ *Ibid*, s 18(4).

¹⁶²⁸ *Ibid*, s 18(7).

¹⁶²⁹ *Ibid*, s 20(1).

¹⁶³⁰ *Ibid*, s 20(4).

¹⁶³¹ Queensland Building and Construction Commission, “BCIPA: Timeframes for Lodging an Adjudication Application”, online: <http://www.qbcc.qld.gov.au/sites/default/files/BCIPA_Timeframes_for_lodging_an_adjudication_application.pdf>.

Jurisdiction	How are they nominated?
	<p>The nomination process for an adjudicator is as follows:</p> <ul style="list-style-type: none"> a) As soon as practicable, the registrar must refer the application to a person eligible to be an adjudicator.¹⁶³² b) An adjudicator may accept an adjudication application referred to him or her by serving notice of acceptance on the parties, but no required timeframe for doing so is specified by the legislation or regulations.¹⁶³³
South Australia	<p>An adjudicator will be selected by an authorized nominating authority chosen by the claimant.¹⁶³⁴</p> <p>The nomination process for an adjudicator is as follows:</p> <ul style="list-style-type: none"> a) An authorized nominating authority has a duty to refer an application to an adjudicator as soon as practicable.¹⁶³⁵ b) An adjudicator may accept an adjudication application by causing notice of the acceptance to be served on the parties, but no required timeframe for doing so is specified by the legislation or regulations.¹⁶³⁶
Tasmania	<p>An adjudicator will be selected by a nominating authority chosen by the claimant.¹⁶³⁷</p> <p>The nomination process for an adjudicator is as follows:</p> <ul style="list-style-type: none"> a) A nominating authority has a duty to refer an application to a person who is a qualified adjudicator as soon as practicable.¹⁶³⁸ b) An adjudicator may accept an adjudication application by causing notice of the acceptance to be served on the parties, but no required timeframe for doing so is specified by the legislation.¹⁶³⁹
Australian Capital Territory	<p>An adjudicator will be selected by an authorized nominating authority chosen by the claimant.¹⁶⁴⁰</p> <p>The nomination process for an adjudicator is as follows:</p> <ul style="list-style-type: none"> a) The authorized nominating authority has a duty to refer an application to an eligible adjudicator as soon as practicable.¹⁶⁴¹ b) An adjudicator may accept an adjudication application by giving notice of the acceptance to be served on the parties, but no required timeframe for doing so is specified by the legislation.¹⁶⁴²
Western Australia	<p>An adjudicator can be selected as follows:</p> <ul style="list-style-type: none"> a) the parties may agree to appoint a registered adjudicator of their choice (who may accept or decline the appointment); or b) the parties may agree on a prescribed appointer who will appoint the adjudicator; or c) if the parties have not agreed on an adjudicator or prescribed appointer, the claimant may choose a prescribed appointer;¹⁶⁴³ or

¹⁶³² Queensland Act, s 21(6).

¹⁶³³ *Ibid*, s 23(1).

¹⁶³⁴ *South Australia Act*, s 17(3)(b).

¹⁶³⁵ *Ibid*, s 17(6).

¹⁶³⁶ *Ibid*, s 19(1).

¹⁶³⁷ *Tasmania Act*, s 21(1).

¹⁶³⁸ *Ibid*, s 22(1).

¹⁶³⁹ *Ibid*, s 22(4).

¹⁶⁴⁰ *Australian Capital Territory Act*, s 19(1).

¹⁶⁴¹ *Ibid*, s 19(4).

¹⁶⁴² *Ibid*, s 21(1).

¹⁶⁴³ *Western Australia Act*, s 26(1)(c).

Jurisdiction	How are they nominated?
	<p>d) failing the making of an appointment by a prescribed appointer, the Building Commissioner will appoint the adjudicator.¹⁶⁴⁴</p> <p>The nomination process for an adjudicator is as follows:</p> <p>a) Within 5 days after being served with an application for an adjudication, a prescribed appointer must:</p> <ul style="list-style-type: none"> • appoint a registered adjudicator to adjudicate the payment dispute concerned; • send the application and any response received to the adjudicator; and • notify the parties and the Building Commissioner.¹⁶⁴⁵ <p>b) If a prescribed appointer does not make such an appointment, the Building Commissioner may appoint a registered adjudicator (although the required timeframe is not specified by the legislation or regulations),¹⁶⁴⁶ and must:</p> <ul style="list-style-type: none"> • notify the prescribed appointer in writing and require the appointer to serve the application and any response received by it on the appointed adjudicator; and • notify the parties of the appointment.¹⁶⁴⁷
Northern Territory	<p>An adjudicator can be selected as follows:</p> <p>a) the parties may agree to appoint a registered adjudicator of their choice (who may accept or decline the appointment); or</p> <p>b) the parties may agree on a prescribed appointer who will appoint the adjudicator; or</p> <p>c) if the parties have not agreed on an adjudicator or prescribed appointer, the claimant may choose a prescribed appointer to appoint the adjudicator;¹⁶⁴⁸ or</p> <p>d) failing the making of an appointment by a prescribed appointer, the Construction Contracts Registrar will appoint the adjudicator.¹⁶⁴⁹</p> <p>The nomination process for an adjudicator is as follows:</p> <p>a) In the absence of an agreed appointment, within 5 working days of being served with an application for adjudication, a prescribed appointer must:</p> <ul style="list-style-type: none"> • appoint a registered adjudicator to adjudicate the dispute; • send the application and any response received to the adjudicator; and • give notice to the parties and Registrar.¹⁶⁵⁰ <p>b) If a prescribed appointer does not make such an appointment, the Registrar may appoint a registered adjudicator,¹⁶⁵¹ and must:</p> <ul style="list-style-type: none"> • give notice of such appointment to the prescribed appointer and require the appointer to serve the application and any response received on the adjudicator; and • give notice of the appointment to the parties.¹⁶⁵²

3. What types of disputes can be adjudicated?

Jurisdiction	What types of disputes can be adjudicated?	What is excluded?
U.K.	A dispute arising under the construction contract may be referred to adjudication. For this purpose, a “dispute”	Excluded from the definition of “construction operations” are

¹⁶⁴⁴ *Ibid*, s 28(2).

¹⁶⁴⁵ *Ibid*, s 28(1)(a) to (d).

¹⁶⁴⁶ *Ibid*, s 28(2).

¹⁶⁴⁷ *Ibid*, s 28(3).

¹⁶⁴⁸ *Northern Territory Act*, s 28(1)(c).

¹⁶⁴⁹ *Ibid*, s 30(2).

¹⁶⁵⁰ *Ibid*, s 30(1).

¹⁶⁵¹ *Ibid*, s 30(2).

¹⁶⁵² *Ibid*, s 30(3).

Jurisdiction	What types of disputes can be adjudicated?	What is excluded?
	<p>includes any difference.¹⁶⁵³</p> <p>A “construction contract” means an agreement for the carrying out of, arranging for, or providing labour for construction operations, and include contracts for architectural or engineering work, surveying work, design, landscaping or decoration work.¹⁶⁵⁴</p> <p>“Construction operations” are operations of a variety of descriptions described under the <i>U.K. Construction Act</i> including, for example: construction, alternation, repair, maintenance, extension, demolition or dismantling of buildings or structures or works forming part of land; installation of fittings; cleaning carried out in the course of construction; or operations which form an integral part of, or are preparatory to, or are for rendering complete, construction operations; tunnelling, boring, laying of foundations, access work; and painting or decorating internal or external surfaces of any building or structure.¹⁶⁵⁵</p>	<p>operations such as: drilling for oil/natural gas; extraction; assembly, installation or demolition of plant or machinery, or erection or demolition of steelwork for the purposes of supporting or providing access to plant or machinery on certain sites; manufacture or delivery to certain sites; or the making, installation and repair of artistic works.¹⁶⁵⁶</p> <p>Contracts of employment and contracts with residential occupiers are excluded.¹⁶⁵⁷</p> <p>Adjudication does not apply to certain contracts excluded by order of the Secretary of State including, for example, private finance initiatives and insurance contracts related to construction projects are excluded by Order.¹⁶⁵⁸</p>
New Zealand	<p>A “dispute” under a construction contract may be referred to adjudication.¹⁶⁵⁹ “Dispute” is defined as “a dispute or difference that arises under a construction contract”.¹⁶⁶⁰</p> <p>A “construction contract” is defined as a “contract for carrying out construction work”.¹⁶⁶¹</p> <p>“Construction work” encompasses a variety of work defined under the <i>New Zealand Act</i> including, for example: include installation, alteration, maintenance, removal, repair, restoration, demolition, or dismantling work on buildings and structures (including temporary structures) and works; installation of fittings within a building; any operation that forms an integral part of, or is preparatory to or is for rendering complete the previously mentioned construction work; as well as “related services”.¹⁶⁶²</p>	<p>The <i>New Zealand Act</i> excludes certain arrangements that might otherwise qualify as “construction contracts”, including:</p> <ul style="list-style-type: none"> • work involved in drilling for or extracting oil or natural gas or minerals;¹⁶⁶³ • contracts for construction work between an employee and employer/owner;¹⁶⁶⁴ • contracts under which a party undertakes to carry out construction work as a condition of a loan agreement, or where a party undertakes to lend or repay money, guarantee money, or provide an indemnity for construction work.¹⁶⁶⁵

¹⁶⁵³ *U.K. Construction Act* at s 108(1).

¹⁶⁵⁴ *U.K. Construction Act* at s 104(1)-(2).

¹⁶⁵⁵ *U.K. Construction Act*, s 105(1).

¹⁶⁵⁶ *U.K. Construction Act*, s 105(2).

¹⁶⁵⁷ *U.K. Construction Act*, s 104(3), 106.

¹⁶⁵⁸ *Construction Contracts (England and Wales) Exclusion Order 1998* (SI 1998/648) as modified by SI 2004/696, at s 4, 5.

¹⁶⁵⁹ *New Zealand Act*, s 25(1).

¹⁶⁶⁰ *New Zealand Act*, s 5.

¹⁶⁶¹ *New Zealand Act*, s 5.

¹⁶⁶² *New Zealand Act*, s 6.

¹⁶⁶³ *New Zealand Act*, s 6(2).

¹⁶⁶⁴ *New Zealand Act*, s 11(a).

¹⁶⁶⁵ *New Zealand Act*, s 11(b).

Jurisdiction	What types of disputes can be adjudicated?	What is excluded?
Ireland	<p>A dispute relating to payment arising under a construction contract may be referred to adjudication.¹⁶⁶⁶</p> <p>“Construction contract” is defined in the <i>Ireland Act</i> as an agreement, whether or not in writing, between parties for one or more of the following: carrying out, arranging or providing labour for construction operations.¹⁶⁶⁷ References to a construction contract include agreements ancillary to the construction contract, such as agreements for architectural, surveying, archaeological, engineering, project management or design work.¹⁶⁶⁸</p> <p>“Construction operations” are defined under the <i>Ireland Act</i> and include, for example, “any activity associated with construction”, including “construction, alteration, repair, maintenance, extension, demolition or dismantling of” buildings, structures or works forming part of land; installation of fittings such as water supply, heating, lighting, security or communication systems; cleaning associated with construction work; operations “which form an integral part of, or are preparatory to, or are for rendering complete” previously described activities; painting or decorating building or structure surfaces; and making, installing or repairing artistic works attached to real property.¹⁶⁶⁹</p>	<p>The <i>Ireland Act</i> does not apply to contracts that would otherwise be construction contracts if:</p> <ul style="list-style-type: none"> • the contract is for a value of less than €10,000; • the contract relates only to a “dwelling” smaller than 200 square metres and intended to be occupied as a residence by one of the contracting parties; • a contract of employment; • a contract between a state authority and its partner in a public-private-partnership arrangement;¹⁶⁷⁰ • contracts for the manufacture or delivery of components, equipment, materials, plant or machinery unless the contract also provides for their installation.¹⁶⁷¹
Singapore	<p>Adjudication applications may be made for any unfulfilled “payment claims” arising from “construction contracts” and “supply contracts”.¹⁶⁷²</p> <p>Payment claims may be made for “progress payments” in the contract or under the <i>Singapore Act</i>. A “progress payment” is defined by the <i>Singapore Act</i> to include single or one-off payments” or payments “based on an event or date”,¹⁶⁷³ but the Building and Construction Authority notes that payment claims may be made for payments that are due at intervals, and final payments covering work done, services provided, provision of supply, “authorized variation work” or interest on overdue payments.¹⁶⁷⁴</p> <p>A “construction contract” is defined under the <i>Singapore Act</i> as an agreement under which “(a) one party undertakes to carry out construction work, whether including the supply of goods or services or otherwise, for one or more other parties; or (b) one party undertakes to supply services to one or more other parties”.¹⁶⁷⁵</p>	<p>The <i>Singapore Act</i> does not apply in the following circumstances:</p> <ul style="list-style-type: none"> • construction work on residential properties not requiring the approval of the Commissioner of Building Control under the <i>Building Control Act</i>;¹⁶⁷⁷ • employment disputes involving construction work or supply;¹⁶⁷⁸ • any work done or supply of goods or services for work done outside Singapore;¹⁶⁷⁹ • or contracts excluded by Regulation.¹⁶⁸⁰

¹⁶⁶⁶ *Ireland Act*, s 6(1).

¹⁶⁶⁷ *Ireland Act*, s 1(1).

¹⁶⁶⁸ *Ireland Act*, s 1(2).

¹⁶⁶⁹ *Ireland Act*, s 1(1).

¹⁶⁷⁰ *Ireland Act*, s 2(1)-(3).

¹⁶⁷¹ *Ireland Act*, s 1(3)-(4).

¹⁶⁷² *Singapore Act*, s 12.

¹⁶⁷³ *Singapore Act*, s 2.

¹⁶⁷⁴ Building and Construction Authority, “Building and Construction Industry Security of Payment Act 2004 Information Kit”, 2005 at 4, online: <http://www.bca.gov.sg/SecurityPayment/others/SOP_infokit.pdf> [Singapore Information Kit].

¹⁶⁷⁵ *Singapore Act*, s 2.

