Appendix 1
Minister of Public Services and Procurement Mandate Letter dated October 4, 2017
Dear Ms. Qualtrough:

I am honoured that you have agreed to serve Canadians as Minister of Public Services and Procurement.

We promised Canadians real change – in both what we do and how we do it. Canadians sent a clear message in the last election, and our platform offered a new, ambitious plan for a strong and growing middle class. Canadians expect us to fulfill our commitments, and it is my expectation that you will do your part in delivering on those promises to Canadians.

We made a commitment to grow our economy, strengthen the middle class, and help those working hard to join it. We committed to provide more direct help to those who need it by giving less to those who do not. We committed to public investment to spur economic growth, job creation, and broad-based prosperity. We committed to a responsible, transparent fiscal plan for challenging economic times.

I expect Canadians to hold us accountable for delivering these commitments, and I expect all ministers to do their part – individually and collectively – to improve economic opportunity and security for Canadians.

It is my expectation that we will deliver real results and professional government to Canadians. To ensure that we have a strong focus on results, I will expect Cabinet committees and individual ministers to: track and report on the progress of our commitments; assess the effectiveness of our work; and align our resources with priorities, in order to get the results we want and Canadians deserve.

If we are to tackle the real challenges we face as a country – from a struggling middle class to the threat of climate change – Canadians need to have faith in their government’s honesty and willingness to listen. I expect that our work will be informed by performance measurement, evidence, and feedback from Canadians. We will direct resources to initiatives that have the greatest, positive impact on the lives of Canadians, and that allow us to meet our commitments to them. I expect you to report regularly on your progress toward fulfilling our commitments and to help develop effective measures that assess the impact of the organizations for which you are answerable.

I made a personal commitment to bring new leadership and a new tone to Ottawa. We made a commitment to Canadians to pursue our goals with a renewed sense of collaboration. Improved partnerships with provincial, territorial, and municipal governments are essential to deliver the real, positive change that we promised Canadians. No relationship is more important to me and to Canada than the one with Indigenous Peoples. It is time for a renewed, nation-to-nation relationship with Indigenous Peoples, based on recognition of rights, respect, co-operation, and partnership.

We have also committed to set a higher bar for openness and transparency in government. It is time to shine more light on government to ensure it remains focused on the people it serves. Government and its information should be open by default. If we want Canadians to trust their government, we need a government that trusts Canadians. It is important that we acknowledge mistakes when we make them. Canadians do not expect us to be perfect – they expect us to be honest, open, and sincere in our efforts to serve the public interest.

Our platform guides our government. Over the course of our four-year mandate, I expect us to deliver on our commitments. It is our collective responsibility to ensure that we fulfill our promises, while living within our fiscal plan. Other issues will arise or will be brought to our attention by Canadians, stakeholders, and the public service. It is my expectation that you will engage constructively and thoughtfully and add priorities to your agenda when appropriate.

As Minister, you will be held accountable for our commitment to bring a different style of leadership to government. This will include: close collaboration with your colleagues; meaningful engagement with Opposition Members of Parliament, Parliamentary Committees and the public service; constructive dialogue with Canadians, civil society, and stakeholders, including business, organized labour, the broader public sector, and the not-for-profit and charitable sectors; and identifying ways to find solutions and avoid escalating conflicts unnecessarily. As well, members of the Parliamentary Press Gallery, indeed all journalists in Canada and abroad, are professionals who, by asking necessary questions, contribute in an important way to the democratic process. Your professionalism and engagement with them is essential.

Canadians expect us, in our work, to reflect the values we all embrace: inclusion, honesty, hard work, fiscal prudence, and generosity of spirit. We will be a government that governs for all Canadians, and I expect you, in your work, to bring Canadians together.
You are expected to do your part to fulfill our government’s commitment to transparent, merit-based appointments, to help ensure gender parity and that Indigenous Peoples and minority groups are better reflected in positions of leadership.

As Minister of Public Services and Procurement, your overarching goal will be to ensure that the services provided by your portfolio are delivered efficiently, and in a way that makes citizens feel respected and valued. At the same time, I expect that you will ensure that the government’s internal services are held to an equally high standard and that procurement processes reflect modern best practices. The delivery of government services, including procurement practices, should reflect public expectations around transparent, open, and citizen-centred government and should serve our policy goals of sustainable economic growth that grows the middle class.

Canada’s Public Service is one of the most highly rated and respected institutions of its kind in the world. This is because of its people – the women and men whom we ask to do ambitious work serving Canadians. As Minister of Public Services and Procurement, you will play an important enabling role, to deliver the tools and resources public servants require in order to deliver our government’s ambitious agenda.

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

- Ensure that public servants are paid accurately and promptly for the highly valued work they do on behalf of Canadians. Working with the President of the Treasury Board, the Working Group of Ministers on Achieving Steady State for the Pay System, the Privy Council Office, and our public service union partners, you will help ensure the pay system is stabilized and able to perform within service standards.

- Bring forward a new vision for Canada Post to ensure it provides the high-quality public service that Canadians expect at a reasonable price. This should build on the recent work of the Task Force on the Future of Canada Post, the House of Commons Standing Committee on Government Operations and Estimates, and additional input the Government has received from Canadians to date. Critical to fulfilling this commitment will also be the renewal of the organization by filling vacant leadership positions through timely, open, transparent, and merit-based selection processes, and the development of a stronger and more constructive relationship between the Corporation, its workers, and the communities in which it operates.

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

  This includes:
  - developing initiatives to increase the diversity of bidders on government contracts, in particular businesses owned or led by Canadians from under represented groups, such as women, Indigenous Peoples, persons with disabilities, and visible minorities, and take measures to increase the accessibility of the procurement system to such groups while working to increase the capacity of these groups to participate in the system;
  - developing better vendor management tools to ensure the Government is able to hold contractors accountable for poor performance or unacceptable behaviour, particularly in large scale procurements;
  - publishing clear metrics to measure government performance on the competitiveness, cost, and timeliness of procurements;
  - making government data more readily available to vendors to encourage more and better bids; and
  - ensuring prompt payment of contractors and sub-contractors who do business with your department.

- Work with the President of the Treasury Board to improve the delivery of information technology within the Government of Canada, including the renewal of Shared Services Canada (SSC) so that it is properly resourced and aligned to deliver common IT infrastructure that is reliable and secure, while at the same time providing departments what they need in order to deliver services that are timely, citizen-centred, and easy to use. This work should build on and complement recent reviews of SSC and the Government’s IT strategic plan.

- Work with the Minister of National Defence, the Minister of Innovation, Science and Economic Development, and the Minister of Fisheries, Oceans and the Canadian Coast Guard to ensure the women and men of the Canadian Armed Forces and the Canadian Coast Guard get the equipment they need on time and on budget, as outlined in the Government’s new Defence Policy, Strong, Secure, Engaged and under the National Shipbuilding Strategy.

- Ensure the timely and orderly transition of Parliamentary operations as part of the renewal of the Parliamentary Precinct. As one of the Government’s largest public infrastructure projects, it will also be important to ensure we not only meet but exceed standards for accessibility, and environmental sustainability.
• Support the Minister of Crown-Indigenous Relations and Northern Affairs, along with First Nations, Inuit, and Métis Nation leadership, as well as local stakeholders, to develop the vision for a national space for Indigenous Peoples at 100 Wellington. This space, on the ancestral land of the Algonquin people, is to be used by and for Indigenous Peoples – their voices must be heard through comprehensive consultation, and they must be involved in leading the project.

• Work with the President of the Treasury Board and the Minister of Families, Children and Social Development, who is responsible for Service Canada, to establish new performance standards and set up a mechanism to conduct rigorous assessments of the performance of key government services and report findings publicly. As well, support the President of the Treasury Board in the development of a new service strategy that aims to create a single online window for all government services with new performance standards.

• Support the Minister of Employment, Workforce Development and Labour to implement a modern Fair Wages Policy.

• Continue to implement reforms that will: enhance the quality and capacity of services delivered by the Translation Bureau and promote the economic vitality of Canada’s translation and interpretation community as the Government and industry adapt to rapid digital transformation.

• Support the Minister of Science to bring forward a new vision for federal science infrastructure, including recapitalization, taking into account the advice of the Chief Science Advisor.

These priorities draw heavily from our election platform commitments.

I expect you to work closely with your deputies and their senior officials to ensure that the ongoing work of your departments is undertaken in a professional manner and that decisions are made in the public interest. Your deputies will brief you on issues your departments may be facing that may require decisions to be made quickly. It is my expectation that you will apply our values and principles to these decisions, so that issues facing your departments are dealt with in a timely and responsible manner, and in a way that is consistent with the overall direction of our government.

Our ability, as a government, to successfully implement our platform depends on our ability to thoughtfully consider the professional, non-partisan advice of public servants. Each and every time a government employee comes to work, they do so in service to Canada, with a goal of improving our country and the lives of all Canadians. I expect you to establish a collaborative working relationship with your deputies, whose roles, and the role of public servants under their direction, are to support you in the performance of your responsibilities.

We have committed to an open, honest government that is accountable to Canadians, lives up to the highest ethical standards, and applies the utmost care and prudence in the handling of public funds. I expect you to embody these values in your work and observe the highest ethical standards in everything you do. When dealing with our Cabinet colleagues, Parliament, stakeholders, or the public, it is important that your behaviour and decisions meet Canadians’ well-founded expectations of our government. I want Canadians to look on their own government with pride and trust.

As Minister, you must ensure that you are aware of and fully compliant with the Conflict of Interest Act and Treasury Board policies and guidelines. Open and Accountable Government has been developed to assist you as you undertake your responsibilities. I ask that you carefully read it and ensure that your staff does so as well. I draw your attention in particular to the Ethical Guidelines set out in Annex A of that document, which apply to you and your staff. As noted in the Guidelines, you must uphold the highest standards of honesty and impartiality, and both the performance of your official duties and the arrangement of your private affairs should bear the closest public scrutiny. This is an obligation that is not fully discharged by simply acting within the law. Please also review the areas of Open and Accountable Government that we have expanded or strengthened, including the guidance on non-partisan use of departmental communications resources and the new code of conduct for exempt staff.

I know I can count on you to fulfill the important responsibilities entrusted in you. In turn, please know that you can count on me to support you every day in your role as Minister.