Jurisdiction	What types of disputes can be adjudicated?	What is excluded?
	<p>A “supply contract” is defined under the <i>Singapore Act</i> as an agreement under which “(a) one party undertakes to supply goods to any other party who is engaged in the business of carrying out construction work or who causes to be carried out construction work; (b) the supply is for the purpose of construction work carried out or caused to be carried out by the second-mentioned party; and (c) the first-mentioned party is not required to assemble, construct or install the goods at or on the construction site”.¹⁶⁷⁶</p>	
Malaysia	<p>A “dispute arising from a payment claim” pursuant to a construction contract may be referred to adjudication.¹⁶⁸¹</p> <p>A “construction contract” is defined as “a construction work contract or construction consultancy contract”.¹⁶⁸²</p> <p>A “construction work contract” is a contract to carry out construction work, which includes the “construction, extension, installation, repair, maintenance, renewal, removal, renovation, alteration, dismantling, or demolition of” any building or structure above or below ground level, any civil works, drainage or irrigation works, water, gas, oil, petrochemical or telecommunication work, and any works which form “an integral part of, or are preparatory to or temporary” for the aforementioned works. Procurement of necessary construction, materials, equipment or workers for the aforementioned works is also covered by the definition.¹⁶⁸³</p> <p>A “construction consultancy contract” means a contract to carry out “consultancy services in relation to construction work”, including engineering, surveying, decoration, landscaping, and project management services.¹⁶⁸⁴</p>	<p>Construction contracts “entered into by a natural person” for any construction work relating to a building less than 4 storeys high, and “wholly intended” for the contracting party’s occupation are excluded (i.e. a residential contract).¹⁶⁸⁵</p>
Hong Kong	<p>Both parties to a construction contract will be entitled to refer a dispute to adjudication but limited to disputes concerning:</p> <ul style="list-style-type: none"> ○ the value of work, services, materials and plant supplied and claimed in a Payment Claim; and/or ○ other money claims made in accordance with any provision of the contract and claimed in a Payment Claim; and/or ○ set offs and deductions against amounts due under Payment Claims; and/or ○ the time for performance or entitlement to extension of the time for performance of work or 	<p>Generally, disputes outside of the scope of “payment” or “extension of time” will not be subject matters that can be considered through adjudication.¹⁶⁹²</p>

¹⁶⁷⁷ *Singapore Act*, s 4(2)(a).

¹⁶⁷⁸ *Singapore Act*, s 4(2)(b)(i).

¹⁶⁷⁹ *Singapore Act*, s 4(2)(b)(ii).

¹⁶⁸⁰ *Singapore Act*, s 4(2)(c).

¹⁶⁷⁶ *Singapore Act*, s 2.

¹⁶⁸¹ *Malaysia Act*, s 7.

¹⁶⁸² *Malaysia Act*, s 4.

¹⁶⁸³ *Malaysia Act*, s 4.

¹⁶⁸⁴ *Malaysia Act*, s 4.

¹⁶⁸⁵ *Malaysia Act*, s 3.

Jurisdiction	What types of disputes can be adjudicated?	What is excluded?
	<p>services or supply of materials or plant under the contract.¹⁶⁸⁶</p> <p>The proposed legislation is expected to apply to written or oral “construction contracts”, which include contracts for construction work and related service (e.g. engineering and architectural design services), material or equipment supply contracts.¹⁶⁸⁷</p> <p>Coverage for projects involving public entities will be more extensive than for those involving private entities.</p> <ul style="list-style-type: none"> • Public Sector Coverage - All construction contracts, consultancy appointments, supply contracts and sub-contracts for Government works and works procured by specified statutory/public bodies or corporations will be covered regardless of value.¹⁶⁸⁸ Relevant works will include virtually all construction activities and maintenance, installation of fixtures and fittings, repair and renovation.¹⁶⁸⁹ • Private Sector Coverage – Only construction contracts, consultancy appointments, supply contracts and sub-contracts relating to a “new building” as defined by the <i>Building Ordinance (Cap 123)</i>¹⁶⁹⁰ will be covered, where the main contract for the new building has an original value in excess of HK\$5,000,000 or consultancy and supply-only contracts in excess of HK\$500,000 for consultancy and supply-only contracts). When the legislation applies to the main contract then it will also apply to all sub-contracts. Where the legislation does not apply to the main contract, it will not apply to the sub-contracts.¹⁶⁹¹ 	
<i>Australia</i>		
NSW	<p>An adjudication application may be made in respect of a payment claim made against a party owing payment in connection with a construction contract who has failed to provide the payment sought, or a payment schedule for the full amount sought, in accordance with the <i>New South Wales Act</i> timelines.¹⁶⁹³</p> <p>A “construction contract” is defined as a “contract or other arrangement” under which “one party undertakes to carry</p>	<p>There are a number of excluded arrangements that might otherwise qualify as construction contracts, including:</p> <ul style="list-style-type: none"> • construction contracts forming part of a loan agreement, contract of guarantee, or contract of insurance; • construction contracts for

¹⁶⁸⁶ Hong Kong Consultation Document at 33.

¹⁶⁸⁷ Hong Kong Consultation Document at 44.

¹⁶⁸⁸ HK Summary and Guide at 2.

¹⁶⁸⁹ HK Summary and Guide at 2.

¹⁶⁹⁰ *Building Ordinance (Cap 123)* defines a “new building” as “any building hereafter erected and also any existing building of which not less than one half measured by volume is rebuilt or which is altered to such an extent as to necessitate the reconstruction of not less than one half of the superficial area of the main walls”.

¹⁶⁹¹ HK Summary and Guide at 2.

¹⁶⁹³ *New South Wales Act*, s 13(1) (defining “claimant”), s 14(1) (defining “respondent”), and 17(1) (who may bring an adjudication application).

Jurisdiction	What types of disputes can be adjudicated?	What is excluded?
	<p>out construction work, or to supply related goods and services, for another party”.¹⁶⁹⁴</p> <p>“Construction work” includes:</p> <ul style="list-style-type: none"> • installation, alteration, maintenance, repair, restoration, extension, demolition, or removal work done on buildings, structures (including temporary structures) and infrastructure such as roads, drainage systems, power lines, docks and harbours;¹⁶⁹⁵ • installation of fittings in any building, structure or works, including heating, lighting, drainage, fire protection, security and communication systems;¹⁶⁹⁶ • any operation “which forms an integral part of, or is preparatory to or is for rendering complete” work of the kind described above;¹⁶⁹⁷ • the painting or decorating of surfaces of any building, structure or works;¹⁶⁹⁸ • any other “work of a kind prescribed by the regulations”. Presently there are no additional types of “work” so prescribed.¹⁶⁹⁹ <p>The phrase “related goods and services” is defined to cover any materials or components to form part of any building, structure, or “work arising from construction work”, and “plant or materials” for use “in connection with the carrying out of construction work”, as well as the following kinds of services required in preparation for or to carry out construction work: construction labour, architectural, design, surveying or quantity surveying, building, engineering, decoration or landscape advisory services.¹⁷⁰⁰</p>	<p>residential building work within the meaning of the <i>Home Building Act 1989</i> on “such part of any premises as the party for whom the work is carried out resides in or proposes to reside in”;</p> <ul style="list-style-type: none"> • construction contracts for which the consideration payable is to be calculated “otherwise than by reference to the value” of the work, goods, or services provided; or • contracts between employers and employees for construction work.¹⁷⁰¹
Victoria	<p>An adjudication application may be made in respect of a payment claim made against a party owing payment in connection with a construction contract who has failed to provide the payment sought, or a payment schedule for the full amount sought, in accordance with the <i>Victoria Act</i> timelines.¹⁷⁰²</p> <p>A “construction contract” is defined as “a contract or other arrangement under which one party undertakes to carry out construction work, or to supply related goods and services”.¹⁷⁰³ A construction contract may be written, oral, or a combination of both.¹⁷⁰⁴</p>	<p>Domestic contracts between a builder or supplier and residential home-owner are not covered under the <i>Victoria Act</i>, but rather under a separate regime in the <i>Domestic Building Contracts Act 1995</i>.¹⁷⁰⁵</p> <p>The <i>Victoria Act</i> does not cover construction work done or materials supplied as part of a “loan agreement, a contract of guarantee or a contract of insurance”; in the course of</p>

¹⁶⁹⁴ *New South Wales Act*, s.4.

¹⁶⁹⁵ *New South Wales Act*, s 5(1)(a)-(b).

¹⁶⁹⁶ *New South Wales Act*, s 5(1)(c).

¹⁶⁹⁷ *New South Wales Act*, s 5(1)(e).

¹⁶⁹⁸ *New South Wales Act*, s 5(1)(f).

¹⁶⁹⁹ *New South Wales Act*, s 5(1)(g).

¹⁷⁰⁰ *New South Wales Act*, s 6(1)(a)-(c).

¹⁷⁰¹ *New South Wales Act*, s 7(2)-(3).

¹⁷⁰² *Victoria Act*, ss 14(1) (defining “claimant”), 15(1) (defining “respondent”), and 18(1) (who may bring an adjudication application).

¹⁷⁰³ Minter Ellison, “Security of Payment Legislation: Victoria”, November 2013, online: <<http://www.constructionlawmadeeasy.com/SecurityofPaymentVIC>> [Minter Ellison re Victoria] See also *Victoria Act*, s 7(4).

¹⁷⁰⁴ *Victoria Act*, s 7(1).

¹⁷⁰⁵ *Victoria Act*, s 7(2)(a), 7(2)(c), 7(3).

Jurisdiction	What types of disputes can be adjudicated?	What is excluded?
	<p>“Construction work” and “related goods and services” are defined nearly identically to the equivalent sections 5 and 6 definitions in the <i>New South Wales Act</i>.</p>	<p>employment; or where the consideration is “to be calculated otherwise than by reference to the value of the work carried out or the value of the goods and services supplied”.¹⁷⁰⁶</p> <p>The following amounts are excluded from any payment claim disputes that could otherwise be adjudicated: “variations that are not “claimable variations” as defined in section 10A of the <i>Victoria Act</i>; latent conditions; time-related costs and claims for damages; and losses arising from changes in regulatory requirements.”¹⁷⁰⁷</p>
Queensland	<p>An adjudication application may be made in respect of a payment claim made against a party owing payment in connection with a construction contract who has failed to provide the payment sought, or a payment schedule for the full amount sought, in accordance with the <i>Queensland Act</i> timelines.¹⁷⁰⁸</p> <p>“Construction work” is defined to include:</p> <ul style="list-style-type: none"> • “construction, alteration, repair, restoration, maintenance, extension, demolition, or dismantling” work done on buildings, structures (including temporary structures) and infrastructure such as roads, sewers, pipelines, docks and harbours;¹⁷⁰⁹ • installation of fittings in any building, structure or works, including heating, lighting, drainage, fire protection, security and communication systems;¹⁷¹⁰ • any operation “which forms an integral part of, or is preparatory to or is for rendering complete” work of the kind described above;¹⁷¹¹ • the painting or decorating of surfaces of any building, structure or works;¹⁷¹² • carrying out the testing of soils and “road making materials” during the construction and maintenance of roads;¹⁷¹³ • building work within the meaning of the <i>Queensland Building and Construction Commission Act 1991</i> and any other “work of a kind prescribed by the regulations”. Presently there are no additional types of “work” so prescribed.¹⁷¹⁴ 	<p>The <i>Queensland Act</i> does not apply to:</p> <ul style="list-style-type: none"> • a construction contract to the extent that it forms part of a loan agreement, contract of guarantee or contract of insurance; a construction contract involving “the carrying out of domestic building work [relating to a building where the owner resides] if a resident owner [as defined under the <i>Queensland Building and Construction Commission Act 1991</i>] is party to the contract”;¹⁷¹⁶ • construction work carried out by an employee for their employer; construction work for which the consideration payable is calculated “other than by reference to the value of” the work, goods, or supplies provided;¹⁷¹⁷ or • construction work involving drilling and extraction of oil, natural gas, or minerals.¹⁷¹⁸

¹⁷⁰⁶ *Victoria Act*, s 7(2)(b)-(ba).

¹⁷⁰⁷ Pickavance, *supra* at 22.19.

¹⁷⁰⁸ *Queensland Act*, s 17(1) (defining “claimant” and “respondent”) and 21(1) (who may bring an adjudication application).

¹⁷⁰⁹ *Queensland Act*, s 10(1)(a)-(b).

¹⁷¹⁰ *Queensland Act*, s 10(1)(c).

¹⁷¹¹ *Queensland Act*, s 10(1)(e).

¹⁷¹² *Queensland Act*, s 10(1)(f).

¹⁷¹³ *Queensland Act*, s 10(1)(g).

¹⁷¹⁴ *Queensland Act*, s 10(1)(h), 10(2).

Jurisdiction	What types of disputes can be adjudicated?	What is excluded?
	<p>The phrase “related goods and services” is defined to cover any materials or components to form part of any building, structure, or “work arising from construction work”, and “plant or materials” for use “in connection with the carrying out of construction work”, as well as the following kinds of services required in preparation for or to carry out construction work: construction labour, architectural, design, surveying or quantity surveying, building, engineering, decoration or landscape advisory services.¹⁷¹⁵</p>	
South Australia	<p>An adjudication application may be made in respect of a payment claim made against a party owing payment in connection with a construction contract who has failed to provide the payment sought, or a payment schedule for the full amount sought, in accordance with the <i>South Australia Act</i> timelines.¹⁷¹⁹</p> <p>A “construction contract” is any contract or “other arrangement”, written or oral, to carry out “construction work” or supply “related goods and services” within South Australia.</p> <p>The definition of construction work in section 5 of the <i>South Australia Act</i> is essentially identical to the definition set out in the <i>New South Wales Act</i>. The South Australia Regulations expand the definition of related goods and services to include project management, construction management, and consultancy services in relation to construction work.</p>	<p>Construction work does not include:</p> <ul style="list-style-type: none"> • the drilling for, or extraction of, oil or natural gas; • the extraction (whether by underground or surface working) of minerals, including tunnelling or boring, or constructing underground works, for that purpose; • other work of a kind prescribed by the regulations;¹⁷²⁰ • a construction contract that forms part of a loan agreement, a contract of guarantee or a contract of insurance • a contract for domestic building work where the contract at issue is with the resident owner.¹⁷²¹
Tasmania	<p>An adjudication application may be made in respect of a payment claim made against a party owing payment in connection with a building or construction contract who has failed to provide the payment sought, or a payment schedule for the full amount sought, in accordance with the <i>Tasmania Act</i> timelines.¹⁷²²</p> <p>A “building or construction contract” is a contract “relating to the supply of ‘building or construction-related goods and services’ by a person in Tasmania.</p> <p>“Building work or construction work” is defined to include the construction, erection, alteration, repair, restoration, maintenance, extension, underpinning, removal, demolition, or dismantling of buildings or works or structures forming part of land.¹⁷²³ This includes works forming part of energy</p>	<p>The <i>Tasmania Act</i> does not apply in the following circumstances:</p> <ul style="list-style-type: none"> • where a claim for the payment has been made in another jurisdiction;¹⁷²⁵ • to a contract that forms part of a loan agreement, a contract of guarantee, insurance or indemnity;¹⁷²⁶ • where it is agreed that the consideration payable is not calculated by reference to the value of the work carried out or the related goods and services supplied;¹⁷²⁷

¹⁷¹⁶ *Queensland Act*, s 3(2),(5).