I am deeply grateful to have this opportunity to serve with you as we build an even greater country. Together, we will work tirelessly to honour the trust Canadians have given us.

Sincerely,

Rt. Hon. Justin Trudeau, P.C., M.P.
Prime Minister of Canada
EXPERT REVIEW OF PROMPT PAYMENT AND ADJUDICATION
ON FEDERAL CONSTRUCTION CONTRACTS

Minister of Public Services and Procurement

Information Package
February 2018
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1. **Introduction**

On January 23, 2018, Public Service and Procurement Canada (“PSPC”) engaged R. Bruce Reynolds and Sharon C. Vogel of Singleton Urquhart Reynolds Vogel LLP (“SURV”) as expert consultants to develop a recommendation package for the Government of Canada in relation to promptness of payment and adjudication in relation to federal construction projects. On January 30, 2018, this engagement was formally announced to the public.¹

As noted by PSPC in its public announcement, the engagement is the result of the Government of Canada’s ongoing commitment to growing the economy, strengthening the middle class and helping those working hard to join it. In particular, the Government of Canada has committed to modernizing procurement practices in respect of federal construction projects.

By way of background, at the 50th annual joint meeting of the Canadian Construction Association (“CCA”) and the Government of Canada on April 11, 2016, certain issues concerning the construction industry were discussed. In particular, CCA identified the issue of prompt payment. Subsequently, at the request of CCA, PSPC, Defence Construction Canada (“DCC”) as well as the members of a CCA taskforce on federal prompt payment (made up of trade contractors, specialty contractors, and general contractors and service providers) formed a Government-Industry Working Group. The National Trade Contractors Coalition of Canada (“NTCCC”) participated indirectly by providing regular feedback on the Working Group process.

Shortly after the initiation of the Government-Industry Working Group, a private Member’s bill (designated Bill S-224) respecting payments made under federal construction contracts was introduced in the Senate. Bill S-224 passed third reading in the Senate on May 4, 2017 and is awaiting tabling in the House of Commons for consideration.²

Over a similar period, Bruce Reynolds and Sharon Vogel were engaged on behalf of the Province of Ontario in carrying out an expert review of Ontario’s *Construction Lien Act*. Their expert report was delivered in April of 2016 and as a result, Bill 142 was introduced in May 2017 and was granted Royal Assent on December 12, 2017 (“Construction Act”). Among other things, the new *Construction Act* implements prompt payment and adjudication in Ontario. Work on the Regulations to the *Construction Act* is currently ongoing.

Importantly, on October 4, 2017, the Office of the Prime Minister issued a mandate letter to the Minister of Public Services and Procurement, the Honourable Carla Qualtrough.³ As part of her mandate, the Prime Minister stated that payment practices should be modernized such that they would be “simpler, less administratively burdensome … encourage greater competition, and include practices that support our economic policy goals, including innovation, as well as green

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² Section 6 of this Information Package addresses Bill S-224.
and social procurement.” Included in the mandate is the requirement to “ensure prompt payment of contractors and sub-contractors who do business” with PSPC.

PSPC’s commitment to modernize procurement practices (through measures such as the initiation of working groups, consultation with stakeholders and the development of a 14 point action plan⁴), led to the engagement of SURV, described above. Our mandate is to develop and implement a process that seeks input from the construction industry, analyzes the feedback provided from a thorough but efficient process of stakeholder engagement, and identifies the elements required to develop a robust federal prompt payment regime and a dispute resolution mechanism that will facilitate prompt payment and efficient resolution of payment disputes throughout the supply chain on federal construction projects in Canada. The results will be set out in a recommendation package.

The recommendation package will be based on research that we are conducting and our knowledge of the subject matter, given our collective 60 years of experience in the practice of construction law.⁵ We will draw upon the expertise of others at SURV, including John R. Singleton, Q.C.⁶ and Helmut K. Johannsen⁷ who have extensive experience in working in a number of Canadian and international jurisdictions. We will also employ SURV’s strong national team of associates and students, including James Little who served as Secretary to the Ontario Review. But perhaps most importantly, the recommendation package is to take into account feedback which we receive from the construction industry in respect of federal construction projects.

We intend to consult with stakeholders at multiple levels (general contractors, subcontractors, sub-subcontractors, suppliers and financial experts) of the construction industry in Canada. On the owner side, we will, of course, consult with federal government stakeholders.

Our intention is to conduct an efficient engagement process that includes meeting with those stakeholders who express an interest in meeting with us and reviewing written submissions that are delivered to us during the review process. In order to engage meaningfully, we have prepared this information package to inform the stakeholders about the issues we are addressing so that they can prepare informed submissions and can attend meaningful stakeholder meetings, if they choose to do so, and talk to us about the issues that concern them.

PSPC has stressed the need for efficiency in our consultations so that our recommendations may be taken into consideration in a timely manner. Our recommendations are to be delivered by May 1, 2018. For stakeholders who want to participate actively in the process, the time to start contributing is now.

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⁶ https://www.singleton.com/people/john-singleton/
⁷ https://www.singleton.com/people/helmut-johannsen/
2. Process and Timeline

We will be asking stakeholders to send us their written submissions a week before meeting with us so that we can review those submissions in advance and make the most of the time we spend meeting together. As well, we would like to receive stakeholder feedback early in our process so that we can take it into consideration as we proceed.

This information package is being sent out to those stakeholders who participate in federal construction projects and that have been identified to us in advance through a provisional list provided by PSPC and supplemented by DCC, the CCA and the General Contractors Alliance of Canada (“GCAC”). The stakeholder list is attached to this information package as Appendix A (the “Stakeholder List”). The Stakeholder List, in its current form, is not a closed list; however, the timeline to complete our review is relatively short. While we expect that further stakeholders will identify themselves and provide meaningful feedback, we must meet our report delivery deadline of May 1, 2018 and would note that we may not be able to address feedback that is not provided in a timely manner. That said, it is our intention to engage with stakeholders in an inclusive, collaborative, and transparent manner and the delivery of this information package is the first step in that process.

Our current timeline is as follows:

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<td>Western Canada Stakeholder Meetings</td>
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The Government of Canada has committed to releasing our package of recommendations after its delivery and after translation into French.

If you want to meet with us, please reach us at federalreview@singleton.com.
3. **Context**

As noted above, we have been asked to review the issues associated with promptness of payment and adjudication in the context of federal construction projects. It is our intention to leverage extensively, and where appropriate, the work conducted in relation to Ontario’s new *Construction Act*.

In considering why payments are not made promptly, a number of issues have been raised. Among these reasons, in our view, two stand out and merit careful consideration:

1) Elongation of the payment cycle; and

2) Gridlock created by significant disputes.

With respect to the elongation of the payment cycle, various studies and surveys have been conducted\(^8\) that conclude that the period of time from the submission of a payment application to the receipt of payment is too long.

With respect to gridlock, our research indicates that when a significant dispute arises on a construction project, resulting in delays and damages, payments may cease and protracted litigation may potentially result.\(^9\)

The federal government intends to play a leading role by introducing reforms that will improve the administration of federal construction contracts and improve the efficiency of dispute resolution on its projects. With this goal in mind, we intend to ask stakeholders about their concerns and what solutions they think should be considered.

We recognize that it is difficult, if not impossible, to achieve unanimity in respect of solutions, because each participant in the construction pyramid will typically approach these issues from their own perspective and with a specific set of objectives in mind. Our goal, however, is to attempt to achieve consensus in respect of a core set of recommendations. Under such an approach, it will not be possible for every stakeholder to fully achieve all of its objectives, but we will be asking stakeholders to consider the perspectives of others with a view to achieving a compromise solution that makes changes that are workable for all.

As a final contextual point, we consider issues that have been raised about the jurisdictional operation of the Act in relation to what kinds of projects it could apply to and at what level of the contractual pyramid. This is an issue we will address in this information package and look forward to the input of stakeholders and the legal community.

It is important to note that this information package is not intended to canvass in detail every issue that will be analyzed in our final recommendation package. Rather, it is intended to inform stakeholders generally about the core issues and stimulate discussion by posing questions that we

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\(^8\) See for example, Prompt Payment Ontario, Trade Contractor Survey Results, Ipsos Reid, November 2015.

hope stakeholders will attempt to answer in their written submissions to us and in the stakeholder engagement sessions. Inevitably, new issues will arise based on stakeholder submissions and meetings which will allow us to craft a fulsome set of recommendations.
4. Prompt Payment

a) International Experience

Prompt payment legislation is in place in a number of jurisdictions around the world, in one instance for decades. It is useful to examine and learn from the significant experiences in these other jurisdictions.

(i) The United States

The global movement in relation to prompt payment originated in the United States. In general terms, American legislation addresses the elongation of the payment cycle by imposing time limits for processing payment applications and by imposing mandatory interest payments for breach of these statutory payment timelines. However, U.S. prompt payment legislation does not address the gridlock that results when there is a payment dispute. There is no alternative form of dispute resolution. Rather, disputes that are not resolved between the parties are litigated at significant cost.

There is prompt payment legislation at both the federal and state level in the United States. The federal Prompt Payment Act (U.S. Code Chapter 39) was enacted in 1982. It applies not only to construction contracts but to all contracts for the supply of services and materials to federal agencies. Provisions specifically applicable to construction contracts were introduced in 1988 by way of statutory amendment.

Under the U.S. federal legislation, the trigger that starts the clock running for payment is the delivery of a "proper invoice". Interest penalties start to run if payment is not made within 14 days in relation to progress payments and 30 days after receipt of a final invoice, unless otherwise agreed. A contractor is entitled to issue an invoice when all relevant contractual requirements have been met. Each invoice is to be reviewed "as soon as is practicable after receipt". If an invoice is determined not to be a "proper invoice", then the invoice is to be returned to the sender within 7 days after its receipt specifying the reasons why it is not a proper invoice.

In addition to imposing obligations on federal agencies, the U.S. Federal Acquisition Regulation imposes payment obligations on contractors in respect of payments to their subcontractors. A subcontract is required to contain a provision stipulating that a contractor will pay a subcontractor within 7 days of receiving payment from the government for work performed by that subcontractor and interest charges apply if payment is not made within this time frame.

In addition to the federal legislation which applies to contracts with the federal government, 49 states have enacted prompt payment legislation for public sector projects. The focus of this

10 1 USCA §§ 3901 to 3907 (West Supp. 2001).
information package is on federal legislation such that state legislation in the U.S. is not summarized. However, both federal and state prompt payment legislation in the U.S. has been criticized for failing to include provisions that provide for the expeditious resolution of disputes over the life of a project. Payment disputes are resolved through litigation which is often a costly and time-consuming exercise.

(ii) The United Kingdom

In the United Kingdom, the Housing Grants, Construction and Regeneration Act 1996 (the "UK Construction Act") came into force in 1988.\(^\text{13}\) The UK Construction Act required that certain minimum standards be met in respect of payment terms in construction contracts, failing which terms contained in secondary legislation, referred to as the "Scheme" would be implied. The UK Construction Act applies to all construction contracts for carrying out construction operations which includes architectural and engineering work and construction work, with limited exceptions. The legislation otherwise applies at all levels of the construction pyramid.

Amendments to the legislation introduced in 2009 included a requirement to deliver a payment notice within the period specified in the contract but no more than 5 days after the expiry of the payment due date as set out in the Scheme. The identification of which party delivers this notice can be set out in the contract. If it is the party who expects to be paid who gives the notice, then the party who did not make the expected payment delivers a second notice called a "pay less notice" which indicates that that party intends to pay less than the amount set out in the payment notice and providing a basis for the calculation. If a payer does not challenge the payee's notice but still fails to make a payment due, then the contractor may suspend its work.

The UK Construction Act specifically prohibits "pay-when-paid" provisions under construction contracts. The only exception to this prohibition is a "pay-when-paid" clause applying in the event that there is an 'upstream' insolvency in a construction contract. This prohibition was extended in the 2009 amendments to also prohibit "pay-when-certified" or "pay-when-entitled" clauses in contracts which had expanded in use following enactment of the UK Construction Act and its prohibition of "pay-when-paid" clauses. As sub-contractors are often not privy to the certification process, they often faced difficulties in determining the timelines associated with certification of payments and difficulties in enforcing payment. Accordingly, the 2009 amendments implemented a requirement that rendered a clause invalid if it made payment conditional on: performance obligations under another contract, or a decision by any person as to whether obligations under another contract had been performed (i.e. certification of the head contract). The prohibition of "pay-when-certified" clauses in the UK did however include certain exceptions in relation to public private partnerships (private finance initiatives).

In addition to the legislative rules under the UK Construction Act, when the Scheme applies to a construction contract, it provides dates for payment and includes a requirement for a 30-day payment period following completion of the work (or the making of a claim by the payee). In circumstances where the Scheme doesn’t apply, the parties are otherwise able to agree to their own terms for payment, including the payment period.

\(^{13}\) Housing Grants, Construction and Regeneration Act 1996, c 53.
Any party to a construction contract has a right to refer a payment dispute to adjudication, as will be discussed below.

(iii) Other International Jurisdictions

Ireland, Australia, New Zealand, Singapore, Malaysia, and Hong Kong all have or are in the course of implementing prompt payment legislation. When comparing the legislation in these jurisdictions significant variations are evident but there are recurring features that are relevant to a consideration of the issues that arise, including the following:

- the timing of delivery of claims for progress payments and final payments by contractors and subcontractors;
- the timing of the evaluation of a progress payment applications by owners and general contractors;
- pre-conditions to the submission of progress payment applications such as testing, commissioning, certification, etc.
- the right to deliver a written notice of a disputed claim for payment, with reasons; and
- the consequences of a failure to pay on time including interest charges and whether or not and when a right to suspend work arises.

b) Ontario

In Canada, the only jurisdiction to have enacted prompt payment legislation is Ontario which included prompt payment provisions in its new Construction Act, which was passed unanimously by the Ontario Legislature in December 2017. The prompt payment provisions of the Act will come into force in late 2019.

In Ontario, the key elements of the new legislation include:

- freedom of contract in respect of invoicing terms (so as to permit a variety of mechanisms such as milestone payments, phase payments, etc.);
- a 28-day payment period which runs from the delivery of a proper invoice and a 7-day payment period for payment to sub-contractors;
- certification processes are to take place within the 28-day payment period;
- evaluation of payment applications and delivery of a notice of non-payment; and
- interest charges arising from a failure to pay and a right to suspend arising after the failure to pay an adjudicator's decision.
c) Questions to Consider

Stakeholders may want to consider the following questions in considering potential prompt payment legislation in the federal context:

- what kinds of contracts should it apply to? What kinds of work should it apply to?
- should there be any exclusions or different treatment for certain types of projects? (e.g. P3 projects)?
- what levels of contract should it apply to in the construction pyramid?
- what should be the trigger for starting the clock running on a payment period?
- what is a reasonable payment period? should these periods differ for parties at different levels of the construction pyramid?
- what, if any, limitations should be placed on the parties to a construction contract in respect of their freedom to contract in relation to invoicing terms?
- should certification be permitted as a pre-condition to the delivery of a proper invoice? are there any other pre-conditions that cause concern?
- on what basis can payment be withheld and when? Should there be any limits on a right of set off (e.g. in relation to other projects)?
- should payment information be posted? If so, where?
- what should the consequences be of a failure to pay?
5. **Adjudication**

a) **International Experience**

Adjudication has been used in a number of international jurisdictions as a mechanism to support the enforcement of prompt payment legislation and also to resolve construction disputes more quickly than through the use of litigation or arbitration. Adjudication is a swift and flexible dispute resolution mechanism. It allows disputes to be resolved on an interim binding basis such that payment can flow and work can continue on a project.

(i) **The United Kingdom**

Adjudication was first introduced in the UK in 1998 and has proven to be a pragmatic solution to unlock the payment gridlock caused by construction disputes, freeing up resources and allowing cash to flow down the construction pyramid. The *U.K. Construction Act* contains a Scheme, as noted above, that sets out a default set of procedures. In respect of adjudication, the Scheme is not overly prescriptive as adjudicators are given a fair degree of control over the process they adopt.

In the UK, any party to a construction contract has a right to refer a dispute arising under the contract to adjudication. The scope of disputes that are subject to adjudication is very broad.

When adjudication was initially introduced in the UK over 20 years ago, an initial roster of adjudicators was created drawn from the ranks of quantity surveyors, engineers, architects, and lawyers. Subsequently, a number of Adjudicator Nominating Bodies were created and these bodies took on the role of training adjudicators and maintaining rosters of qualified adjudicators with expertise in relevant technical subjects.

In terms of process, adjudicators in the UK are able to determine what steps they will take to make a determination, including whether or not to have an oral hearing or whether to just review written submissions. The adjudicator may take the initiative in ascertaining the facts and the law necessary to determine the dispute and has the authority to decide on the procedure to be followed.

In the UK, the parties can choose their adjudicator by prior agreement, by agreeing on an adjudicator at the time the dispute arises, or by referring the dispute to an adjudicator nominated by the Adjudicator Nominating Body.

In terms of the timeframe within which an adjudication is to be completed, the goal is that the process proceed quickly. The maximum length of the process is 42 days, absent the agreement of both parties to an extension.

(ii) **Other International Jurisdictions**

A number of other jurisdictions have followed the lead of the UK and have implemented or are in the course of implementing adjudication legislation, including Australia, Singapore, Malaysia, Ireland, and New Zealand. A description of each of the adjudication models adopted in these jurisdictions is beyond the scope of this information package, but there are some interesting
distinguishing features adopted in some jurisdictions that differ from the UK model.\textsuperscript{14} For example:

- the Australia East Coast model and Singapore have utilized a more restrictive model where only a payee can initiate an adjudication;

- different criteria exist as to who can be an adjudicator with some jurisdictions requiring certain professional designations and others relying more generally on the number of years of construction industry experience;

- in some jurisdictions there is only one body that is responsible for training adjudicators and maintaining a roster (e.g. Singapore, Malaysia, and Hong Kong) and in other jurisdictions there are multiple bodies;

- in some jurisdictions, such as New Zealand, it is not possible to select an adjudicator prior to a dispute arising;

- in parts of Australia and Singapore only disputes related to payment matters can be adjudicated;

- in Australia, New Zealand, Malaysia, and Singapore the conduct of adjudication proceedings are prescribed by legislation; and

- the timeframes for an adjudication range from 14 days in certain parts of Australia to 45 working days in Malaysia.

b) Ontario

In Canada, as with prompt payment, the only jurisdiction to have enacted legislation that includes adjudication of construction disputes is Ontario. Adjudication is included in the new \textit{Construction Act}, and the adjudication provisions will come into force in October of 2019. In the interim, there will be time spent setting up the authorized nominating authority and getting adjudicators in place.

In Ontario, the key elements of the legislation include:

- targeted interim binding adjudication in relation to a defined set of issues focussed on payment disputes;

- available to all participants in the construction pyramid on projects in both the public and private sectors;

- consolidated adjudications are permitted;

\textsuperscript{14} For greater detail, see the website, \url{www.constructionlienactreview.com} for the report of the Ontario Construction Lien Act Review, “Striking the Balance”.
• adjudicators will have significant experience in the construction industry;
• there will be a single Authorized Nominating Authority;
• parties cannot agree in advance to the adjudicator;
• adjudicators will have considerable discretion in setting procedures; and
• the total time frame of an adjudication will be 46 days, unless extensions are agreed to.

c) Questions to Consider

Stakeholders may want to consider the following questions in considering potential adjudication legislation in the federal context:

  o who can require adjudication and when?

  o who can adjudicate a dispute?

  o how should an adjudicator be nominated?

  o what is the role of an authorized nominating authority?

  o what types of disputes should be adjudicated? Should there be limits to the quantum of the disputes that are subject to adjudication?

  o what should an adjudication process look like?

  o how should the costs of an adjudication process be addressed?

  o what should the process for enforcing adjudication decisions look like?
6. **Bill S-224**

Bill S-224 – *An Act Respecting Payments Made under Construction Contracts* was introduced as a private Member’s bill by Senator Donald Neil Plett on April 13, 2016. The Bill had second reading on November 28, 2016 and was referred to the standing Senate Committee on Banking, Trade and Commerce which held a number of hearings and then presented its report with amendments on April 4, 2017. Third reading then took place on May 4, 2017 and the Bill was passed by the Senate without amendment.

At second reading of the Bill, Senator Plett noted that there were two major problems in federal construction work in Canada, being:

1. Delays by federal authorities in processing valid invoices for construction work when there is no dispute that the work has been performed in accordance with the contract; and

2. There are delays in remitting payments down the subcontract chain when the work performed is not in dispute and when valid invoices have been submitted.