¹⁷¹⁷ *Queensland Act*, s 3.

¹⁷¹⁸ *Queensland Act*, s 10(3).

¹⁷¹⁵ *Queensland Act*, s 11(1)(a)-(c).

¹⁷¹⁹ *South Australia Act*, ss 13(1) (defining “claimant”), 14(1) (defining “respondent”), and 17(1) (who may bring an adjudication application).

¹⁷²⁰ *South Australia Act*, s 5(2).

¹⁷²¹ *South Australia Act*, s 7(2).

¹⁷²² *Tasmania Act*, s 17(1) (defining “claimant”), s 4 (defining “respondent”), and 21(1) (who may bring an adjudication application).

¹⁷²³ *Tasmania Act*, s 5(1)(a)-(b).

Jurisdiction	What types of disputes can be adjudicated?	What is excluded?
	or telecommunications infrastructure, marine infrastructure, railway or aviation infrastructure; installation of systems and services forming part of land, such as heating, power supply, elevators, and fire safety and security systems; and any operation “that forms an integral part of, preparatory to, or completes” work previously referred to. ¹⁷²⁴	<ul style="list-style-type: none"> to a contract to the extent that a party undertakes to carry out work or supply related goods and services as an employee;¹⁷²⁸ and to a building or construction contract, or a class of building or construction contracts, prescribed to be a contract or class of contracts to which the <i>Tasmania Act</i> does not apply.¹⁷²⁹ <p>The definition of “building work or construction work” explicitly excludes work relating to the extraction of oil, natural gas, or minerals.¹⁷³⁰</p>
Australian Capital Territory	<p>An adjudication application may be made in respect of a payment claim made against a party owing payment in connection with a construction contract who has failed to provide the payment sought, or a payment schedule for the full amount sought, in accordance with the <i>Australian Capital Territory Act</i> timelines.¹⁷³¹</p> <p>A “construction contract” is a contract or arrangement to carry out “construction work” or “supply related goods and services” within the Australian Capital Territory.¹⁷³²</p> <p>“Construction work” is defined in section 7 of the <i>Australian Capital Territory Act</i> and by exclusions in sections 7(1)(h) and 9(2)-(3). The phrase “related goods and services” is defined in section 8. These sections essentially adopt the definitions and exclusions set out by the equivalent provisions in the <i>New South Wales Act</i>.</p> <p>“Construction work” also includes “building work” within the meaning of the Australian Capital Territory’s <i>Building Act 2004</i>.¹⁷³³</p>	<p>The <i>Australian Capital Territory Act</i> does not apply to a construction contract to the extent that it forms part of a loan agreement, contract of guarantee or contract of insurance; a construction contract for carrying out “residential building work if a resident owner is a party to the contract”; construction work carried out by an employee for their employer; construction work for which the consideration payable is calculated “other than by reference to the value of” the work, goods, or supplies provided; or to construction work involving drilling and extraction of oil, natural gas, or minerals.¹⁷³⁴</p>
Western Australia	<p>Any party to a construction contract may apply to have a payment dispute adjudicated, unless the dispute is already the subject of an order, judgment or other finding in another dispute resolution forum.¹⁷³⁵</p>	<p>Construction work is defined by the <i>Western Australia Act</i> to exclude:</p> <ul style="list-style-type: none"> construction of a shaft, pit or

¹⁷²⁵ *Tasmania Act*, s 7(4).

¹⁷²⁶ *Tasmania Act*, s 7(5)(a).

¹⁷²⁷ *Tasmania Act*, s 7(5)(b).

¹⁷²⁴ *Tasmania Act*, s 5(1)(b)-(d).

¹⁷²⁸ *Tasmania Act*, s 7(6).

¹⁷²⁹ *Tasmania Act*, s 7(8).

¹⁷³⁰ *Tasmania Act*, s 5(2).

¹⁷³¹ *Australian Capital Territory Act*, ss 15(1) (defining “claimant” and “respondent”) and 19(1) (who may bring an adjudication application).

¹⁷³² *Australian Capital Territory Act*, s 6, 9(4).

¹⁷³³ *Australian Capital Territory Act*, s 7(1)(g). Note that sections 6(1)-(2) of the *Building Act 2004* defines “building work” as work relating to the “erection, alteration or demolition” of a building, including disposal of waste generated, or work relating to structural repairs, or work included in the Regulations, but does not include demolition of residential buildings or work exempted by the Regulations.

¹⁷³⁴ *Australian Capital Territory Act*, s 9(2)-(3), 7(1)(h).

¹⁷³⁵ *Western Australia Act*, s 25.

Jurisdiction	What types of disputes can be adjudicated?	What is excluded?
	<p>A “payment dispute” arises if an amount claimed by a payment claim has not been paid when due, or has been rejected or disputed; any money retained by a party and due to be released has not been released; or any security held by a party is due to be returned and has not been returned.¹⁷³⁶</p> <p>If a construction contract does not contain express terms governing a due date for payment, the Western Australia Act requires that the time for payment will be 28 days from receipt of a payment claim.¹⁷³⁷</p> <p>A “construction contract” is a “contract or other agreement, whether in writing or not”, to carry out construction work, “supply to the site ... any goods that are related to construction work” and/or to provide related professional services or related on-site services.¹⁷³⁸</p> <p>“Construction work” is defined broadly by the <i>Western Australia Act</i> to include:</p> <ul style="list-style-type: none"> • the reclamation, draining or prevention of subsidence or erosion of land, and the installation, extension, maintenance, dismantling, demolition or removal of any works, apparatus, fittings, machinery, or plant associated with the land-related work;¹⁷³⁹ • constructing the whole or part of any civil works on land or “sea bed”, and installing, altering, repairing, maintaining, extending, demolishing or removing any associated fittings (e.g. electricity, gas, sanitation, irrigation, telecommunications, air conditioning, fire protection, security);¹⁷⁴⁰ • any work that is “preparatory to, necessary for, an integral part of, or for the completion of” work mentioned above;¹⁷⁴¹ • any work prescribed by regulation to be construction work (although the Western Australia Regulations do not currently contain any such prescriptions).¹⁷⁴² 	<p>quarry, or constructing a plant for the purposes of discovering or extracting oil, natural gas, or any “mineral bearing or other substance”;¹⁷⁴³</p> <ul style="list-style-type: none"> • construction, installation, repair, restoration, extension, demolition or removal of “wholly artist works (e.g. sculptures, installations and murals);¹⁷⁴⁴ or • work done or services supplied by an employee for their employer;¹⁷⁴⁵ • work prescribed not to be construction work or contracts to which the <i>Western Australia Act</i> or provisions are prescribed not to apply by the regulations (although the <i>Western Australia Regulations</i> do not currently contain any such prescriptions).¹⁷⁴⁶
Northern Territory	<p>Any party to a construction contract can unilaterally refer a “payment dispute” under a “construction contract” to adjudication.¹⁷⁴⁷</p> <p>A payment dispute arises if a payment claim has been made under a contract and the claim was “rejected or wholly or partly disputed”, the amount claimed was due to be paid but not paid “in full”, an amount retained by a party to the</p>	<p>The <i>Northern Territory Act</i> does not apply to contracts for:</p> <ul style="list-style-type: none"> • drilling, or constructing a shaft, pit or quarry for the purpose of resource extraction (e.g. oil, natural gas, or minerals);¹⁷⁵² • constructing, repairing, maintaining or removing

¹⁷³⁶ *Western Australia Act*, s 6(a)-(c).

¹⁷³⁷ *Western Australia Act*, Schedule 1, Division 5, section 7.

¹⁷³⁸ *Western Australia Act*, s 3.

¹⁷³⁹ *Western Australia Act*, s 4(2)(a)-(b).

¹⁷⁴⁰ *Western Australia Act*, s 4(2)(c)-(e).

¹⁷⁴¹ *Western Australia Act*, s 4(2)(f).

¹⁷⁴² *Western Australia Act*, s 4(2)(g).

¹⁷⁴³ *Western Australia Act*, s 4(3)(a)-(c).

¹⁷⁴⁴ *Western Australia Act*, s 4(3)(d).

¹⁷⁴⁵ *Western Australia Act*, s 7(3).

¹⁷⁴⁶ *Western Australia Act*, s 4(3)(e), 7(4).

¹⁷⁴⁷ *Northern Territory Act*, s 27.

Jurisdiction	What types of disputes can be adjudicated?	What is excluded?
	<p>contract is due to be paid but not paid, or when any security held by a party under the contract is due to be returned, but has not been returned.¹⁷⁴⁸</p> <p>A “construction contract” is defined as a contract under which a person (the “contractor”) has “one or more of the following obligations:</p> <ul style="list-style-type: none"> (a) to carry out construction work; (b) to supply to the site where construction work is being carried out any goods that are related to construction work; (c) to provide, on or off the site where construction work is being carried out, professional services that are related to the construction work (including architectural, design, engineering, surveying and project management services, but not including accounting, financial or legal services);¹⁷⁴⁹ (d) to provide, on the site where construction work is being carried out, on-site services that are related to the construction work (including labour).”¹⁷⁵⁰ <p>Construction work is defined to include:</p> <ul style="list-style-type: none"> • reclaiming land, draining land or preventing the subsidence, movement or erosion of land; • installing, altering, repairing, restoring, maintaining, extending, dismantling, demolishing or removing any works, apparatus, fittings, machinery or plant associated with any work mentioned in paragraph; • constructing the whole or a part of any civil works, or a building or structure, that forms or will form, part of land or the seabed; and • fixing or installing on or in anything mentioned above and any fittings forming, or to form, part of the thing.¹⁷⁵¹ 	<p>“wholly artistic works” such as sculptures or murals;¹⁷⁵³</p> <ul style="list-style-type: none"> • constructing the whole or part of any watercraft.¹⁷⁵⁴ • construction contracts between employees and employers;¹⁷⁵⁵ • construction contracts that are expressly excluded by Regulation.¹⁷⁵⁶

4. What is the adjudication process and how are costs dealt with?

4.1 Process Timeframes

Jurisdiction	Timeframe to apply for adjudication	Timeframe for response	Timeframe for adjudication decision
U.K.	The Notice of Adjudication is served following the crystallization of a dispute at any time, even after the acceptance of	Within 7 calendar days of the Notice of Adjudication, the referring party must send a	The adjudicator must reach his or her decision no later than 28 calendar days after

¹⁷⁵² Northern Territory Act, s 6(2)(a)-(b).

¹⁷⁴⁸ Northern Territory Act, s 8(a).

¹⁷⁴⁹ Northern Territory Act, s 7(2).

¹⁷⁵⁰ Northern Territory Act, s 5(1)(a)-(d). Regarding labour as on-site service, see Northern Territory Act, s 7(3).

¹⁷⁵¹ Hall Chadwick et al., “NT Construction Industry Update”, April 21, 2015, online: <<http://hallchadwick.com.au/NT%20Construction%20Industry%20Update%20paper%20-%20April%202015.pdf>>.

¹⁷⁵³ Northern Territory Act, s 6(2)(c).

¹⁷⁵⁴ Northern Territory Act ss 6(3).

¹⁷⁵⁵ Northern Territory Act ss 9(3).

¹⁷⁵⁶ Northern Territory Act ss 9(4).

APPENDIX C ADJUDICATION CONSIDERATIONS AND MECHANICS

Jurisdiction	Timeframe to apply for adjudication	Timeframe for response	Timeframe for adjudication decision
	repudiation or the expiry of the limitation period, or while there are proceedings pending in court or by arbitration. ¹⁷⁵⁷	Referral Notice and associated documents to the adjudicator and every other party to the dispute. ¹⁷⁵⁸ Adjudicator will then set out a timetable, which can include requesting written submissions, directing the responding party to serve a response, meeting the parties, requesting documents, etc. ¹⁷⁵⁹	the Referral Notice; or 42 days from the Referral Notice if the referring party so consents (or any other period if both parties agree). ¹⁷⁶⁰
New Zealand	Subject to limitations legislation, a claimant serves a prescribed notice of adjudication at any time in relation to a construction contract. ¹⁷⁶¹ All notices of adjudication must be accompanied by a prescribed form that includes a statement of the respondent's rights and obligations as well as a brief explanation of the adjudication process. ¹⁷⁶²	Within 5 days of receipt of adjudicator's notice of acceptance, the claimant must serve its claim. ¹⁷⁶³ Within 5 days receipt of such claim (or the adjudicator's notice of acceptance), the respondent may serve a written response. ¹⁷⁶⁴ Within 5 days of such response, a claimant may serve a reply. ¹⁷⁶⁵	Determination within 20 working days of the response of the responding party (or within 30 working days if extended). ¹⁷⁶⁶
Ireland	A party to a construction contract has the right to refer for adjudication any payment dispute by serving the other party at any time notice of intention to refer the payment dispute for adjudication. ¹⁷⁶⁷	Within 7 days of the appointment, the claimant must refer the payment dispute to the adjudicator with associated documents. ¹⁷⁶⁸ Adjudicator will then set out a timetable, which can include requesting written submissions, directing the responding party to serve a	Decision within 28 calendar days of the day the referral was made, or within 42 days by extension of the adjudicator and consent of the claimant, or within such further time as agreed by the parties after the referral is made. ¹⁷⁷⁰

¹⁷⁵⁷ *U.K. Construction Act*, s 108 and the Scheme Part 1; see also Davis, Richard, *Construction Insolvency: Security, Risk and Renewal in Construction Contracts* (2011) at 12-002 to 12-003 [Davis] citing *Connex v MJ Building Services* [2005] BLR 201.

¹⁷⁵⁸ *Scheme*, s 7.

¹⁷⁵⁹ *Scheme*, s 13.

¹⁷⁶⁰ *Scheme*, s 19.

¹⁷⁶¹ *New Zealand Act*, s 28. See also Pickavance at 490, s 25.13.

¹⁷⁶² *Construction Contracts Amendment Act 2015*, online:

<<http://www.legislation.govt.nz/act/public/2015/0092/latest/DLM4998107.html>> [*NZ Amendment Act*].

¹⁷⁶³ *New Zealand Act*, s 36.