Senator Plett described these payment delays as systemic. He spoke to the difficulty encountered by trade contractors who often perform upwards of 80% of the work on a construction project and who may have limited access to bank credit such that their dependence on cash flow is high. He noted that trade contractor revenues are subject to unpredictable delays without any flexibility on their payables such as Canada Revenue Agency, workers compensation, wages, and materials and equipment rentals.

Bill S-224 is intended to address issues of payment delays in relation to federal government projects.

As described in the Bill, its purpose is to strengthen the stability of the construction industry and to lessen the financial risk faced by contractors and subcontractors by providing for timely payments to them under construction contracts involving government institutions. The Bill is intended to apply to departments and ministries of the federal government as well as crown corporations. It provides that a government institution must make progress payments to a contractor for construction on a monthly basis or at shorter intervals provided for in the construction contract. Payment is to be made by the government institution on or before the 20th day following the approval or certification of the contractor’s payment application. Similarly a contractor and subcontractor are to make progress payments on a monthly basis or at shorter intervals provided for in the construction contract. The contractor is to pay the subcontractor and the subcontractor must pay any of its subcontractors on or before the 23rd day following the approval or certification of the subcontractor’s payment application. There is a deemed approval of a payment application, 10 days after its receipt when it is submitted by a contractor or the 20th day after its receipt when it submitted by a subcontractor, unless before that time the payor or the payment certifier delivers a written notice disputing the amount in the payment application or requires an amendment to the payment application.

The Bill provides for a right to suspend performance of the construction work if a payor fails to make payment in accordance with the Bill. There is a right to terminate a construction contract for non-payment. As well, interest is payable on overdue payments. Finally, the Bill does
contain some provisions on dispute resolution, which includes an option to refer a dispute to adjudication.

Over the course of the consideration of Bill S-224, some concern was raised about the jurisdictional operation of the Bill, as discussed in the following section. Concerns were also raised by multiple industry stakeholders regarding the lack of industry-wide consultation during the development of Bill S-224.
7. Jurisdictional Operation of the Act

As Bill S-224 was being considered by stakeholders, issues were raised about the application of the Act in relation to what kinds of projects it could apply to and at what level of the contractual pyramid.

Some commentators have questioned whether the federal government has the jurisdiction to legislate in respect of prompt payment and adjudication on federal construction projects, because legislation in relation to contracts is generally considered a provincial matter. Others have taken the position that because the federal government has jurisdiction over federal property, anything that is integral to federal property or the creation of that property is within federal jurisdiction.

Some have suggested that the focus should be on whether provincial law or federal law applies in a specific set of circumstances. Here, a focal point would be whether or not the proposed legislation is integral to federal property in the sense of actually creating federal property through the construction of a project. This is an issue that will need to be explored as part of our review, including during the stakeholder consultation process.

The following issues may arise in relation to the jurisdictional operation of proposed federal legislation aimed at regulating prompt payment on federal construction projects:

1. What kinds of projects would federal legislation implementing prompt payment and adjudication apply to?

2. Are there potential conflicts between such federal legislation and provincial legislation?

3. If so, in view of the doctrine of paramountcy, is there any constraint on the federal legislation?

4. Would some combination of federal legislation and amendments to standard form contracts be appropriate?

5. Are there any operational concerns that federal legislation could be different than provincial/territorial legislation (i.e. would there be different rules applicable to a federal construction site as opposed to a provincial/territorial construction site)?

6. From an operational perspective, should the federal government defer to provincial/territorial prompt payment legislation where it exists?
8. Stakeholder Submissions

As noted at the outset of this information package, we are soliciting meaningful feedback by way of written submissions from stakeholders so as to inform the recommendation package that we have been tasked with preparing. We are approaching this mandate with an open mind and look forward to the challenge of considering the issues brought forward by stakeholders. Our review of stakeholder submissions and meetings with stakeholders will benefit from timely receipt of submissions that include the following:

- a description of the stakeholder group including the nature of its membership (if it is an association) and what it does;

- a summary of the experiences of the stakeholder group in addressing issues associated with promptness of payment, or a lack of prompt payment, and in resolving disputes using litigation and alternative dispute resolution;

- responses to the questions posed regarding prompt payment, as set out above, i.e.:
  - what kinds of contracts should it apply to? What kinds of work should it apply to?
  - should there be any exclusions or different treatment for certain types of projects? (e.g. P3 projects)?
  - what levels of contract should it apply to in the construction pyramid?
  - what should be the trigger for starting the clock running on a payment period?
  - what is a reasonable payment period? should these periods differ for parties at different levels of the construction pyramid?
  - what, if any, limitations should be placed on the parties to a construction contract in respect of their freedom to contract in relation to invoicing terms?
  - should certification be permitted as a pre-condition to the delivery of a proper invoice? are there any other pre-conditions that cause concern?
  - on what basis can payment be withheld and when? Should there be any limits on a right of set off (e.g. in relation to other projects)?
  - should payment information be posted? If so, where?
  - what should the consequences be of a failure to pay?

- responses to the questions posed regarding adjudication, as set out above, i.e.:
  - who can require adjudication and when?
o who can adjudicate a dispute?

o how should an adjudicator be nominated?

o what is the role of an authorized nominating authority?

o what types of disputes should be adjudicated? Should there be limits to the quantum of the disputes that are subject to adjudication?

o what should an adjudication process look like?

o how should the costs of an adjudication process be addressed?

o what should the process for enforcing adjudication decisions look like?

• views as to the jurisdictional operation of the Act if any, in relation to the following questions:

  o What kinds of projects would federal legislation implementing prompt payment and adjudication apply to?

  o Are there potential conflicts between such federal legislation and provincial legislation?

  o If so, in view of the doctrine of paramountcy, is there any constraint on the federal legislation?

  o Would some combination of federal legislation and amendments to standard form contracts be appropriate?

  o Are there any operational concerns that federal legislation could be different than provincial/territorial legislation (i.e. would there be different rules applicable to a federal construction site as opposed to a provincial/territorial construction site)?

  o From an operational perspective, should the federal government defer to provincial/territorial prompt payment legislation where it exists?

• conclusions regarding solutions that will improve the functioning of the construction industry in relation to federal projects.
9. **Conclusion**

For us, it is a great honour to have been chosen by the Government of Canada as expert consultants to develop a set of recommendations in relation to promptness of payment and adjudication for federal construction projects. As noted above, our engagement is the result of the Government of Canada’s ongoing commitment to growing the economy, strengthening the middle class and helping those working hard to join it, as well as the work of national stakeholders such as CCA, the NTCCC and the GCAC. We commit to perform our engagement to the very best of our abilities, to address the issues with intellectual honesty, and to conduct this review in a manner consistent with the principles of inclusiveness, transparency, and collaboration.
### Written Submissions from Stakeholders

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<thead>
<tr>
<th>Stakeholder</th>
<th>Date of Submission</th>
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<tbody>
<tr>
<td>1. Alberta Construction Association (ACA)</td>
<td>April 7, 2018</td>
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<tr>
<td>2. BGIS Global Integrated Solutions Canada LP (BGIS)</td>
<td>April 30, 2018</td>
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<tr>
<td>3. Canadian Bar Association (CBA)</td>
<td>May 4, 2018</td>
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<td>4. Canadian Construction Association (CCA)</td>
<td>March 23, 2018</td>
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<td>5. Canadian Institute of Quantity Surveyors (CIQS)</td>
<td>March 28, 2018</td>
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<td>6. Defence Construction Canada (DCC)</td>
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<td>7. General Contractors Alliance of Canada (GCAC)</td>
<td>April 5, 2018</td>
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<td>8. National Trade Contractors Coalition of Canada (NTCCC)</td>
<td>March 2018</td>
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<td>9. Public Services and Procurement Canada (PSPC)</td>
<td>March 21, 2018</td>
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<td>10. Coalition contre les retards de paiement dans la construction (Quebec Coalition)</td>
<td>April 10, 2018</td>
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<td>11. Surety Association of Canada (SAC)</td>
<td>March 29, 2018</td>
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<tr>
<td>12. Winnipeg Construction Association (WCA)</td>
<td>April 11, 2018</td>
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</table>
April 7, 2018

Brue Reynolds
Sharon Vogel

Transmitted via email: federalreview@singleton.com

Dear Mr. Reynolds and Ms. Vogel:

The Alberta Construction Association appreciates the opportunity to provide feedback to the Expert Review of Prompt Payment and Adjudication on Federal Construction Contracts.

The association also appreciates meeting with you March 15th. We understand the federal initiative will draw upon many of the principles of the Ontario legislation and we have not had an opportunity to analyze and understand how that works and how it will roll out. As we shared with you in the March 15th meeting, it is challenging to provide a comprehensive response from our 3200 member firms within the abbreviated time available for the Review. Indeed, as was evident from our March 15th discussion, our dialogue raised additional questions for consideration.

It is important to reiterate that the March 15th discussion and this letter focus solely on prompt pay as it relates to federal construction contracts. ACA urges that the proposed federal legislation restrict itself to PSPC and DCC projects that are 100% federally funded and on federal land, and for federally-funded projects on First Nations, Metis, and Inuit territories. It is our expectation that payment and dispute resolution terms will be adjusted in applicable PSPC, DCC, and RP federal contracts, as well as contracts pertaining to federally-funded FNMI projects.

ACA urges that your recommendations to the federal government embody fairness and consistent treatment to each party in the construction value chain. ACA urges you to recommend that federal holdbacks be eliminated given that there is no corresponding lien fund.

Sincerely,

[Signature]
Paul Heyens, Chairman
TAB 2
April 30, 2018

Bruce Reynolds and Sharon Vogel
Singleton Urquhart Reynolds Vogel LLP
150 King Street West, Suite 2512
Toronto, ON M5H 1J9

Re: Expert Review of Prompt Payment and Adjudication on Federal Construction Contracts

BGIS Global Integrated Solutions Canada LP (“BGIS”) is pleased to submit comments in respect of your mandate to prepare recommendations in the development of an effective legislative solution for federal construction contracts. We sincerely thank you for your invitation to participate. BGIS applauds the introduction of federal prompt payment legislation and appreciates the opportunity to provide its perspective on the considerations set out in these submissions.

BGIS is a provider of real estate management services, including facility management services, project delivery services, and energy and sustainability services. BGIS manages 215 million square feet of real estate across 24,000 locations in Canada. In Canada, BGIS issues more than 700,000 work orders annually and manages 8,000 construction projects for its clients.

BGIS has the privilege to manage real estate for its clients in the public sector, including federal and provincial governments and Crown corporations, and in the private sector, including those in federally regulated industries such as banking and telecommunications.

In addition, BGIS operates and maintains facilities at numerous public-private partnership (“P3”) projects in Canada, including provincial and federal projects, where BGIS has operations and maintenance responsibility and ‘lifecycle’ responsibility for the replacement and refurbishment of maintained elements.

Committed to providing safe and healthy working conditions for the prevention of workplace injuries and ill health, BGIS was named as one of Canada’s Safest Employers for 2017 by Canadian Occupational Safety. BGIS is committed to sustainability, innovation and cost reduction through the implementation of innovative solutions and programs that reduce energy, decrease water consumption, and decrease and divert waste across our clients’ facilities. These efforts are emphasized at BGIS’s “An Inspired Future” event; a bi-annual forum for decision makers in the corporate real estate industry to gather as industry leaders in sustainability to collaborate, showcase, and inspire. BGIS’s procurement team considers environmental performance as one of the important indicators of a product or subcontractor’s overall desirability. BGIS’s subcontractors are required to use environmentally-friendly products where available, implement and use effective waste diversion programs, and restrict environmentally-damaging treatments, paints, refrigerants, and other building materials. BGIS is embarking on a ‘Procure-to-Pay’ modernization project that will make administration processes for clients and subcontractors the best the industry has to offer. The result will be an integrated, seamless software solution for sourcing, procuring, and payment that will speed up subcontractor on-boarding, while making subcontracting easier and more efficient for our clients and subcontractors.
1. **Constitutionality of Prompt Payment**

BGIS understands that the constitutionality of the proposed legislation has been questioned. BGIS supports a version of the prompt payment legislation that is narrow enough to reduce known risks of being considered unconstitutional, yet broad enough to minimize any delays in federal authorities’ processing of valid invoices and delays in remitting payments down the contracting chain. BGIS recommends that legislative application be focused on only true construction projects on federal land, yet mandate behaviour on the entire contracting chain from top to bottom.

(a) **Construction on Federal Land**

Section 91(1A) of the *Constitution Act, 1867* gives the federal Crown exclusive legislative authority over the “The Public Debt and Property.” Provincial laws affecting the use of land are inapplicable to land owned by the federal Crown, even where such land is leased and is not being used for a public purpose.\(^1\) The Court of Appeal for Ontario has held that any regime that seeks to regulate the use and development of federal property invades Parliament’s exclusive jurisdiction.\(^2\) Whether the law is targeted at a lessee or has general application, “this distinction makes no constitutional difference. In both cases, the provincial law would affect and thus cannot apply to federal property.”\(^3\)

An application of federal prompt payment that focuses on only federal land appears to be well supported by these principles.

(b) **Definition of Improvement**

To the extent that the definition of “improvement” includes maintenance and repairs, the legislation may expand its breadth beyond constitutional jurisdiction and its necessity. The effect may regulate property and civil rights in respect of private parties contracting for regular maintenance and cleaning of equipment, maintenance and cleaning of doors and hardware, lawn maintenance and landscaping, snow removal, janitorial services, pest control services, and parking services, among others. Although protection of subcontractors in these industries is commendable, (i) there are typically fewer layers in these contracting chains and fewer opportunities for delays, (ii) in most contexts, these services have no nexus to construction, (iii) the definition may apply outside the constitutional jurisdiction of use and development of federal land,\(^4\) and (iv) the definition is inconsistent with the definition of “improvement” under provincial lien legislation.

Accordingly, we recommend the Expert Review Panel consider a definition of “improvement” that includes capital repairs but excludes ordinary maintenance and repairs that is intended to prevent normal deterioration of an asset.

(c) **Government Institutions**

BGIS understands that the breadth of the legislation has been questioned in respect of application to Crown corporations, projects receiving federal funding, and private-sector businesses in federally-regulated industries. BGIS manages real estate, including construction work, for organizations under these considerations and, in our experience, these organizations carry out their construction projects subject to, and in accordance with, provincial lien legislation. Their projects have existing legislative protections in respect of the contracting chain and will be subject to forthcoming provincial initiatives to implement
prompt payment. The need for federal legislative protection is less, and may infringe on provincial jurisdiction in respect of property and civil rights.

BGIS would favour a version of federal prompt payment that is narrowly drafted so as to avoid unnecessary risks of being considered unconstitutional.

2. Federal Procurement of Construction Work

One of BGIS’s clients is Her Majesty the Queen in right of Canada, as represented by the Minister of Public Services and Procurement Canada (“PSPC”). In 2015, PSPC engaged BGIS for the delivery of diverse real property services, including the management of Crown-owned and leased buildings and assets across Canada. At that time, PSPC estimated the contracts to have a total potential value of $22.8 billion.5 In the prior year, PSPC engaged BGIS to provide similar property management and project services to a portfolio of buildings in the National Capital Region.6 The portfolios of approximately 4,300 facilities are commonly referred to as RP-1 and RP-2, respectively. Due to the nature of the work, many small and medium-sized enterprises across the country have access to the work through thousands of competitive subcontracting opportunities.

The contracts related to the RP-1 and RP-2 portfolios relate to services in the fields of, among others, construction, commissioning, cleaning, maintenance and repairs, landscaping, security, energy management, environmental management, lease administration, and parking. BGIS is an independent contractor engaged by PSPC to perform the work and is not an agent for Canada, except for exclusive exceptions that are specifically identified in the contracts.

In respect of payment problems within the construction industry, BGIS, like owners, is bound to contractual obligations with parties who are also bound to contracts with others. BGIS does not have an effective contractual mechanism to know all of the firms working on any particular project or to be aware of the terms and conditions of subcontracts in the contracting chain. In some instances, BGIS has sought disclosure of a list of subcontractors on projects but, in our experience, those lists are not always provided and have shown to be unreliable, being subject to frequent changes as subcontractors are added, removed, and replaced with alternates. In part due to this lack of transparency, BGIS is not aware of whether the sources of payment problems are due to administrative obligations, inadvertent error, contractual excusing events between only two parties, bad behaviour of particular parties, or a combination of these or other causes.

In a deliberate attempt to speed up the flow of cash down the contracting chain, BGIS has made systematic changes to its automated processes to reduce its payment terms to as short as possible. BGIS applauds efforts to mandate prompt payment for all parties involved.

3. Payments to Subcontractors

BGIS recommends that a payment obligation, from the top down, arise only after a contractor submits to a federal authority’s both a payment certificate and a proper invoice. An owner’s receipt of only one, without the other, may jeopardize standard checks and balances required for good accounting practices and maintaining integrity.

In respect of construction projects for the RP-1 and RP-2 portfolios, 93% of BGIS’s subcontractors’ invoices are approved within 10 days of receipt.7 The delay in approving the remaining 7% is due to issues such as
administrative processes for receipt, data entry issues, inability to validate charges, and absence of proper approval. For example, certain administrative processes require more time where invoiced work was not completed, a subcontractor name on the invoice does not match BGIS’s records, or the purchase order number referenced on the invoice is not valid.

Of the 93% of invoices approved within 10 days, 82% of BGIS’s subcontractors’ invoices are paid on time and 11% are not paid on time due to the subcontractors’ late invoicing (more than 30 days after their respective due dates).

Any legislated deadlines that requires rushed invoicing practices may be achieved only at the expense of checks and balances for the safeguarding of public funds.

4. **Disconnected Invoicing and Payment Regimes**

BGIS recommends that any prompt payment legislation require a correlation between the bases for payment made by the federal authority and within the contracting chain, and that each payor expressly identify the specific projects and invoices being paid or disputed. At present, the bases used for invoicing and payment are not correlated. As described below, in our experience, most of the contracting chain invoices based on construction work performed, while the federal authorities require invoices based on delivery of pre-determined documents.

(a) **Subcontractor – Invoicing Against Percentage of Completion**

In BGIS’s experience, most of the Canadian construction industry is accustomed with an invoicing methodology based on ‘percentage of completion’, as verified by a third-party payment certifier. In order to achieve the best value for Canada, BGIS and its subcontractors use that familiar invoicing methodology so as to increase participation of small and medium-sized enterprises in the federal projects.

(b) **Federal Authority - Invoicing Against Prescribed Documents**

In our understanding, the rigours of the *Financial Administration Act*⁸ created a need by federal authorities for a billing methodology disconnected from ‘percentage of completion’ typically used by contractors. Certifications under subsection 34(1) must be objective, and must overcome any actual or perceived subjectivity inherent the ‘percentage of completion’ billing methodology.

BGIS and federal authorities worked to develop an objective invoicing methodology that is in compliance with the *Financial Administration Act*. The invoices and payments, in accordance with that objective invoicing methodology, are made against prescribed tangible deliverables, namely, the delivery of 46 specified sets of documentation, each objectively representing a milestone, e.g., a commissioning plan, tender documents, and as-built drawings. The improper preparation of any tangible deliverable, any error in uploading a required document to a database, or any deficiency in the document, could give rise to delays in federal payment. Only upon each document being deemed acceptable, can there be certification under section 34(1) of the Act and corresponding payment. The determination of proper invoices, and delays in payments, are not based on construction work performed in accordance with the contract.
This disconnect must be removed, and each payor must expressly identify and describe the projects and invoices being paid or disputed, if the legislation is to address the problems identified by The Honourable Donald Plett in reference to the proposed prompt payment legislation:

“Honourable senators, I am proud to rise today to speak to Bill S-224, the Canada prompt payment act. There are two major problems in federal construction work in Canada today.

First, there are delays by federal authorities in processing valid invoices for construction work when there is no dispute that the work has been performed according to the contract.

Second, there are delays in remitting payments down the subcontract chain, again when the work is not in dispute and when valid invoices have been submitted. These payment delays are not occasional; they are systemic.”

The flow of funds would be hindered, and contractors’ adjudication rights would be ineffective against the federal authority, if it were permitted to delay payments for construction work when there is no dispute that the work has been performed according to the contract.