¹⁷⁶⁴ *New Zealand Act*, s 37.

¹⁷⁶⁵ *New Zealand Act*, s 37A.

¹⁷⁶⁶ *New Zealand Act*, s 46.

¹⁷⁶⁷ *Ireland Act*, s 6(1) and (2).

¹⁷⁶⁸ *Ireland Act*, s 6(5).

APPENDIX C ADJUDICATION CONSIDERATIONS AND MECHANICS

Jurisdiction	Timeframe to apply for adjudication	Timeframe for response	Timeframe for adjudication decision
		response, meeting the parties, requesting documents, etc. ¹⁷⁶⁹	
Singapore	A claimant can apply to an ANB for adjudication of a payment claim dispute within a range of 7 to 14 days depending on whether a payment schedule was received. ¹⁷⁷¹	Within 7 days of the receipt of the application, an ANB must release a Notice confirming the appointment. ¹⁷⁷² Within 7 days of receipt of the application, a responding party must serve a Response. ¹⁷⁷³	Decision within 7 days of the commencement of the adjudication (if the respondent fails to make a payment or pay a response amount) ¹⁷⁷⁴ or 14 days in any other case. ¹⁷⁷⁵
Malaysia	An unpaid party may serve a payment claim on a non-paying party for payment pursuant to a construction contract. An unpaid party or a non-paying party may refer a dispute arising out of the payment claim to adjudication following the payment claim response period (10 days). ¹⁷⁷⁶ This right is subject to Malaysia limitations legislation. ¹⁷⁷⁷	10 Business Days from receipt of claim, respondent must serve response. ¹⁷⁷⁸ 5 Business Days from receipt of a response, the claimant may issue a reply. ¹⁷⁷⁹	Decision within 45 working days of expiry of period for response. May be extended by agreement of parties. ¹⁷⁸⁰
Hong Kong	Notice of Adjudication must be served within 28 calendar days of dispute arising (or certain other events), and claim must be served on or before appointment or nomination of adjudicator, within 5 working days of commencement of adjudication. ¹⁷⁸¹	20 working days after the receipt of claim, a responding party must serve a written response. ¹⁷⁸²	Decision within 20 working days of receipt of the responding party's submissions extendable by the adjudicator up to 55 working days from appointment, unless extended on consent. ¹⁷⁸³
<i>Australia</i>			
NSW	A claimant may apply for the adjudication of a payment claim within a range of 10 or 20 business days depending on applicable circumstances	A respondent may lodge a response at any time within 5 business days after receiving copy of application; or 2	Within 10 business days of notifying claimant and respondent of acceptance of application but not before the

¹⁷⁷⁰ Ireland Act, s 6(6)-(7).

¹⁷⁶⁹ Ireland Draft Code, supra at 20.

¹⁷⁷¹ Singapore Act, s 12 and 13.

¹⁷⁷² Singapore Act, s 14(3). An adjudicator may accept or decline a proposed appointment – see Singapore Act, s 14(2).

¹⁷⁷³ Singapore Act, s 15.

¹⁷⁷⁴ Singapore Act, s 17(1)(a).

¹⁷⁷⁵ Singapore Act, s 17(1)(b).

¹⁷⁷⁶ Malaysia Act, s 5 and 6.

¹⁷⁷⁷ Malaysia Act, s 7.

¹⁷⁷⁸ Malaysia Act, s 10.

¹⁷⁷⁹ Malaysia Act, s 11.

¹⁷⁸⁰ Malaysia Act, s 12(2)

¹⁷⁸¹ HK Summary and Guide at 6; see also Hong Kong Consultation Document at 35. The requirement of serving the notice within 28 days is one of a number of anti-ambush provisions under the proposed legislation.

¹⁷⁸² Hong Kong Consultation Document at 36.

¹⁷⁸³ Hong Kong Consultation Document at 36.

APPENDIX C ADJUDICATION CONSIDERATIONS AND MECHANICS

Jurisdiction	Timeframe to apply for adjudication	Timeframe for response	Timeframe for adjudication decision
	related to payment due dates under the legislation. ¹⁷⁸⁴	business days after receiving notice of adjudicator's acceptance of application. ¹⁷⁸⁵	end of the timeframe for a response. ¹⁷⁸⁶
Victoria	Depending on the application, a claimant may apply for adjudication of a payment claim within a range of 7 to 10 days depending on whether a payment schedule ¹⁷⁸⁷ was received. ¹⁷⁸⁸	5 business days after receiving copy of application; or 2 business days after receiving notice of adjudicator's acceptance of application. ¹⁷⁸⁹	Within 10 business days of notifying claimant and respondent of acceptance of application; with claimants agreement longer—but no longer than 15 business days. ¹⁷⁹⁰
Queensland	A claimant may apply for adjudication of a payment claim within a range of 10 or 20 business days depending on whether the respondent provided a payment schedule ¹⁷⁹¹ in response to the payment claim. ¹⁷⁹²	For standard claim: Within 10 business days of receiving application; or 7 business days of receiving notice of adjudicator's acceptance of application. ¹⁷⁹³ For complex claim: 15 and 12 business days respectively, ¹⁷⁹⁴ with option of extending by 15 business days. ¹⁷⁹⁵	For standard claim: 10 business days after receiving respondent's response. For complex claim: 15 business days. ¹⁷⁹⁶
South Australia	A claimant may apply for adjudication of a payment claim within a range of 15 or 20 business days depending on whether the respondent provided a payment schedule ¹⁷⁹⁷ in response to the payment claim. ¹⁷⁹⁸	5 business days after receiving copy of application; or 2 business days after receiving notice of adjudicator's acceptance of application. ¹⁷⁹⁹	Within 10 business days of respondent's response, or if no response—the date response is due. ¹⁸⁰⁰
Tasmania	A claimant may apply to an ANA for adjudication of a payment claim within a range of 10 or 20 business days	Within 10 business days after receiving copy of the application; or 5 business	Within 10 business days of receiving the respondent's response. ¹⁸⁰⁴

¹⁷⁸⁴ *New South Wales Act (NSW)*, s 17(1)–(2).

¹⁷⁸⁵ *New South Wales Act*, s 20(1).

¹⁷⁸⁶ *New South Wales Act*, s 21(3).

¹⁷⁸⁷ *Victoria Act*, s 15 and s 18. Section 15 Payment Schedules are documents that are provided by a respondent to a payment claim that set out an amount of proposed payment, alleged excluded amounts, and associated payment claim information.

¹⁷⁸⁸ *Victoria Act*, s 18(1)–(2).

¹⁷⁸⁹ *Victoria Act*, s 21(1).

¹⁷⁹⁰ *Victoria Act*, s 22(4).

¹⁷⁹¹ *Queensland Act*, s 18.

¹⁷⁹² *Queensland Act*, s 21(3)(c)(i)–(iii).

¹⁷⁹³ *Queensland Act*, s 24A(2).

¹⁷⁹⁴ *Queensland Act*, s 24A(4).

¹⁷⁹⁵ *Queensland Act*, s 25A(5).

¹⁷⁹⁶ *Queensland Act*, s 24A(5).

¹⁷⁹⁷ *South Australia Act*, s 14.

¹⁷⁹⁸ *South Australia Act*, s 17.

¹⁷⁹⁹ *South Australia Act*, s 20(1).

¹⁸⁰⁰ *South Australia Act*, s 21(3).

Jurisdiction	Timeframe to apply for adjudication	Timeframe for response	Timeframe for adjudication decision
	depending on whether the respondent provided a payment schedule ¹⁸⁰¹ in response to the payment claim. ¹⁸⁰²	days after receiving notice of adjudicator’s acceptance of the application. ¹⁸⁰³	
Australian Capital Territory	A claimant may apply to an ANA for adjudication of a payment claim within a range of 10 or 20 business days depending on whether the respondent provided a payment schedule ¹⁸⁰⁵ in response to the payment claim. ¹⁸⁰⁶	Within 7 business days after receiving copy of the application; or 5 business days after receiving notice of adjudicator’s acceptance of the application. ¹⁸⁰⁷	Within 10 business days of receiving the respondent’s response. ¹⁸⁰⁸
Western Australia	To have a payment dispute adjudicated, a party to the contract must apply within 28 days after the dispute arises. ¹⁸⁰⁹	Within 14 days of being served with an application for adjudication. ¹⁸¹⁰	Within 14 days from date of service of the response. ¹⁸¹¹
Northern Territory	Within 90 days after the dispute arises. ¹⁸¹²	Within 10 working days after being served. ¹⁸¹³	Within 10 working days of receiving the respondent’s response. ¹⁸¹⁴

4.2 Costs of Adjudication

Jurisdiction	How much does adjudication cost?
U.K.	Hourly fees for adjudicators run between £75 to over £200 per hour, with most adjudicators charging over £200 per hour or between £175 and £200 per hour. ¹⁸¹⁵ According to a 2011 study by Kennedy et al, ¹⁸¹⁶ the most popular range of fees for an adjudication was between £2,500 and £5,000, however a very close second range of fees was between £15,001 to £20,000 per adjudication. No survey return identified a fee in excess of £40,000. ¹⁸¹⁷
New Zealand	The New Zealand Department of Building and Housing estimates that filing a statutory adjudication claim can cost between NZD\$500 and NZD\$3000, while litigation filing fees can range from NZD\$143

¹⁸⁰⁴ *Tasmania Act*, s 24(1).

¹⁸⁰¹ *Tasmania Act*, s 18.

¹⁸⁰² *Tasmania Act*, s 21.

¹⁸⁰³ *Tasmania Act*, s 23(2).

¹⁸⁰⁵ *Australian Capital Territory Act*, s 16.

¹⁸⁰⁶ *Australian Capital Territory Act*, s 19.

¹⁸⁰⁷ *Australian Capital Territory Act*, s 22(1).

¹⁸⁰⁸ *Australian Capital Territory Act*, s 23(3)(a).

¹⁸⁰⁹ *Western Australia Act*, s 26.

¹⁸¹⁰ *Western Australia Act*, s 27.

¹⁸¹¹ *Western Australia Act*, s 31(1).

¹⁸¹² *Northern Territory Act*, s 28(1).

¹⁸¹³ *Northern Territory Act*, s 29(1).

¹⁸¹⁴ *Northern Territory Act*, s 33(3).

¹⁸¹⁵ Adjudication Reporting Centre, School of Engineering and Built Environment, Glasgow Caledonian University, “Adjudication Reports”, online: <<http://www.gcu.ac.uk/ebe/businessservices/adjudicationreports>> [Glasgow Study] and JL Milligan & L Cattnach, “CDR Report No 13” (October 2014), online: <http://www.cdr.uk.com/documents/Report13_001.pdf> [Report No. 13].

¹⁸¹⁶ Kennedy et al, *The Development of Statutory Adjudication in the UK and its relationship with construction workload*, Glasgow Caledonian University, School of the Built and Natural Environment (2010) updated in 2011 by the same authors, online:

<<https://www.gcu.ac.uk/media/gcalwebv2/ebe/content/COBRA%20Conference%20Paper%202010.pdf>> and <http://www.cdr.uk.com/documents/COBRAPaper2011_000.pdf>.

¹⁸¹⁷ *Ibid.*

Jurisdiction	How much does adjudication cost?
	<p>to over NZD\$4,000 (not including legal costs).¹⁸¹⁸</p> <p>The Building Disputes Tribunal has estimated based on statistical data that the adjudication process itself costs on average, about 12.3% of the amount claimed (16% of the total amount determined).¹⁸¹⁹</p>
Ireland	<p>The <i>Ireland Act</i> has not yet been enacted so there is no current data on the cost of adjudication.</p> <p>The draft code in Ireland however, requires the adjudicator to provide the parties with proposed terms of appointment, including fees and costs, immediately following appointment.¹⁸²⁰ The <i>Ireland Draft Code</i> also requires the adjudicator’s fees and costs to be reasonable, “having regard to the amount in dispute, the complexity of the dispute, the time spent by the adjudicator and other relevant circumstances.”¹⁸²¹</p>
Singapore	<p>The Singapore Mediation Centre’s Fee Schedule¹⁸²² requires an application fee of SGD\$642 or a review application fee of SGD\$1,284. For claims valued at up to SGD\$24,000, an adjudicator may charge up to SGD\$321 (inclusive of GST) per hour, to a maximum of SGD\$2,568. For claims valued at above SGD\$24,000, an adjudicator is entitled to charge the previously mentioned maximum, but on a daily basis. The total adjudicator fee may not exceed 10% of the claimed amount.</p>
Malaysia	<p>The <i>Malaysia Regulations</i> set out the fees to be paid to an adjudicator. However, the KLRCA believes that the schedule of fees in the Regulations may not be sufficient to attract individuals with the necessary qualifications and professionalism, and has therefore released an alternative fee schedule based on the amount claimed and timeline.¹⁸²³ If the parties and the adjudicator fail to agree on a fee schedule, section 19(1) of the <i>Malaysia Act</i> set the KLRCA’s standard terms of appointment and fees as the default.¹⁸²⁴</p> <p>KLRCA’s recommended fees are as follows:</p> <ul style="list-style-type: none"> • for a dispute of up to RM150,000, fees of RM8,400; • for a dispute of RM150,001 to RM300,000, fees of RM8,400 plus 3.5% of the amount beyond RM150,000; • for a dispute of RM300,001 to RM800,000, fees of RM13,650 plus 1.3% of the amount beyond RM300,000; • for a dispute of RM800,001 to RM1.3 million, fees of RM20,150 plus 1.25% of the amount beyond RM800,000; • for a dispute of above RM1.3 million to RM1.8 million, fees of RM26,400 plus 1.1% of the amount beyond RM1.3 million; • The fee schedule continues in this fashion until the claim reaches a value of above RM15 million, at which point the adjudicator’s fees are capped at RM89,615.¹⁸²⁵ <p>Expenses are also to be borne by the parties, but must be of reasonable value and submitted to the KLRCA for approval.¹⁸²⁶</p>

¹⁸¹⁸ Department of Building and Housing, Ministry of Business, Innovation & Employment, New Zealand “Review of the Construction Contracts Act 2002: Proposals for change”, April 20, 2011, online: <<http://www.mbie.govt.nz/info-services/building-construction/current-work/ris-construction-contracts-act-review>>.

¹⁸¹⁹ Building Disputes Tribunal, Current Trends in Adjudication, Buildlaw, online: <<http://www.buildingdisputes tribunal.co.nz/site/buildingdisputes/files/BuildLaw/Issue%202/CURRENT%20TRENDS%20IN%20ADJUDICATION%20revised.pdf>>.

¹⁸²⁰ *Construction Contracts Act 2013 (Code of Practice) (Adjudication) Order 2014*, s 3. [Ireland Draft Code] <[https://www.engineersireland.ie/EngineersIreland/media/SiteMedia/groups/Divisions/civil/Construction-Contracts-Act-2013-\(Code-of-Practice\)-\(Adjudication\)-Order-2014.pdf?ext=.pdf](https://www.engineersireland.ie/EngineersIreland/media/SiteMedia/groups/Divisions/civil/Construction-Contracts-Act-2013-(Code-of-Practice)-(Adjudication)-Order-2014.pdf?ext=.pdf)>.

¹⁸²¹ *Ireland Draft Code*, s 27.

¹⁸²² See Singapore Mediation Centre, “Fee Schedule”, 3rd Edition, April 2015, online: <<http://www.mediation.com.sg/assets/business-services/SMC-Fee-Schedule-wef-1-June-2015.pdf>>.

¹⁸²³ Pickavance, *supra* at s 24.56-24.57.

¹⁸²⁴ *Malaysia Act*, s 19(1).

¹⁸²⁵ KLRCA CIPAA Circular 02, “Circular on KLRCA’s Recommended Schedule of Fees”, August 1, 2014 at 138-139.

¹⁸²⁶ Pickavance, *supra* at s 24.59.

Jurisdiction	How much does adjudication cost?
Hong Kong	A specific costs schedule has not been released, but the Consultation Document notes that adjudication should be a “relatively low cost option, especially for smaller contractors, subcontractors and suppliers.” ¹⁸²⁷
<i>Australia</i>	
NSW	In 2012/13, the average adjudication fee was AUD\$3,036, but the highest fee recorded was AUD\$67,747. ¹⁸²⁸ According to the University of New South Wales, which monitors adjudication statistics, “the data indicates that adjudication is providing a financially viable option, particularly for those making claims less than \$100,000, to have progress payment disputes heard and determined, albeit on an interim basis, by an independent third party.” ¹⁸²⁹ Almost 78% of adjudication applications made under the NSW Act in 2012/13 were for claims lower than \$100,000. ¹⁸³⁰
Victoria	Nominating authorities may set their own fee schedules. As an example, Adjudicate Today, a nominating authority active in Victoria, charges the following fees for adjudication (inclusive of GST): <ul style="list-style-type: none"> • Application fee: AUD\$0. • Adjudicator hourly fee: approximately AUD\$260 – \$400 depending on experience. • For small claims, a fixed fee schedule is available: <ul style="list-style-type: none"> ○ up to \$15,000 - fixed fee of AUD\$1,089; ○ from \$15,001 to \$25,000 - fixed fee of AUD\$2,178; ○ from \$25,001 to \$40,000 - fixed fee of AUD\$3,300. • Additional cost for issuance of a certificate ranging from AUD\$110 for awards up to \$15,000 to AUD\$825 for awards over \$750,000. • Unless otherwise advised in advance, disbursements are charged at cost.¹⁸³¹ <p>In 2014-15, adjudication fees ranged from an average of AUD\$350 for claims smaller than AUD\$5,000 to over AUD\$40,000 for claims higher than AUD\$5 million.¹⁸³²</p>
Queensland	The application fee schedule is set by the Queensland Building and Construction Commission and suggested adjudicator’s fees are provided for adjudicators, who may set their own fees: <ul style="list-style-type: none"> • Application fees: ranging from AUD\$51.75 for a claim for less than AUD\$10,000 to AUD\$672.75 for a claim of between AUD\$750,000 and AUD\$1,000,000. Claims of greater value are charged at 0.07% of the claimed amount, but capped at a maximum of AUD\$5,175. • For small claims of up to AUD\$25,000, a capped fee schedule (including disbursements) is suggested as follows: <ul style="list-style-type: none"> ○ up to AUD\$5,000 – flat fee of AUD\$610; ○ from AUD\$5,001 to AUD\$15,000 – flat fee of AUD\$900; ○ from AUD\$15,001 to AUD\$20,000 – flat fee of AUD\$1,800; ○ from AUD\$20,001 to AUD\$25,000 – flat fee of AUD\$2,000. • Reasonable adjudicator hourly fees (including disbursements) for claims over AUD\$25,000 would range from AUD\$260 to AUD\$385 per hour, depending on the adjudicator’s experience.¹⁸³³

¹⁸²⁷ Hong Kong Consultation Document at 39.

¹⁸²⁸ University of New South Wales Adjudication Research and Reporting Unit, *Adjudication Activity in New South Wales, Annual Report 2012/13*, New South Wales Government, Finance and Service (2014) at 10 [New South Wales Annual Report 2012-13].

¹⁸²⁹ New South Wales Annual Report 2012-13, *supra* at 10.

¹⁸³⁰ New South Wales Annual Report 2012-13, *supra* at 10.

¹⁸³¹ Adjudicate Today, “How Much Does it Cost for Adjudication”, February 10, 2015, online: <http://www.adjudicate.com.au/Fee_policy.php> [Adjudicate Today]

¹⁸³² Victorian Building Authority, Government of Victoria, Adjudication Activity Statistics 2014-2015 Financial Year at 14, online: <http://www.vba.vic.gov.au/__data/assets/pdf_file/0007/37177/Adjudication-Activity-Statistics-2014-2015-Financial-Year.pdf> [Victoria Statistics 2015].

¹⁸³³ Queensland Building and Construction Commission, “Going to adjudication”, undated website at 2-4 online: <<https://www.qbcc.qld.gov.au>>.

APPENDIX C ADJUDICATION CONSIDERATIONS AND MECHANICS

Jurisdiction	How much does adjudication cost?
South Australia	<p>Nominating authorities may set their own fee schedules. As an example, the Resolution Institute, a nominating authority active in South Australia, charges the following fees for adjudication (exclusive of GST):</p> <ul style="list-style-type: none"> • Application fee: AUD\$0. • Adjudicator hourly fee for claims below AUD\$200,000 in value: AUD\$220 per hour. • Adjudicator hourly fee for claims equal to or above AUD\$200,000 in value: AUD\$330 per hour. • For small claims, a capped fee schedule is available: <ul style="list-style-type: none"> ○ up to AUD\$9,999 – maximum cost of AUD\$1,100; ○ from AUD\$10,000 to AUD\$19,999 - maximum cost of AUD\$2,200; ○ from AUD\$20,000 to AUD\$199,999 - maximum cost of AUD\$1,100.¹⁸³⁴
Tasmania	<p>Nominating authorities may set their own fee schedules. As an example, Adjudicate Today, one of the four nominating authorities active in Tasmania, charges the following fees for adjudication (inclusive of GST):</p> <ul style="list-style-type: none"> • Application fee: AUD\$0. • Adjudicator hourly fee: approximately AUD\$260 – \$400 depending on experience. • For small claims, a fixed fee schedule is available: <ul style="list-style-type: none"> ○ up to \$15,000 - fixed fee of AUD\$1,089; ○ from \$15,001 to \$25,000 - fixed fee of AUD\$2,178; ○ from \$25,001 to \$40,000 - fixed fee of AUD\$3,300. • Additional cost for issuance of a certificate ranging from AUD\$110 for awards up to \$15,000 to AUD\$825 for awards over \$750,000. • Unless otherwise advised in advance, disbursements are charged at cost.¹⁸³⁵ <p>To keep costs low, adjudication is expected to be “informal, fast and inexpensive”.¹⁸³⁶</p>
ACT	<p>Nominating authorities may set their own fee schedules. As an example, the Australian Building & Construction Dispute Resolution Service, one of the nominating authorities active in the Australian Capital Territory, charges the following fees for adjudication (inclusive of GST and up to \$50 in disbursements):</p> <ul style="list-style-type: none"> • Application fee: N/A. • For small claims, a capped fee schedule is available: <ul style="list-style-type: none"> ○ up to \$6,500 – flat fee of \$770; ○ from \$6,501 to \$15,000 – flat fee of \$1,155; ○ from \$15,001 to \$25,000 – flat fee of \$2,250. ○ from \$25,001 to \$40,000 – flat fee of \$3,465. ○ from \$40,001 to \$60,000 – flat fee of \$4,565. ○ from \$60,001 to \$100,000 – flat fee of \$6,215. • Adjudicator hourly fees range from \$225 to \$365 per hour, depending on the adjudicator’s experience. • Additional charge for certificate of adjudication.¹⁸³⁷ <p>These costs may be capped by the Minister or, in the absence of a cap, must be a reasonable amount “having regard to the work done and expenses incurred”.¹⁸³⁸</p>

¹⁸³⁴ Resolution Institute, “Building and Construction Industry Security of Payments Act 2009 (SA): Adjudication Application”, undated form, online: <<https://www.iama.org.au/sites/default/files/SA%20IAMA%20Adjudication%20Application%202013.pdf>>.

¹⁸³⁵ Adjudicate Today, *supra*.

¹⁸³⁶ See Department of Justice, Tasmania, “Adjudication”, undated website at 2 of PDF, online: <http://www.justice.tas.gov.au/building/security_of_payment/adjudication>.

¹⁸³⁷ Australian Building and Construction Dispute Resolution Service, “Terms and Conditions of Application (NSW & A.C.T)”, undated form, online: <<http://abcdrs.com.au/wp-content/uploads/2015/12/adjudication-application-fee-terms-and-conditions.pdf>>.

¹⁸³⁸ *Australian Capital Territory Act*, s 34(2) (nominating authority) and s 36(1) (adjudicator).

Jurisdiction	How much does adjudication cost?
Western Australia	<p>Nominators and adjudicators may set their own fee schedules. As an example, the Royal Institution of Chartered Surveyors (RICS), one of the nominating authorities active in Western Australia, charges the following fees for adjudication (inclusive of GST unless otherwise specified):</p> <ul style="list-style-type: none"> • Application fee: ranging from AUD\$220 for claims of less than AUD\$200,000 to AUD\$660 for claims above AUD\$1 million. • Hourly fees directly determined by adjudicators. No flat-fee arrangements available. • A certificate of determination is AUD\$220.¹⁸³⁹ <p>Adjudicator hourly fees generally range from AUD\$200 – AUD\$400 depending on experience, whether or not disbursements are included, and in some cases, size of the claim.¹⁸⁴⁰</p>
Northern Territory	<p>Nominating authorities may set their own fee schedules. As an example, the Royal Institution of Chartered Surveyors (RICS), one of the nominating authorities active in the Northern Territories, charges the following fees for adjudication (inclusive of GST unless otherwise specified):</p> <ul style="list-style-type: none"> • Application fee: ranging from AUD\$220 for claims of less than AUD\$200,000 to AUD\$660 for claims above AUD\$1 million. • Hourly fees directly determined by adjudicators. No flat-fee arrangements available. • A certificate of determination is AUD\$220.¹⁸⁴¹ <p>Adjudicator hourly fees: ranging from AUD\$170 – AUD\$400 depending on experience, whether or not disbursements are included, and in some cases, size of claim.¹⁸⁴²</p>

4.3 Allocation of Costs

Jurisdiction	How are costs allocated?
U.K.	<p>In the U.K., the adjudicator’s costs will be split equally between the parties unless any applicable adjudication rules provide otherwise. For example, in the <i>Scheme</i>, an adjudicator has discretion to apportion his or her costs.¹⁸⁴³ Depending on the applicable adjudication rules, the adjudicator has discretion to apportion party’s costs.¹⁸⁴⁴</p> <p>Courts are unlikely to unpick the apportionment of costs on the basis that it would be “an extremely difficult task for a tribunal that has not heard the same arguments as the adjudicator.”¹⁸⁴⁵ The adjudicator’s fees however, must be reasonable although there is a “considerable ‘margin of appreciation’ by the court in favour of the adjudicator”.¹⁸⁴⁶</p>

¹⁸³⁹ Royal Institution of Chartered Surveyors, “Adjudication Fee Schemes: Western Australia and Northern Territory”, undated form, online: <http://www.rics.org/Global/RICS%20DRS%20Fee%20Schemes_Australia.pdf>.

¹⁸⁴⁰ See Government of Western Australia’s list of adjudicators, undated webpage, online: <<https://www.commerce.wa.gov.au/building-commission/find-adjudicator>>.

¹⁸⁴¹ Royal Institution of Chartered Surveyors, “Adjudication Fee Schemes: Western Australia and Northern Territory”, undated form, online: <http://www.rics.org/Global/RICS%20DRS%20Fee%20Schemes_Australia.pdf>.

¹⁸⁴² See Northern Territory Government’s List of Adjudicators, January 2016. <<http://www.nt.gov.au/justice/policycoord/construction/adjudicator.shtml>>

¹⁸⁴³ Pickavance, *supra* at 228 citing the *Scheme* at para 25 (2011) and 2009 U.K. *Construction Act* amendments.

¹⁸⁴⁴ Pickavance, *supra* at 12.52.

¹⁸⁴⁵ Pickavance, *supra* at 232 citing *Castle Inns (Stirling) Ltd trading as Castle Leisure Group v Clark Contracts Ltd* [2005] CSOH 178.