(c) Invoicing and Payment

BGIS does not practice a pay-when-paid methodology with its subcontractors and does not change its payment behaviour based on the unique federal invoicing methodology. The result is that BGIS is stuck between two disconnected invoicing methodologies, and bears the risks that funds received are not sufficient to address funds payable. Nevertheless, BGIS pays its subcontractors, according to contractual payment terms, regardless of any underfunded cash positions, and regardless of federal authorities disputing any documentary deliverables that form the basis of BGIS’s invoices.

Table 1 illustrates the above-described relationships and methodologies.
(d) An Example

Contractual payment terms between PSPC and BGIS require invoicing on the 5th business day of each month for work in the preceding month, with 30-day payment terms.

In a typical payment cycle, BGIS’s subcontractor, and its subcontractors, prepare invoices dated April 30 for work in the current month and submit same to a payment certifier for verification. On May 5th, BGIS submits to the federal authority evidence of prescribed deliverables justifying any payment to which it is entitled. On or about May 10th, BGIS’s subcontractor submits its payment certificate, together with an invoice back-dated to April 30th. If BGIS’s May 5 invoice is approved and certified under the Financial Administration Act, the federal authority pays BGIS on June 5th and, regardless of federal approval or payment, BGIS pays its subcontractor by June 14, which is 45 days from the date of the subcontractor’s invoice, provided that the invoice is a proper invoice or is corrected within those 45 days.

5. Transition with Contractual Relations

Neither contractual responses nor legislative responses can, alone, solve payment problems unless they are implemented in tandem. BGIS recommends that prompt payment legislation fully consider the contractual relations for the RP-1 and RP-2 portfolios, which are based on their own public policy values.

Prior to PSPC entering contracts in respect of the RP-1 and RP-2 portfolios, there were three years of extensive consultation with the industry (including industry associations and small and medium enterprises), which unanimously recommended that market forces should prevail in selecting one or multiple firms based on the results obtained through a fair, open and transparent procurement process.

The real estate management contracts leverage the private sector’s ability to build human resources capacity and thus have the private-sector contractor absorb the risk related to the fluctuation of demand for real estate services. Leveraging the private sector contributes to key government priorities like achieving value for money, realizing efficiencies, eliminating duplication of efforts by the public and private sectors and fostering economic growth in Canada.

Between 1998 and 2015, PSPC’s model of outsourcing real estate services had identified savings to Canada of at least $702 million. PSPC has succeeded in its continuing transformation agenda, moving towards greater use of private-sector expertise, with the objective of being more efficient and offering best value to Canadians.

(a) Contractual Harmony

BGIS recommends the legislation apply from only a point in time when the federal authority initiates a construction project. The Expert Review Panel might consider this point to be the date the federal authority tenders the head contract or the date the federal authority enters a head contract. Alternatively, appropriate opportunities may be found within existing contracts to apply prompt payment legislation, including long-term contracts, provided there are statutorily protected contractual accommodations for changing payment mechanisms and recovery of attendant expenses incurred.

The legislation should not invite scenarios where upper-tier contracts were commenced under one set of obligations, which permit payment delays and immunity from adjudication, while subcontracts entered
later on the same project are subject to different obligations and methodologies regarding prompt payment and adjudication processes.

At any given time, BGIS is managing thousands of concurrent federal construction projects. Many more are at various stages of procurement. BGIS and PSPC’s contracts, and many more subcontracts on federal work, are structured as long-term master agreements and standing offers with pre-defined processes and pricing, pursuant to which work authorizations and ‘call-ups’ are issued. Transition provisions could apply the legislation to only projects under new head contracts. However, we expect that opportunities can be found to implement legislative changes to existing contracts, provided that contractors and subcontractors were permitted contractual revisions for cost recovery, so as not to put any private-sector contractors and subcontractors in an untenable situation.

At the time of BGIS entering the contracts for RP-1 and RP-2 portfolios, the contractual relations drove significant investments in development of I.T. infrastructure, software, systems, processes, and personnel staffing methods to achieve best value for Canada, drive competitive pricing, and accommodate PSPC’s milestone document billing methodology. Without statutorily protected contractual accommodations for cost recovery, a contractor or subcontractor could be faced with minimal negotiating leverage and absorb the increase cost or risk termination of a contract that was hard-fought and won.

6. **Contract Suspension**

We recommend that the Expert Review Panel also consider the potential effect of expressly permitting a subcontractor’s right to suspend work upon a payment dispute, in view of the nature of the projects affected.

The ability to suspend federal projects might have significant public policy implications. Federal projects are, by their nature, pursued for public purposes and in Canada’s national interests, rather than for a private commercial interest. The public purpose behind any particular federal project may be protecting the safety and security of Canadians or providing a significant economic benefit for all of Canada.

There may be a reasonable alternative in requiring subcontract work to continue despite any payment disputes, with no right of suspension until an independent person is persuaded of the legitimacy of the dispute, and then only if the relevant payor fails to make due payment after a reasonable time for doing so.

7. **Adjudication**

We understand that the Expert Review Panel is considering the cost-sharing of adjudicative processes. In an effort to minimize over-inclusion of innocent parties in payment disputes, BGIS recommends the Expert Review Panel consider an approach that apportions adjudication costs to those parties wrongfully delaying payment or wrongfully initiating the adjudication.

It may be that a subcontractor’s delayed payment will be, or alleged to be, due to delayed payment from its upper-tier contractor, and so on. In such instances, contractors and subcontractors may request upper-tier contractors, such as BGIS, and the federal authorities as necessary parties in adjudicative processes. At the current rate of construction projects, namely, 3,000 concurrent projects managed by BGIS, an adjudicative process that does not motivate restraint may be cost prohibitive or administratively burdensome on the wronged parties.
BGIS recommends a process permitting the publication of a payor’s payment to the next level in the contracting chain, which could reduce unnecessarily over-inclusion of innocent parties in payment disputes. Publishing payment information, such as payment dates and project references would also increase transparency and confidence in prompt payment mechanisms.

8. Public-Private Partnerships

BGIS recommends that the Expert Review Panel consider the unique nature of P3 projects in the construction industry. As described below, unless there were a full exemption for all present and future P3s, a ‘one size fits all’ approach with legislation may not be effective or reasonable. In respect of existing P3 projects, we recommend an exclusion to all parties in the contracting chain for the concession period. In respect of P3s tendered after legislation coming into force, we recommend that the obligations of owner shift to the federal authority at ‘service commencement’, which is when the funding model shifts to government funding of capital repairs and projects.

BGIS operates and maintains facilities at numerous P3 projects in Canada, including provincial and federal projects. Typically, service providers in similar roles on P3s are responsible for operations and maintenance of the facilities, including interior and exterior elements, and ‘lifecycle’ responsibility for the replacement and refurbishment of maintained elements of the facility, such as structure, building systems, equipment, fixtures, and finishes.

Depending on the particular P3 project, federal authorities contract with the private sector, through a special purpose entity (a “Project Co”) to design, build, finance, operate, and maintain a public facility. The federal authority may issue only limited, if any, payments until the initial design-build project is completed and certified by an independent certifier. It is the private sector’s responsibility to secure the initial financing, which is often a combination of debt and equity financing.12 However, the funding model shifts once the asset is ready for use or there is long-term service commencement. Government-funded payments are typically made on a regular basis, and continue for the 25-year to 30-year concession period as monthly payments, akin to monthly rent, in exchange for the use of the facility. The payment structure is are contractual, predetermined monthly payments from the federal authority to Project Co, and onwards one or more layers into the contracting chain.

(a) Existing Federal P3 Projects

BGIS recommends that the prompt payment legislation exempt existing P3 projects, where disruption to existing contractual mechanisms could disregard heavily negotiated agreements and cause unknown consequences.

The typical P3 project involves significant investment and exposure for the private sector, including private equity investors, institutional lenders, general contractors, service providers, consultants, and engineers. Each project’s payment mechanisms and risk profiles are heavily negotiated and evaluated in advance, with financing and contractor involvement being conditional on the assessment of the payment mechanisms. Throughout the 25-year to 30-year project, lenders, financial institutions, and credit rating agencies monitor changes to payment mechanisms. Credit ratings can be downgraded due to a project’s operating, maintenance, and lifecycle resiliencies.13
(b) **New Federal P3 Projects**

In respect of P3 projects tendered after legislation comes into force, there may be opportunities to impart owner obligations on a Project Co during initial construction, with owner obligations shifting to a federal authority during the service term.

Although the Project Co may seem to be ultimate payor during the initial construction in the first 12 months to 24 months of the P3, the model shifts for all construction in the following 25 to 30 years. The federal authority becomes the ultimate payor and source of all funds for operations, maintenance, and construction, which could approach 500 projects.

We also note that, under the typical current P3 models, the predetermined monthly payments do not easily correlate to actual construction projects carried out at the facility during the concession period. The payments remain the same regardless of actual work performed. However, the above-described monthly payments from the federal authority fund almost every minute component of operations, maintenance, and lifecycle construction for upwards of 30 years.

An application of federal prompt payment to all parties in the P3 payment chain could effectively apply to all P3s tendered after the legislation coming into force. BGIS is confident that, for P3 projects not yet tendered, the private sector and federal authorities could design payment methodologies to accommodate prompt payment. Alternatively, application to any existing P3s would likely require significant changes to contractual provisions and risk profiles. Although likely a significant exercise, it could be possible if the alterations were to affect all parties, from top to bottom, and accompanied by an express entitlement to cost recovery.

BGIS recommends that the Expert Review Panel consider unique considerations in federal P3 projects and is confident that appropriate solutions can be designed after careful, thorough consideration.

BGIS is pleased to provide its perspective and trust that the foregoing comments have been helpful.

Yours truly,

Andrew McLachlin
Vice President, Legal

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2 *Mississauga (City) v. Greater Toronto Airports Authority*, 2000 CanLII 16948 (Ont. C.A.) [emphasis added].
3 *Infra*, at para. 68.
4 *Quebec (Minimum Wage Commission) v. Construction Montcalm Inc.* (1979), 1 S.C.R. 754.