¹⁸⁴⁶ Pickavance, *supra* at 228 and 231 citing *Fenice Investments Inc v Jerram Falkjys Construction Ltd* [2011] EWHC 1678 (TCC) where the TCC considered what is reasonable in the context of adjudication and said that there should be a “considerable ‘margin of appreciation’ for the following reasons: (1) the work has to be undertaken at considerable speed, and sometimes with moving targets in the sense of what the core issues underlying the adjudication are, or become; by analogy, where work is done by solicitors on an urgent basis, this is frequently advanced as a reason why the Court should award more than the guideline rate of costs; (2) routine satellite litigation

Jurisdiction	How are costs allocated?
	<p>An adjudicator in the U.K. is not entitled to exercise any lien on his decision (i.e. is not able to withhold his decision while awaiting payment of fees).¹⁸⁴⁷</p> <p>In relation to the costs of the parties, the 2009 modifications to the <i>U.K. Construction Act</i> prevents parties from agreeing on allocation of costs relating to the adjudication of a dispute unless such agreement is made in writing after the service of the notice of adjudication.¹⁸⁴⁸</p>
New Zealand	<p>Section 56 of the <i>New Zealand Act</i> describes the mechanism for costs of adjudication proceedings.</p> <p>Under the legislation, an adjudicator may determine that costs and expenses must be met by any of the parties to the adjudication (whether those parties are or are not, on the whole, successful in the adjudication) if the adjudicator considers that the party has caused those costs and expenses to be incurred unnecessarily by: a) bad faith on the party of that party; or b) allegations or objections by that party that are without substantial merit.¹⁸⁴⁹</p> <p>If the adjudicator does not make any such determination, the parties must meet their own costs and expenses.¹⁸⁵⁰ Any agreements made as to cost apportionment made prior to the dispute are not binding.¹⁸⁵¹</p> <p>In relation to fees, the adjudicator’s fee requirements are set out under section 57 of the <i>New Zealand Act</i>. Section 57 stipulates that the parties can agree on what the adjudicator is entitled to be paid by way of fees and expenses and if there is no agreement, the payment should be reasonable having regard to the work done and expenses incurred. The parties are then jointly and severally liable for the adjudicator’s fees and expenses.¹⁸⁵² The apportionment is either equal, or in some proportion determined by the adjudicator.¹⁸⁵³</p> <p>The adjudicator may decide to depart from equal apportionment of fees and expenses if it is in the adjudicator’s view that: a) the claimant’s adjudication claim (or respondents response) was without substantial merit; or b) a party acted in a contemptuous or improper manner during the adjudication.¹⁸⁵⁴</p> <p>An adjudicator is not entitled to any payment of fees or expenses if the adjudication is not determined within the specific time limits of the <i>New Zealand Act</i>.¹⁸⁵⁵ The adjudicator may however, require payment before communicating the decision on a dispute.¹⁸⁵⁶</p>
Ireland	<p>Section 6(15) of the <i>Ireland Act</i> specifies that “[e]ach party shall bear his or her own legal and other costs incurred in connection with the adjudication”¹⁸⁵⁷ and section 6(16) specifies that “[t]he parties shall pay the amount of the fees, costs and expenses of the adjudicator in accordance with the decision of the adjudicator.”¹⁸⁵⁸</p>
Singapore	<p>According to section 30 of the <i>Singapore Act</i>, the costs are limited to an amount prescribed by the Minister but an adjudicator has the discretion to “decide which party shall pay the costs of the adjudication and, where applicable, the amount of contribution by each party”.¹⁸⁵⁹</p>

about an adjudicator’s costs could not have been intended by the framers of s108 or the *Scheme* and would be a discouragement to potential adjudicators to act in this important process.”

¹⁸⁴⁷ Pickavance, *supra* at 12.27 and 16.7.2.

¹⁸⁴⁸ 2009 *U.K. Act*, s 108A.

¹⁸⁴⁹ *New Zealand Act*, s 56(1).

¹⁸⁵⁰ *New Zealand Act*, s 56(2).

¹⁸⁵¹ *New Zealand Act*, s 56(3).

¹⁸⁵² *New Zealand Act*, s 57(1) and (2).

¹⁸⁵³ *New Zealand Act*, s 57(3).

¹⁸⁵⁴ *New Zealand Act*, s 57(4).

¹⁸⁵⁵ *New Zealand Act*, s 57(5).

¹⁸⁵⁶ *New Zealand Act*, s 57(6).

¹⁸⁵⁷ *Ireland Act*, s 6(15).

¹⁸⁵⁸ *Ireland Act*, s 6(17).

¹⁸⁵⁹ *Singapore Act*, s 30(1) and (2).

Jurisdiction	How are costs allocated?
	<p>Where the adjudicator is satisfied that a party incurred costs because of frivolous or vexatious conduct on the part of, or unfounded submissions by, another party, the adjudicator may decide that the second-mentioned party shall pay some or all of those costs.¹⁸⁶⁰</p> <p>A party to an adjudication shall bear all other costs and expenses incurred as a result of or in relation to the adjudication, but may include the whole or any part thereof in any claim for costs in any proceeding before a court or tribunal or in any other dispute resolution proceeding.¹⁸⁶¹</p> <p>The parties to an adjudication can agree with the adjudicator on the adjudicator’s fees and expenses. Failing such agreement, fees and expenses can be determined by the authorized nominating body having regard to the work done and expenses incurred by the adjudicator.¹⁸⁶²</p> <p>An adjudicator is not entitled to fees if he or she fails to make the determination within the set time limits for adjudication.¹⁸⁶³</p>
Malaysia	<p>Under section 18 of the <i>Malaysia Act</i>, the adjudicator (in his decision) shall order that costs follow the event and shall fix the quantum of costs. The adjudicator’s order on costs prevails over any agreement made by the parties prior to the commencement of adjudication proceedings by which one party agrees to pay the other party’s costs or bear the adjudicator’s fees.¹⁸⁶⁴</p> <p>Section 19 of the <i>Malaysia Act</i> stipulates that the parties and the adjudicator are free to agree on the fees to be paid to the adjudicator. Failing such agreement, the standard terms of the KLRCA apply. The parties to the adjudication are jointly and severally liable to pay the adjudicator’s fees and expenses and the adjudicator may recover the fees and expenses due as debt.¹⁸⁶⁵</p> <p>In Malaysia, there is also a requirement for parties to contribute and deposit with the Director of the KLRCA a reasonable proportion of fees in equal share as directed by the adjudicator in advance as security.¹⁸⁶⁶ The adjudicator may also hold back the decision and require full payment of fees and expenses to be deposited with the Director of the KLRCA.¹⁸⁶⁷ If the adjudicator fails to make his or her determination within the specific time limits of the dispute, the adjudicator is not entitled to any fees or expenses (except where, pursuant to section 19(5) of the <i>Malaysia Act</i>, the adjudicator requires full payment of fees and expenses before releasing the adjudication decision, and such fees and expenses have not yet been deposited with the Director of the KLRCA).¹⁸⁶⁸</p>
Hong Kong	<p>According to the Consultation Document, it is anticipated that “[e]ach party will bear its own legal costs of the adjudication but the adjudicator may decide which party pays the adjudicator’s fees and expenses or the proportions in which they are to be jointly paid by the parties”.¹⁸⁶⁹</p> <p>Hong Kong proposes to be in line with other countries with security of payment legislation in this regard. The Development Bureau noted that “these costs are likely to be far less than party legal costs” in litigation and “[i]t should be relatively easy for an adjudicator to decide how to award their fees and expenses”. The ability for the adjudicator to apportion fees also was thought to “provide an incentive against speculative pursuit of unrealistic claims and the maintaining of unrealistic defences to delay payment”.¹⁸⁷⁰</p>
<i>Australia</i>	
NSW	Subsection 4(1) of the <i>New South Wales Act</i> defines “adjudication fees” to mean “any fees or expenses

¹⁸⁶⁰ *Singapore Act*, s 30(3).

¹⁸⁶¹ *Singapore Act*, s 30(4).

¹⁸⁶² *Singapore Act*, s 31(1).

¹⁸⁶³ *Singapore Act*, s 31(2).

¹⁸⁶⁴ *Malaysia Act*, s 18.

¹⁸⁶⁵ *Malaysia Act*, s 19(1) to (3).

¹⁸⁶⁶ *Malaysia Act*, s 19(4).

¹⁸⁶⁷ *Malaysia Act*, s 19(5).

¹⁸⁶⁸ *Malaysia Act*, s 19(6).

¹⁸⁶⁹ Hong Kong Consultation Document at 37.

¹⁸⁷⁰ Hong Kong Consultation Document at 39.

Jurisdiction	How are costs allocated?
	<p>charged by an authorised nominating authority, or by an adjudicator” under the <i>New South Wales Act</i>. Subsection 28(3) permits authorized nominating authorities to charge a fee for services provided in connection with adjudication applications made to the authority. The parties are jointly and severally liable to pay any such fee.¹⁸⁷¹ Each party is liable in equal proportions, or in such proportions as the adjudicator may determine.¹⁸⁷²</p> <p>Subsection 29(1) entitles an adjudicator to be paid fees and expenses for adjudicating an application either as agreed between the adjudicator and the parties or, in the absence of an agreement, amounts that are “reasonable having regard to the work done and expenses incurred by the adjudicator”. The parties are again jointly and severally liable to pay the adjudicator’s fees and expenses.¹⁸⁷³ Each party is liable in equal proportions, or in such proportions as the adjudicator may determine.¹⁸⁷⁴</p> <p>If a claimant has paid a respondent’s share of adjudication fees in relation to an adjudication but has not been reimbursed, the claimant may request the unpaid share be added to the adjudication certificate where it becomes part of the adjudicated amount.¹⁸⁷⁵</p>
Victoria	<p>Section 4 of the <i>Victoria Act</i> defines “adjudication fees” to mean “any fees or expenses charged by an authorised nominating authority or by an adjudicator” under the <i>Victoria Act</i>.</p> <p>Subsection 43C(1) permits authorized nominating authorities to charge a fee for services provided in connection with adjudication applications or adjudication review applications made to the authority.</p> <p>Subsection 45(2) entitles an adjudicator to be paid fees and expenses for adjudicating an application either as agreed between the adjudicator and the parties or, in the absence of an agreement, amounts that are “reasonable having regard to the work done and expenses incurred by the adjudicator”. The parties are jointly and severally liable to pay the adjudicator’s fees and expenses.¹⁸⁷⁶ Each party is liable in equal proportions, or in such proportions as the adjudicator may determine.¹⁸⁷⁷</p> <p>A party may elect to pay the other party’s contribution to the adjudicator if that party refuses to pay his or her required contribution.¹⁸⁷⁸ If a party has paid another party’s share of adjudication fees or adjudication review fees, as applicable, but has not been reimbursed, that party may request the unpaid share be added to an adjudication certificate.¹⁸⁷⁹</p>
Queensland	<p>Section 9 of Schedule 2 of the <i>Queensland Act</i> defines “adjudication fees” to mean “fees or expenses charged by an adjudicator” under the <i>Queensland Act</i>.</p> <p>Subsection 35(1) entitles an adjudicator to be paid fees and expenses for adjudicating an application either as agreed between the adjudicator and the parties or, in the absence of an agreement, amounts that are “reasonable having regard to the work done and expenses incurred by the adjudicator”. The parties are jointly and severally liable to pay the adjudicator’s fees and expenses.¹⁸⁸⁰ Each party is liable in equal proportions, or in the proportions the adjudicator decides.¹⁸⁸¹</p> <p>When deciding on the proportion of fees and expenses to be paid by the claimant and respondent respectively, subsection 35A(2) provides that the adjudicator may consider the following matters:</p> <ul style="list-style-type: none"> (a) the relative success of the claimant or respondent in the adjudication; (b) whether the claimant or respondent commenced or participated in the adjudication for an improper purpose; (c) whether the claimant or respondent commenced or participated in the adjudication without reasonable prospects of success; (d) whether the claimant or respondent has acted unreasonably leading up to the adjudication; (e) whether the claimant or respondent has acted unreasonably in the conduct of the adjudication; (f) the reasons given by the respondent for not making the progress payment the subject of the

¹⁸⁷¹ *New South Wales Act*, s 28(4)(a).

¹⁸⁷² *New South Wales Act*, s 28(4)(b).

¹⁸⁷³ *New South Wales Act*, s 29(2).

¹⁸⁷⁴ *New South Wales Act*, s 29(3).

¹⁸⁷⁵ *New South Wales Act*, s 24(5).

¹⁸⁷⁶ *Victoria Act*, s 45(3).

¹⁸⁷⁷ *Victoria Act*, s 45(4).

¹⁸⁷⁸ *Victoria Act*, s 45(7).

¹⁸⁷⁹ *Victoria Act*, s 28Q(5) [claimant] and s 28Q(5) [respondent].

¹⁸⁸⁰ *Queensland Act*, s 35(2).

¹⁸⁸¹ *Queensland Act*, s 35(3).

Jurisdiction	How are costs allocated?
	<p>adjudication application;</p> <ul style="list-style-type: none"> (g) whether the respondent included additional reasons for withholding payment in the adjudication response that were not included in the payment schedule served on the claimant; (h) whether an adjudication application is withdrawn; (i) the services provided by the adjudicator in adjudicating the adjudication application, including the amount of time taken to consider discrete aspects of the amount claimed; (j) another matter the adjudicator considers relevant in making the decision. <p>If the claimant has paid the respondent’s share of the adjudication fees but is not reimbursed by the respondent, the claimant may ask the registrar to include the unpaid portion in the adjudication certificate, where it becomes part of the adjudicated amount.¹⁸⁸²</p>
South Australia	<p>Section 4 of the <i>South Australia Act</i>¹⁸⁸³ defines “adjudication fees” to mean “fees or expenses charged by an authorised nominating authority, or by an adjudicator” under the <i>South Australia Act</i>.</p> <p>Subsection 29(4) permits authorized nominating authorities to charge a fee for any service provided in connection with adjudication applications made to the authority. The parties are jointly and severally liable to pay any such fee.¹⁸⁸⁴ Each party is liable in equal proportions or in such proportions as the adjudicator may determine.¹⁸⁸⁵</p> <p>Subsection 30(1) entitles an adjudicator to be paid fees and expenses for adjudicating an application either as agreed between the adjudicator and the parties or, in the absence of an agreement, either amounts that are “reasonable having regard to the work done and expenses incurred by the adjudicator” or any prescribed hourly rate, if any, and reasonable expenses. The South Australia Regulations do not currently prescribe an hourly rate. The parties are again jointly and severally liable to pay the adjudicator’s fees and expenses.¹⁸⁸⁶ Each party is liable in equal proportions, or in such proportions as the adjudicator may determine.¹⁸⁸⁷</p> <p>If a claimant has paid a respondent’s share of adjudication fees in relation to an adjudication but has not been reimbursed, the claimant may request the unpaid share be added to the adjudication certificate where it becomes part of the adjudicated amount.¹⁸⁸⁸</p>
Tasmania	<p>Section 4 of the <i>Tasmania Act</i>¹⁸⁸⁹ defines “adjudication fees” to mean “fees or expenses charged by a nominating authority... or by an adjudicator” under the <i>Tasmania Act</i>.</p> <p>Subsection 32(1) permits authorized nominating authorities to charge an amount for any service provided in connection with an adjudication application made to the authority. The claimant and respondent are jointly and severally liable to pay any such amount.¹⁸⁹⁰ Each party is liable in equal proportions, or in such proportions as the adjudicator may determine.¹⁸⁹¹</p> <p>Subsection 37(1) entitles an adjudicator to be paid fees and expenses for adjudicating an application either as agreed between the adjudicator and the parties or, in the absence of an agreement, an amount that is “reasonable having regard to the work done and expenses incurred by the adjudicator”. The parties are again jointly and severally liable to pay the adjudicator’s fees and expenses.¹⁸⁹² Each party is liable in equal proportions, or in such proportions as the adjudicator may determine.¹⁸⁹³ If a decision is made under the <i>Magistrates Court (Administrative Appeals Division) Act 2001</i> to uphold an adjudicator’s withdrawal for disqualification for interest, the adjudicator may recover costs incurred in relation to the review from the party who applied for the review.¹⁸⁹⁴ If the adjudicator’s decision to withdraw is not upheld, costs of the review may not be recovered by the adjudicator.¹⁸⁹⁵</p>

¹⁸⁸² *Queensland Act*, s 30(6) and s 30(7).

¹⁸⁸³ *Building and Construction Industry Security of Payment Act 2009* [South Australia Act].

¹⁸⁸⁴ *South Australia Act*, s 29(6)(a).

¹⁸⁸⁵ *South Australia Act*, s 29(6)(b).

¹⁸⁸⁶ *South Australia Act*, s 30(2).

¹⁸⁸⁷ *South Australia Act*, s 30(3).

¹⁸⁸⁸ *South Australia Act*, s 24(5).

¹⁸⁸⁹ *Tasmania Act*.

¹⁸⁹⁰ *Tasmania Act*, s 32(3)(a).

¹⁸⁹¹ *Tasmania Act*, s 32(3)(b).

¹⁸⁹² *Tasmania Act*, s 37(3)(a).

¹⁸⁹³ *Tasmania Act*, s 37(3)(b).

¹⁸⁹⁴ *Tasmania Act*, s 37(2)(a).

¹⁸⁹⁵ *Tasmania Act*, s 37(2)(b).

Jurisdiction	How are costs allocated?
	If a claimant has paid a respondent’s share of adjudication fees in relation to an adjudication but has not been reimbursed by the respondent, the claimant may request the unpaid share be added to the adjudication certificate where it becomes part of the adjudicated amount. ¹⁸⁹⁶
Australian Capital Territory	<p>Subsection 34(2) of the <i>Australian Capital Territory Act</i>¹⁸⁹⁷ permits authorized nominating authorities to charge costs and expenses for services provided in relation to an adjudication application. The claimant and respondent are each liable to pay any costs and expenses charged by the authorized nominating authority.¹⁸⁹⁸ Each party is liable in equal proportions, or in such proportions as the adjudicator may determine.¹⁸⁹⁹</p> <p>Subsection 36(1) entitles an adjudicator to be paid fees and expenses for adjudicating an application either as agreed between the adjudicator and the parties or, in the absence of an agreement, a “reasonable amount having regard to the work done and expenses incurred by the adjudicator”. The claimant and respondent are each liable to pay the adjudicator’s fees and expenses.¹⁹⁰⁰ Each party is liable in equal proportions, or in such proportions as the adjudicator may decide.¹⁹⁰¹</p> <p>If a claimant has paid a respondent’s share of adjudication fees in relation to an adjudication but has not been reimbursed, the claimant may request the unpaid share be added to the adjudication certificate where it becomes part of the adjudicated amount.¹⁹⁰²</p>
Western Australia	<p>Adjudication costs consist of the prescribed apportioner’s fees (if used) and the adjudicator’s fees and expenses.¹⁹⁰³ Subsection 34(1) of the Western Australia Act provides that the parties to an adjudication bear their own costs in relation to adjudication of a dispute. However, an adjudicator may make a disproportionate award of the costs against a party because of “frivolous or vexatious conduct” or “unfounded submissions” from that party which resulted in another party incurring costs of the adjudication.¹⁹⁰⁴ In this case, the adjudicator must give written notice and reasons for their decision regarding the amount of costs and the date they are payable.¹⁹⁰⁵</p> <p>Subsection 44(6) further provides that the parties to an adjudication are expected to pay the costs of adjudication in equal shares. Subsection 44(1) of the Western Australia Act defines costs of an adjudication for the purposes of that section to include any amounts to which the adjudicator is entitled and the cost of any testing done or of any expert engaged.</p> <p>The parties are jointly and severally liable to pay the costs of an adjudication.¹⁹⁰⁶ A party that pays more than their share of the costs of an adjudication without being required to do so may recover those costs by written decision of the adjudicator setting out the date on which the amount is payable.¹⁹⁰⁷ An appointed adjudicator may also recover the costs of an adjudication in court from a person liable to pay as if the costs were a debt due to the adjudicator.¹⁹⁰⁸</p>
Northern Territory	<p>Subsection 36(1) of the Northern Territories Act provides that the parties to a payment dispute bear their own costs in relation to an adjudication of the dispute. However, if an adjudicator is satisfied that a party to a payment dispute incurred costs of the adjudication because of frivolous or vexatious conduct or unfounded submissions by another party, the adjudicator may decide that the other party must pay some or all of these costs.¹⁹⁰⁹ In this case, the adjudicator must give written notice and reasons for their decision regarding the amount of costs and the date they are payable.¹⁹¹⁰</p> <p>Subsection 46(5) further provides that the parties to an adjudication are expected to pay the costs of adjudication in equal shares. Subsection 46(12) of the Northern Territory Act defines costs of an</p>

¹⁸⁹⁶ *Tasmania Act*, s 27(7)(a) and (b).

¹⁸⁹⁷ *Australian Capital Territory Act*.

¹⁸⁹⁸ *Australian Capital Territory Act*, s 34(3)(a).

¹⁸⁹⁹ *Australian Capital Territory Act*, s 34(3)(b).

¹⁹⁰⁰ *Australian Capital Territory Act*, s 36(2).

¹⁹⁰¹ *Australian Capital Territory Act*, s 36(3).

¹⁹⁰² *Australian Capital Territory Act*, s 26(6) and s 26(7).

¹⁹⁰³ See, for example, *Western Australia Act*, s 26(1).

¹⁹⁰⁴ *Western Australia Act*, s 34(2).

¹⁹⁰⁵ *Western Australia Act*, s 34(3).

¹⁹⁰⁶ *Western Australia Act*, s 44(5).

¹⁹⁰⁷ *Western Australia Act*, s 44(10) and 44(11).

¹⁹⁰⁸ *Western Australia Act*, s 44(12).

¹⁹⁰⁹ *Northern Territory Act*, s 36(2).

¹⁹¹⁰ *Northern Territory Act*, s 36(3).

Jurisdiction	How are costs allocated?
	<p>adjudication for the purposes of that section to include any amounts to which the adjudicator is entitled and the cost of any testing done or of any expert engaged.</p> <p>The parties are jointly and severally liable to pay the costs of an adjudication.¹⁹¹¹ A party that pays more than their share of the costs of an adjudication without being required to do so may recover those costs by written decision of the adjudicator setting out the date on which the amount is payable.¹⁹¹² An appointed adjudicator may also recover the costs of an adjudication in court from a person liable to pay as if the costs were a debt due to the adjudicator.¹⁹¹³</p>

5. How is a decision of an adjudicator enforced?

Jurisdiction	How is a decision of an adjudicator enforced?
U.K.	<p>Decisions of an adjudicator may be enforced through enforcement proceedings of the Technology and Construction Court (TCC). The Technology and Construction Court Guide sets out a procedure for prompt enforcement of adjudication decisions at s. 9.2.¹⁹¹⁴ The party seeking to enforce an adjudicator’s decision would provide the TCC with a claim for accompanied by an application notice that sets out the procedural directions sought. Commonly, the application will seek summary judgment under the Civil Procedure Rules Part 24. A TCC judge ordinarily will provide directions within 3 working days of the receipt of the application and the application will be dealt with by the TCC judge on paper, without notice. The TCC Guide notes that directions will ordinarily provide for an enforcement hearing within about 28 days of the directions being made and for the defendant to be given at least 14 days from the date of service for serving evidence in opposition of the enforcement application.¹⁹¹⁵</p> <p>Courts will generally enforce the adjudicator’s decision unless “it is plain that the question which he has decided was not the question referred to him or the manner in which he has gone about his task is obviously unfair.”¹⁹¹⁶</p>
New Zealand	<p>A claimant may make use of a variety of enforcement mechanisms, including application to a District Court for recovery of a monetary amount as a debt owed by entry as a judgment or for enforcement of a non-monetary award, or by suspending any further construction work upon 5 working days’ notice and in accordance with the process set out in the <i>New Zealand Act</i>.¹⁹¹⁷</p> <p>A statutory review process provided for in the <i>New Zealand Act</i> is found in section 71A, which permits non-respondent owners against whom a charging order is awarded (as described below) to appeal the award to the District Court within 20 working days of the relevant adjudicator’s determination unless an application for extension is made.¹⁹¹⁸</p> <p>The New Zealand Court of Appeal has expressed a preference for aggrieved parties to re-litigate the underlying dispute by way of another dispute resolution proceeding.¹⁹¹⁹ Relief by way of judicial review will be available “only rarely” and courts will be “vigilant to ensure that judicial review of adjudicators’ determinations does not cut across the scheme of the [<i>New Zealand Act</i>] and undermine its objectives”.¹⁹²⁰</p>
Ireland	Decisions of an adjudicator may be enforced by way of action, or by leave of the High Court, in the

¹⁹¹¹ *Northern Territory Act*, s 36(4).

¹⁹¹² *Northern Territory Act*, s 46(9) and 46(10).

¹⁹¹³ *Northern Territory Act*, s 46(11).

¹⁹¹⁴ TCC Guide, 2nd ed, 3rd rev, 2014, section 9, online:

<https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/448256/technology-and-construction-court-guide.pdf> [TCC Guide].

¹⁹¹⁵ TCC Guide, s 9.2.

¹⁹¹⁶ *Carillion Construction Ltd v Devonport Royal Dockyard Ltd* at para 85.

¹⁹¹⁷ *New Zealand Act* ss 59-61, 72-79.

¹⁹¹⁸ *New Zealand Act*, s 71A, 71B(2).

¹⁹¹⁹ *Pickavance*, *supra* at 499, s 25.50, citing *Rees v. Firth*, [2011] NZCA 668 at para 22.

¹⁹²⁰ *Ibid*, p. 499, s 25.51 citing *Rees v Firth*, [2011] NZCA 668 at para 27.

Jurisdiction	How is a decision of an adjudicator enforced?
	<p>same manner as a judgment or order of that Court with the same effect as a judgment or order of the High Court.¹⁹²¹ The claimant also has the option to suspend work under the construction contract upon 7 days' written notice.¹⁹²²</p> <p>Section 6(12) of the <i>Ireland Act</i> provides that a decision of the adjudicator, if binding, shall (unless otherwise agreed) be binding on them for all purposes and may be relied upon by any party "by way of defence, set-off, or otherwise, in any legal proceedings".¹⁹²³</p>
Singapore	<p>A claimant may file an adjudication certificate in court as a judgment for debt, or suspend construction work or supply of related goods or services 7 days after serving notice of intention to suspend.¹⁹²⁴</p> <p>The claimant may seek payment of an adjudicated amount from a principal, defined as a "person who is liable to make payment to the respondent for or in relation to the whole or part of the construction work" that is the subject of the contract between the respondent and claimant.¹⁹²⁵ The principal may make payment if, 2 days after service of a notice of payment on the respondent, the respondent fails to show proof of payment of the adjudicated amount.¹⁹²⁶ Any payment by the principal to the claimant may be treated as payment to the respondent, or may be recovered as debt due from the respondent.¹⁹²⁷</p> <p>The <i>Singapore Act</i> provides aggrieved respondents with the opportunity to seek a single adjudication review from an adjudication determination in which:</p> <ul style="list-style-type: none"> • the adjudication involves a construction contract; • the adjudicated amount exceeds the relevant response amount by at least SGD\$100,000; and • the respondent had served a payment response.¹⁹²⁸ <p>A review application must be made within 7 days of receipt of the adjudication determination.¹⁹²⁹ The respondent must first pay any adjudicated amounts, including any amounts in dispute.¹⁹³⁰ The review adjudicator (independent from the original determination) or a majority of a 3-adjudicator review panel¹⁹³¹ may substitute the initial determination for any other determination considered appropriate, or refuse the review application.¹⁹³²</p>
Malaysia	<p>A claimant may seek enforcement of the decision as a judgment of the High Court, or slow or suspend performance of obligations under the construction contract upon written notice.¹⁹³³ The claimant may also request payment directly from the principal of the respondent of any amounts due and payable by the principle to the respondent.¹⁹³⁴ The principal may recover any amounts paid as debt or via set-off.¹⁹³⁵</p> <p>Section 15 of the <i>Malaysia Act</i> provides an aggrieved party with the opportunity to apply to the High Court to set aside an adjudication decision on one or more of the following grounds:</p> <ul style="list-style-type: none"> • the adjudication decision was procured through fraud or bribery; • there was a denial of natural justice;

¹⁹²¹ *Ireland Act*, s 6(11).

¹⁹²² *Ireland Act*, s 7(1).

¹⁹²³ *Ireland Act*, s 6(12).

¹⁹²⁴ Singapore Information Kit, *supra* at 16, s 5.3. See also *Singapore Act*, s 26(1).

¹⁹²⁵ *Singapore Act*, s 2.

¹⁹²⁶ *Singapore Act*, s 24(1)-(2).

¹⁹²⁷ *Singapore Act*, s 24(4).

¹⁹²⁸ Singapore Information Kit, *supra* at 17, s 5.4.

¹⁹²⁹ *Singapore Act*, s 18(2).

¹⁹³⁰ *Singapore Act*, s 18(3).

¹⁹³¹ *Singapore Act*, s 19(7).

¹⁹³² *Singapore Act*, s 19(4).

¹⁹³³ *Malaysia Act*, s 28-29.

¹⁹³⁴ Pickavance, *supra* at 485, s 24.68 citing *Malaysia Act* 4 (definition) and 30.

¹⁹³⁵ *Malaysia Act*, s 30.