7 These figures are based on a representative sample of BGIS payment data.


TAB 3
Expert Review of a Legislative Scheme for Federal Construction Contracts

May 2018
PREFACE

The Canadian Bar Association is a national association representing 36,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the CBA Construction and Infrastructure Law Section, with assistance from the Legislation and Law Reform Directorate at the CBA office. The submission has been reviewed by the Law Reform Subcommittee and approved as a public statement of the CBA Construction and Infrastructure Law Section.
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Expert Review of a Legislative Scheme for Federal Construction Contracts

I. INTRODUCTION

The Construction and Infrastructure Law Section of the Canadian Bar Association (the CBA Section) is pleased to comment on the expert review of prompt payment and adjudication of federal construction contracts led by Bruce Reynolds and Sharon Vogel of Singleton Urquhart Reynolds Vogel LLP (the Expert Review). We are responding to the request for comments outlined in the February 2018 Information Package.

The CBA Section comprises lawyers across Canada with expertise in construction and infrastructure law, who act for a broad cross-section of stakeholders in the construction industry, including public and private owners, building code authorities, contractors and subcontractors, construction lenders and insurers, construction professionals and construction industry associations. In our CBA Section role, we do not speak for, nor represent their individual interests.

The CBA Section has closely followed developments in prompt payment legislation across Canada. In November 2017, we wrote¹ to the Minister of Public Services and Procurement urging the federal government to undertake broad stakeholder consultation before introducing any prompt payment legislation in the construction industry. Prompt payment legislation will have significant and direct impacts on commercial arrangements throughout the country and the CBA Section applauds this Expert Review and its consultation process. Further, we recommend that the mandate and timelines of the Expert Review be extended through the legislative drafting stage, and that stakeholders be afforded an opportunity to comment on the Expert Review report.

Below, we offer our comments on a proposed federal legislative scheme.

II. A WORKABLE SYSTEM – HARMONIZATION, CLARITY AND FLEXIBILITY

The CBA Section brings a unique perspective to this Expert Review, as our members practice in all jurisdictions of Canada. We share developments in construction law, and often discuss the marked differences across the country, both in practice and in principle. While we applaud efforts by the federal government to ensure prompt payment in the construction industry, we foresee challenges in a national system, particularly given the myriad rules that exist across the country. We recommend a modest workable system, and our comments are largely informed by this perspective.

We note the differences across Canada to illustrate the complexity in introducing prompt payment legislation at the federal level. Ontario recently implemented a novel prompt payment and adjudication scheme. It is comprehensive and extends far beyond that of most jurisdictions. However, it will require significant financial investment from the provincial government. Other jurisdictions are considering more modest ways to modernize their legislation. For example, in British Columbia, the Law Institute has undertaken a review of its legislation and will prepare a report and recommendations to the government; in Manitoba, the Law Reform Commission has released a consultation paper on its legislation and is seeking feedback, and in New Brunswick, the Attorney General’s Legislative Services Branch has published Law Reform Notes to gather feedback on aspects of its legislation in relation to the three pillars of the Ontario reform – modernization, prompt payment and adjudication.

Quebec is also carefully studying prompt payment options. The province implemented a pilot project in December 2017\(^2\) testing various measures aimed at facilitating the payment of enterprises that are a party to public contracts or subcontracts. These measures may include the use of payment calendars, a dispute settlement mechanism and accountability reporting mechanisms, based on terms and conditions determined by the Chair of the Québec Treasury Board. The pilot project will run for three years, after which a report will be published.

\(^2\) On December 1, 2017, Québec adopted Bill 108, An Act to facilitate oversight of public bodies' contracts and to establish the Autorité des marchés publics, which amended the Act respecting contracting by public bodies to, amongst other things, allow the Chair of the Conseil du trésor to authorize implementation of this pilot project.
Some jurisdictions in Canada continue to rely on statutes that have been amended piecemeal over many years and appear long overdue for reform. The CBA Section is concerned with the challenges stemming from a lack of uniformity in legislation across Canada and that this may be exacerbated if another unique legislative scheme is implemented at the federal level. Given that Ontario has done a complete overhaul of its regime, and jurisdictions undertaking reform efforts are looking to Ontario’s approach, the Expert Review should consider if the federal legislation could run lock-step with any elements of the Ontario model to address some of these existing jurisdictional challenges. When weighing options for reform, the Expert Review, and other provinces and territories across the country, would be well served by promoting values of harmonization and clarity as much as possible in the circumstances. Flexibility should also be encouraged as much as possible to avoid stifling innovation in complex federal projects.

The CBA Section is also of the view that Bill S-224, *Canada Prompt Payment Act*, contains significant flaws and that the federal government, should it introduce prompt payment legislation, would be well served by drafting legislation separate and apart from Bill S-224.

### III. PROMPT PAYMENT

The CBA Section supports efforts to effect prompt payment in the construction industry. Similar to the Construction and Infrastructure Law Section of the Ontario Bar Association (a Branch of the CBA), we encourage the Expert Review to consider the broad impact of prompt payment legislation on the many stakeholders in the construction industry, including owners, contractors, sureties and lenders.

**A. Application**

**Federal Projects**

The CBA Section questions the scope and kinds of contracts to which a federal scheme should apply. Our concerns stem from overlapping jurisdictions, unnecessary complexity and potential conflicts.

We recommend that any federal legislation apply to projects where the federal government is both the owner of the project and the lands on which construction is taking place (we see this

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as clearly federal jurisdiction). We also recommend that federal legislation apply to any contract with a Government of Canada department, agency or crown corporation, for improvements or supply of services, and in relation to any land owned or directly controlled by the Government of Canada, and any improvements to the interest of the Government of Canada in any land (tenant improvements or repairs). Bill S-224, as currently drafted, creates confusion as to how it would apply to different project delivery models. Clear statutory language is necessary in any federal scheme to give certainty to stakeholders.

The CBA Section recommends that federal legislation not apply where the federal government has a limited role or interest in a project, such as where the project is not entirely federally funded, on lands not owned by the federal government. We also recommend that projects should not be under the application of federal legislation solely by virtue of being a federal undertaking (e.g. a pipeline or airport). Issues of jurisdictional overlap already arise in these types of projects, with associated confusion and burden on stakeholders. A federal scheme should not add additional complexity, cost and confusion. As well, these types of projects may already be subject to prompt payment legislation under provincial jurisdiction.

**Public-Private Partnerships**

The CBA Section sees no reason to exclude public-private partnership (P3) projects from the proposed federal legislation. P3 contracts at the local trade levels are not dissimilar to the typical general contractor (GC)/subcontractor contracts – they are still relatively conventional projects at this stage – which should warrant inclusion in prompt payment legislation. Should the government decide that P3 projects are appropriately included in the scope of the legislation the CBA Section recommends that the Ontario approach be adopted at the federal level.

**International Projects**

International projects, such as an international bridge commission/authority, may also require special consideration. For simplicity, we recommend that these projects be excluded from the scope of federal legislation.

**Prescribed by Legislation/Regulation**

Notwithstanding the above, the CBA Section appreciates that limiting prompt payment legislation to federal projects on federal lands may pose challenges. An alternative may be to expressly list the types of projects to which prompt payment legislation would apply, either by
legislation or regulation. This approach is used in other contexts where there is a potential for overlapping jurisdiction, as a means of providing clarity and certainty. For example, the
Canadian Environmental Assessment Act, 2012\(^4\) contains a project list approach (rather than a trigger approach), whereby projects are designated by regulation or by Ministerial order.

**Parties**

Some members of the CBA Section recommend that prompt payment run all the way down the contractual construction pyramid. Issues with timeliness of payment often occur further down the contractual chain, beyond the GC/owner, as those parties lower in the pyramid often lack leverage, power and protection in contractual relationships. They would benefit significantly from prompt payment. Any federal legislation should also be consistent with the Financial Administration Act. Other members of the CBA Section question the practicality of applying prompt payment down the contractual chain, since a GC may subcontract portions of their work under different payment structure such as unit rates or milestones. To address this issue, the CBA Section recommends that a federal legislative scheme balance freedom of contract (for example, by allowing the GC/owner to adopt varied payment structures) with statutory intervention to ensure that payment flows (for example, by adopting shorter time periods for payment to lower tiers on the pyramid).

Another challenge when applying a prompt payment regime down the construction pyramid is ensuring that funds actually flow down with properly spaced intervals between tiers. The CBA Section encourages the Expert Review to consider a relative pay period between each tier in the pyramid. The Ontario model would be a suitable example for tiered payment, with its 28-7-7-7 timing. Prescribing a fixed date by legislation for only two tiers, as contemplated by Bill S-224, will create problems for subsequent tiers.

**B. Project Value Threshold**

There may be some discussions as to whether a minimum project value threshold should apply for prompt payment. Although we understand the appeal of a minimum threshold (e.g. $100,000 threshold) to avoid a legislative burden on small contractors, there are persuasive countervailing arguments. First, a dollar threshold may lead to confusion where, for example, a contract starts at $90,000, and through change orders becomes $110,000. Second, smaller

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\(^4\) S.C. 2012, c. 19, s. 52.
subcontractors are likely the most vulnerable and would benefit from the protection of the proposed legislation.

C. Invoicing and Payment Schedule

Submitting a proper invoice should be the trigger to start the clock running on the prompt payment periods, however defined. The CBA Section believes, however, that parties ought to be left to negotiate invoicing terms best suited to their specific project and business needs, as in Ontario. We also recommend that milestone payments be permitted, and do not support the prohibition on milestone payments in Bill S-224 (section 11(1)). If a payer and payee agree that milestone payments are appropriate for the subcontract work, it is unclear what interest the federal government has in forcing them to use invoicing terms incompatible with their business interests.

The CBA Section recognizes that a clear regime for timely invoices is necessary for prompt payment to work. There is some disagreement, however, amongst our members as to whether there should be complete freedom of contract or a minimum interval such that payment cannot take place on an interval slower than the payment schedule between the government institution and general contractor. The payment periods established in Ontario appear to be reasonable, and we would support a consistent approach across jurisdictions. Most members also support the Ontario approach of an implied minimum term, such as a monthly payment of 28 days.

In the context of milestone payments, some members encourage requirements for written/email/posted notice of milestone payments by a GC before entering into a construction contract (similar to section 11(2) of Bill S-224). This type of requirement gives clarity to payers and payees and is in the best interests of all parties.