Jurisdiction	How is a decision of an adjudicator enforced?
	<ul style="list-style-type: none"> • the adjudicator did not act independently or impartially; • the adjudicator exceeded their jurisdiction.¹⁹³⁶
Hong Kong	<p>Adjudicator’s decisions would be enforceable in the same way as a judgment of the court, and would be granted a generous amount of deference by reviewing courts.</p> <p>An error of law or fact by the adjudicator would not be grounds for resisting enforcement – appeals could be taken on a procedural but not substantive basis. The only basis for the court refusing enforcement would be if the paying party could show convincingly that the procedure adopted was “materially unfair or the adjudicator had exceeded their remit”.¹⁹³⁷</p>
<i>Australia</i>	
NSW	<p>A claimant may file an adjudication certificate as a judgment debt in court or suspend any further construction work upon 2 business days’ notice and in accordance with the process laid out in the New South Wales Act.¹⁹³⁸</p> <p>Although section 25 of the New South Wales Act provides that a respondent may commence proceedings to set aside the filing of an adjudication certificate as a judgment for debt, the respondent cannot directly challenge the adjudicator’s determination.¹⁹³⁹ However, the New South Wales Court of Appeal held in 2010 that an adjudication determination could be set aside on the basis of jurisdiction error.¹⁹⁴⁰</p> <p>More recent court decisions have discussed examples of actions that might constitute a jurisdictional error by an adjudicator, such as where an adjudicator has:</p> <ul style="list-style-type: none"> • made a mistake about whether or not they had jurisdiction to determine the adjudication application, or the limits of that jurisdiction (for example, because they determined that an adjudication application was served in time when it was not); • failed to comply with the statutory obligations upon which their jurisdiction was based (for example, by ignoring something the New South Wales Act requires to be considered as a condition of jurisdiction or, conversely, considering something required to be ignored); • failing to engage with either or both of the parties’ submissions such that they produced an arbitrary, capricious, unreasonable or irrational justification for their determination; or • caused the denial of natural justice or procedural fairness (for example, by considering fresh submissions from one party in its adjudication response without granting the other party an opportunity to respond).¹⁹⁴¹
Victoria	<p>A claimant may obtain a court order for payment as a judgment debt by requesting an adjudication certificate from the authorized nominating authority.¹⁹⁴² The adjudicated amount can be collected from</p>

¹⁹³⁶ *Malaysia Act*, s 15(1)-(d).

¹⁹³⁷ HK Summary and Guide at 5.

¹⁹³⁸ *New South Wales Act*, s 24-26A.

¹⁹³⁹ *New South Wales Act*, s 25(4).

¹⁹⁴⁰ Minter Ellison, “Security of Payment Legislation: New South Wales”, July 15, 2015, online: <[http://www.constructionlawmadeeasy.com/SecurityofPaymentNew South Wales](http://www.constructionlawmadeeasy.com/SecurityofPaymentNew%20South%20Wales)>, see also *New South Wales Act*, s 22 [Minter Ellison re New South Wales], citing *Chase Oyster Bar v Hamo Industries* [2010] New South Wales CA 190, online: <[http://www.austlii.edu.au/au/cases/New South Wales/New South Wales CA/2010/190.html](http://www.austlii.edu.au/au/cases/New%20South%20Wales/New%20South%20Wales%20CA/2010/190.html)>.

¹⁹⁴¹ Minter Ellison re New South Wales, *supra* citing *Bauen Constructions Pty Limited v Westwood Interiors Pty Limited* [2010] New South Wales SC 1359 <[http://www.austlii.edu.au/au/cases/New South Wales/New South Wales SC/2010/1359.html](http://www.austlii.edu.au/au/cases/New%20South%20Wales/New%20South%20Wales%20SC/2010/1359.html)> and *St Hilliers Contracting Pty Limited v Dualcorp Civil Pty Limited* [2010] New South Wales SC 1468 <[http://www.austlii.edu.au/au/cases/New South Wales/New South WalesSC/2010/1468.html](http://www.austlii.edu.au/au/cases/New%20South%20Wales/New%20South%20WalesSC/2010/1468.html)>.

¹⁹⁴² *Victoria Act*, s 28P, 28O.

Jurisdiction	How is a decision of an adjudicator enforced?
	<p>the respondent or from the principal, up to a maximum of the amount owed to the respondent under their contract.¹⁹⁴³ A successful applicant can also suspend construction work with 3 days’ notice of intention to do so.¹⁹⁴⁴ However, a claimant may not exercise these remedies if the respondent has lodged a request for an adjudication review and the review has not yet been determined.¹⁹⁴⁵</p> <p>The respondent may make an “adjudication review application” to a review adjudicator within five days of receiving the determination if certain conditions of the Victoria Act are fulfilled:</p> <ul style="list-style-type: none"> • the adjudicated amount exceeds AUD\$100,000;¹⁹⁴⁶ • the respondent previously submitted a payment schedule to the claimant in accordance with the provisions of the Victoria Act;¹⁹⁴⁷ • the respondent has paid any undisputed amount to the claimant and the disputed amount into a designated trust account as described in Section 28F of the Victoria Act;¹⁹⁴⁸ • the review is sought on the grounds that the adjudicated amount includes an excluded amount (defined in Section 10B of the Act and including amounts claimed for damages for breach of contract).¹⁹⁴⁹ <p>The claimant may also appeal to a review adjudicator within five business days of receiving the determination if certain conditions of the Victoria Act are fulfilled:</p> <ul style="list-style-type: none"> • the adjudicated amount exceeds AUD\$100,000;¹⁹⁵⁰ • the review is sought on the grounds that the adjudicator “failed to take into account a relevant amount in making an adjudication determination because it was wrongly determined to be an excluded amount”.¹⁹⁵¹ <p>The applicant must make the review application, in writing, to the same authorized nominating authority to which the original application was made. The review adjudicator (who was not directly or indirectly involved with the original determination) is permitted to substitute a new adjudication determination, or confirm the original determination.¹⁹⁵²</p>
Queensland	<p>A claimant may apply to court to claim an unpaid adjudication amount as judgment debt in two circumstances: (1) where the respondent has agreed to payment under a schedule and the adjudicator has determined the amount is payable, yet the respondent hasn’t paid; or (2) where the respondent has not given a payment schedule within time and the claim is deemed a debt owing.¹⁹⁵³</p> <p>The claimant may also suspend construction work upon 2 business days’ notice.¹⁹⁵⁴</p> <p>There is no statutory appeal route for adjudication decisions. An adjudication decision may be challenged in court for jurisdictional error.¹⁹⁵⁵</p>
South Australia	<p>A claimant may request an adjudication certificate and file it as a judgment debt in court.¹⁹⁵⁶ The claimant may also suspend work or the supply of related goods and services under the contract, upon giving 2 business days’ notice in accordance with the provisions of the South Australia Act.¹⁹⁵⁷</p>

¹⁹⁴³ See Division 4 of *Victoria Act*, e.g. s 31.

¹⁹⁴⁴ *Victoria Act*, s 29(1).

¹⁹⁴⁵ *Victoria Act*, s 28O(3)(4).

¹⁹⁴⁶ *Victoria Act*, s 28A(a).

¹⁹⁴⁷ *Victoria Act*, s 28A(2).

¹⁹⁴⁸ *Victoria Act*, s 28A(5)(6).

¹⁹⁴⁹ *Victoria Act*, s 28A(3).

¹⁹⁵⁰ *Victoria Act*, s 28A(a).

¹⁹⁵¹ *Victoria Act*, s 28C(2).

¹⁹⁵² *Victoria Act*, s 28I(5).

¹⁹⁵³ Minter Ellison, “Security of Payment Legislation: Queensland”, October 15, 2015, online:

<<http://www.constructionlawmadeeasy.com/SecurityofPaymentQLD#Rightslegislationconfersoncontractor>>

[Minter Ellison re Queensland].

¹⁹⁵⁴ *Queensland Act*, s 33(1).

¹⁹⁵⁵ Minter Ellison re Queensland, *supra* at 5 (in PDF).

¹⁹⁵⁶ *South Australia Act*, ss 24, 25.

¹⁹⁵⁷ *South Australia Act*, ss 24, 28.

Jurisdiction	How is a decision of an adjudicator enforced?
	<p>There is no statutory right of appeal, but the Supreme Court of South Australia has found that an adjudicator’s determination may be set aside if:</p> <ul style="list-style-type: none"> • the payment claim does not comply with the requirements under the South Australia Act and does not allow a reasonable principal to ascertain with sufficient certainty the basis of the claim (notwithstanding minor arithmetical errors); • there is a denial of natural justice (e.g. if the adjudicator fails to invite further submissions or evidence from the parties); • there is a reasonable apprehension of bias on the part of the adjudicator or person nominating the adjudicator; or • the adjudicator made an error of law.¹⁹⁵⁸
Tasmania	<p>The claimant may file an adjudication certificate in court as a judgment for debt, or suspend construction work or supply of related goods or services 2 days after serving notice of intention to suspend.¹⁹⁵⁹</p> <p>The Tasmania Act does not include a statutory appeal process. However, it is likely that an adjudicator’s determination could be challenged on the limited grounds on which adjudication determinations have been successfully challenged in other Australian States without appeal rights.¹⁹⁶⁰</p>
Australian Capital Territory	<p>A claimant may file an adjudication certificate in court as a judgment for debt, or suspend construction work or supply of related goods or services 2 business days after serving notice of intention to suspend.¹⁹⁶¹</p> <p>Part 5 of the Australian Capital Territory Act contains a statutory appeal mechanism. Except as provided for in Part 5, a court “does not have jurisdiction to set aside or remit an adjudication decision on the ground of error of fact or law on the face of the decision”.¹⁹⁶² An appeal may be made by any parties to the adjudication to the Supreme Court of the Australian Capital Territory on “any question of law arising from an adjudication decision”, with leave of the court, or on consent of the parties.¹⁹⁶³</p> <p>The Court will not grant leave unless there is a question of law that could “substantially affect the rights” of at least one party and that a “manifest error of law on the face of the adjudication” was made or there is strong evidence that an error of law was made and a determination would add substantially to the certainty of the law.¹⁹⁶⁴</p> <p>On appeal, the Supreme Court may confirm, amend, set aside or remit the adjudication decision to an adjudicator (either the original or a new appointee) for reconsideration and a new decision to be released within 10 business days after the day the decision was remitted, or within such other time as the Court directs.¹⁹⁶⁵</p>
Western Australia	<p>An adjudicator’s determination may be enforced as a judgment debt or court order with leave of a “court of competent jurisdiction”.¹⁹⁶⁶ A claimant may suspend performance of their construction contract for non-payment upon 3 days’ notice and in accordance with the procedure set out in the Western Australia Act.¹⁹⁶⁷</p> <p>Section 46 of the Western Australia Act provides a limited appeal to the Commercial and Civil stream</p>

¹⁹⁵⁸ Minter Ellison re South Australia, *supra* citing *Built Environs Pty Ltd v Tali Engineering Pty Ltd & Ors* [2013] South Australia SC 84 <<http://www.austlii.edu.au/au/cases/sa/SASC/2013/84.html>>.

¹⁹⁵⁹ Minter Ellison re Tasmania.

¹⁹⁶⁰ Minter Ellison re Tasmania at 5 (PDF).

¹⁹⁶¹ *Australian Capital Territory Act* ss 27, 29.

¹⁹⁶² *Australian Capital Territory Act* ss 43(1).

¹⁹⁶³ *Australian Capital Territory Act*, s 43.

¹⁹⁶⁴ *Australian Capital Territory Act*, s 43(4).

¹⁹⁶⁵ *Australian Capital Territory Act*, s 43(6)-(7).

¹⁹⁶⁶ *Western Australia Act*, s 43(2).

¹⁹⁶⁷ *Western Australia Act*, s 42(2).

Jurisdiction	How is a decision of an adjudicator enforced?
	<p>of the State Administrative Tribunal, and permits the Tribunal to set aside an adjudicator’s decision to dismiss the application without determining its merits, under Section 31(2)(a).¹⁹⁶⁸ Section 31(2)(a) permits such a dismissal if:</p> <ul style="list-style-type: none"> • the contract is not a “construction” contract; • the application has not been prepared or served in accordance with the Western Australia Act; • an order was previously been made by another person (court or arbitrator) about the matter which is the subject of the application; or • the adjudicator fails to make a decision within the time prescribed.¹⁹⁶⁹ <p>If the Tribunal sets the decision aside, the adjudicator must make a new determination on the merits within 14 days of the date of reversal, unless the parties consent to a longer period.¹⁹⁷⁰ Although Section 46(3) provides that an adjudicator’s determination “cannot be appealed or reviewed” except to the State Administrative Tribunal, determinations or dismissals that result in jurisdictional errors or which do not fulfil the requirements of natural justice may nevertheless be reviewed and set aside by the Supreme Court.¹⁹⁷¹</p>
Northern Territory	<p>The claimant may file an adjudication certificate to be enforced as a judgment debt in court or suspend any further construction work in accordance with the process laid out in the Northern Territory Act, including giving notice at least 3 working days in advance.¹⁹⁷²</p> <p>Section 48 of the Northern Territory Act provides an appeal route to the “Local Court”¹⁹⁷³ for a review of an adjudication decision to dismiss an application under section 33(1)(a) without making a determination of its merits, on the basis that:</p> <ul style="list-style-type: none"> • the contract under dispute is not a construction contract; • the application was not prepared or served in accordance with the requirements of section 28 of the Northern Territory Act; • an “arbitrator or other person or a court or other body dealing with a matter arising under a construction contract” made “an order, judgment or other finding” about the dispute that is the subject of the application; or • it is not possible to fairly make a determination either because of the complexity of the matter or because the prescribed time or any extension thereof is insufficient for another reason.¹⁹⁷⁴ <p>A Section 48 appeal permits the decision to be set aside and referred back to the initial adjudicator, although a “substantial denial of natural justice that might have affected the outcome” could also be appealable.¹⁹⁷⁵ Except as provided for above, the results of an adjudication cannot be appealed or reviewed.¹⁹⁷⁶</p>

¹⁹⁶⁸ *Western Australia Act*, s 46(1). See also Phil Evans, “Discussion Paper: Statutory Review of the Construction Contracts Act 2004 (WA), October 2015 at pp. 28-29, online: <http://www.commerce.wa.gov.au/sites/default/files/atoms/files/constructionactdiscusspaper_0.pdf> [Evans Report].

¹⁹⁶⁹ *Western Australia Act*, s 31(2)(a).

¹⁹⁷⁰ *Western Australia Act*, s 46(2).

¹⁹⁷¹ Evans Report, *supra* at 29, citing *Ridge v Baldwin* [1964] AC 40, [1963] UKHL 2 and *Najjar v Haines* (1991) 25 NSWLR 224.

¹⁹⁷² *Northern Territory Act*, ss 45, 44.

¹⁹⁷³ The Local Court has jurisdiction over civil cases involving a maximum of \$100,000. See Northern Territory Magistrates Courts, “Local Court”, 2005, online: <http://www.nt.gov.au/justice/ntmc/local_court.shtml>.

¹⁹⁷⁴ *Northern Territory Act*, s 33(1)(a)(i)-(iv).

¹⁹⁷⁵ Hall Chadwick et al., “NT Construction Industry Update”, April 21, 2015 at 14.

¹⁹⁷⁶ *Northern Territory Act*, s 48(3).