D. Payment Triggers and Certification

The CBA Section supports the Ontario approach of prohibiting certification as a precondition to a proper invoice because it would remove an impediment to payment flowing down the chain. Issues of payment certifiers delaying payment by refusing to certify work are all too common in the construction industry. The one exception would be for P3s projects, similar to the Ontario model, where certification is a necessary step on account of the financing machinery in place. Section 7(3) of Bill S-224 does not address these delays in approval of certification of
payment applications, and again we recommend a payment period triggered by submitting a proper invoice.

Any legislation will require clear drafting of terms such as proper invoice, certification and approval when outlining payment triggers. Outlining a minimum standard for a proper invoice, and allowing parties the freedom to negotiate additional inclusions appears to be a rational approach to ensuring flexibility in the prompt payment system for varying project sizes.

With respect to payment applications, Bill S-224 contains a deemed approval of payment applications (see section 16). While deemed approval can create clarity and is fundamental to the objectives of prompt payment, we caution against tying payment in this manner without adequately addressing the timing of payment throughout the entire payment stream. Timing requirements help ensure that payments are not out of sync down the chain and that parties are not forced to make downstream payments when there is no assurance of upstream payments. This would be onerous on subcontractors and suppliers further down the chain and could impact solvency. As well, we recommend allowing sufficient time between receipt of the application and the deeming, to ensure payers have time to adequately verify the work after an application has been received.

**E. Disclosure Obligations**

The CBA Section believes it would be beneficial for basic payment information to be easily accessible, and recommends either requiring it to be publicly posted (where possible), or mandating that it be made available upon request, with five to seven days' notice. We suggest looking to existing lien legislation in Ontario and BC. Most members of the CBA Section are of the view that payment information should be limited in scope. It would be challenging, for example, to ask a GC to submit detailed payment information that may include sensitive pricing information, or to break down progress draws by line item or subcontractor work components, each and every month; the burden would be unnecessarily severe.

**F. Remedies and Consequences of Non-Payment**

**Notice Requirement**

To manage issues with non-payment and its impact on the construction pyramid, some CBA Section members suggest a formal notice requirement if an owner or GC does not intend to pay.

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5 For example, information such as date, amount, and proper invoice reference number.

Notice of non-payment could be required at several levels to increase communication about payment on projects, and failure to provide notice could result in mandatory payment. Payment disputes, as indicated in a standard notice, could proceed by way of an efficient dispute resolution system, for example, a separate adjudication scheme or contractual dispute resolution. After a decision or determination is made, a process would need to be established to enforce payment, where applicable.

**Trust Schemes**

Some CBA Section members also propose adopting consequences for failure to pay. If trust rules were adopted, holding officers and directors\(^7\) personally liable for any failure to pay project beneficiaries (i.e. diversion of payments outside of a project stream, as in several provincial builders’ lien acts) would be a new remedy available to payees. Those members note that many contractors in Canada are working in provinces that have already adopted trust/trustee schemes to protect funds in the construction space, so this would not be a major change from existing practice. Currently, the Northwest Territories, Yukon, Nunavut, Prince Edward Island, Newfoundland and Quebec, do not have trust provisions. We recognize that implementing a trust scheme would be a significant departure for these jurisdictions and would require careful consideration. There are many complications associated with establishing a trust scheme where there are none (notwithstanding the challenges posed by the existing jurisdictional schemes).

**Bonding**

The CBA Section also recognizes that most federal projects request bonding, and we recommend that federal projects continue to request or require bonding. Performance and payment bonds offer assurances that projects will be completed in the event of a general contractor default, and also ensure all sub-trades and suppliers have recourse in the event of non-payment. Sureties also continuously monitor bonded projects and contractors, and have the ability to track any failures to pay or aged payments accruing.

**Suspension and Termination Rights**

Some of our members recommend that suspension and termination rights be available for non-payment, similar to the Ontario approach. These members note that a suspension right is

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\(^7\) Along with any other person that knew or ought to have known, or acquiesced to the breach, for example, following common wording of trust remedies in lien legislation across Canada.
clearly contemplated by the standard form contracts endorsed by the Canadian Construction Documents Committee. However, Bill S-224, as drafted, raises serious concerns, as an immediate right to suspend discourages negotiation and other informal means of dispute resolution and instead allows payees to exercise the “nuclear option” very early in the process (with negative consequences for all parties and the project). We recommend the Ontario model be followed, and not the model contained in Bill S-224.

Alternatively, the federal government could look to standard form contracts prepared by the Canadian Construction Association, as well as US legislation that requires GC payment to sub- trades in a stipulated time from receiving payment.

**G. Set-Off Rights**

The CBA Section urges caution in interfering with set-off rights. The federal government should be reluctant to restrict set-off rights (as set out in section 22 of Bill S-224) as the implications could be severe, particularly in the case of bankruptcy. If a GC becomes bankrupt, without the right of set-off, the government may be forced to make payment to a receiver instead of using contract funds to complete defective work. Conversely, an owner’s set-off rights are often abused toward the end of the project. For example, on substantial completion, a deficiency holdback may be established, the GC then dutifully completes the deficiencies only to find an increasing number of excuses as to why it will not be paid. Cross-contractual set-off rights between GCs and federal owners typically exist already, with significant potential consequences, especially in some of the larger federal infrastructure projects – if a major GC went under, protection of the lower tiers on many projects could be in jeopardy. Similarly, a lack of set-off rights could prejudice a surety’s subrogation rights.

**IV. ADJUDICATION**

**A. Appropriateness in the Federal Context**

Payment delays are tied to the timely resolution of disputes and therefore an effective dispute resolution system is an important part of improving the promptness of payment. However, some members question whether adjudication is appropriate in the federal context, notwithstanding political will to adopt an adjudication system. The scope of federal projects, combined with the vastness of Canada, raises question about the efficiency of a federal adjudication process in the traditional sense; in-person adjudications appear impractical.
These same challenges are less likely in smaller geographical areas, such as a single province or territory, as opposed to all of Canada.

The CBA Section suggests letting the Ontario adjudication process unfold and seeing what lessons can be learned before implementing something similar at the federal level. Adopting a sophisticated adjudication process such as in the United Kingdom, or more recently, Ontario, would be a significant change requiring considerable resources. For example, the UK model requires a GC to expend considerable time and money to document projects in case a dispute arises. This may not be feasible or cost effective for certain types of projects, unless alternative solutions are explored. The UK also has a different constitutional structure than Canada.

Other CBA Section members suggest, given that there is only one owner in the federal context, that greater attention be placed on standard form procurement documents, to strengthen existing dispute resolution processes. Having the dispute resolution process in procurement documents, as opposed to legislation, would offer parties greater flexibility to make changes in the future. What’s more, the existing dispute resolution system in most federal procurement documents, although not without challenges or concerns, appears to be working relatively well.

Alternatively, a legislative scheme could include adjudication as a default, unless the federal entity has a fast track dispute resolution mechanism to ensure that disputes are resolved in a set number of days. We encourage the Expert Review to look at existing federal dispute resolution models.

A further option is a model adjudication 'light' process included in federal contracts, whereby payment disputes are subject to a 30-day decision-making process, or any dispute resolution process is conducted by arbitrators or mediators on shortened timelines.

**B. Appointment and Qualifications**

If an adjudication process is implemented through federal legislation, the CBA Section supports the establishment of an Authorized Nominating Authority (ANA), similar to the UK approach for nominating adjudicators. The CBA Section views an ANA as an essential element of a successful prompt payment adjudication system. Given the need to resolve disputes in a timely manner, it would be too time consuming to have court appointed adjudicators.

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8 This could be achieved through staged implementation, as discussed below.
However, we foresee a number of challenges with establishing an ANA at the federal level, including determining who will run the authority and who will fund it. We anticipate a limited desire on the part of the federal government to organize, fund, staff and administer an entirely new federal authority. But, as we have previously stated, setting up an effective adjudication system requires active engagement, commitment and funding from the department charged with its administration.

What’s more, establishing a sufficient body of qualified adjudicators may prove difficult. A federal adjudication process will require more adjudicators than the Ontario model, for example, to cover the volume of federal contracts and their associated disputes. Particular qualifications, namely knowledge and expertise in the unique federal construction industry, may also be in short supply. The CBA Section suggests that the federal government consider recognizing adjudicators already certified under a provincial or territorial regime to manage some of these resource challenges, as authorities are established across the country.

The CBA Section also urges the federal government to be sensitive to regional and local differences in the construction industry and the challenges it poses. For example, many disputes are sensitive to local building codes and practices, which would make it difficult for an Ontario-based adjudicator to effectively adjudicate a Nova Scotia matter, notwithstanding that the federal law governing the projects and the contracts is the same. As well, given that adjudicators ought to, and are expected to have, significant construction expertise (and not all lawyers), the inherently local nature of construction will require an extensive breadth and density of adjudicators (more than may currently be under consideration). Adjudicators will need to be extensively trained and developed for a federal adjudication scheme to be practical and effective.

We also wish to raise the issue of procedural fairness. In particular, an actual or perceived conflict of interest may arise in a federal prompt payment adjudication scheme given that the federal government would likely be a party to disputes and may also fund the project.

**C. Types of Disputes**

The primary purpose of a federal adjudication process should be to resolve payment disputes. In Ontario, disputes other than payment disputes are also eligible for adjudication, on agreement of the parties. Allowing greater scope in what is subject to adjudication may give

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9 Supra note 1.
parties much sought after flexibility, but care should also be taken to specify what is and is not subject to adjudication. For example, some jurisdictions outline particular circumstances in which a bona fide dispute has arisen justifying a right to withhold payment. The CBA Section supports this approach as it would gives greater clarity to stakeholders and may reduce certain types of disputes.

All parties should be subject to, and be able to, initiate adjudication when there is agreement. Parties should also be able to consolidate, on agreement, akin to the Ontario model. Further, at the GC level, parties should be able to consolidate by right to avoid being trapped in a subcontractor/owner fight. We also recommend following the Ontario model for who can adjudicate a dispute, but recommend a time limitation on initiating adjudication to avoid the risk of “adjudication by ambush” where one party amasses an enormous claim and drops it on the other side with little or no time to respond.

D. Implementation

The federal government should give time for the novel Ontario adjudication scheme to be established before any rules for a federal scheme are finalized or come into force. Ontario will have the first statutory adjudication model in the Canadian construction industry and it will not come into force until October 2019.

The CBA Section also suggests that the timeline for implementing a federal adjudication model and its mechanical details be set in regulation. This will allow flexibility to amend the adjudication scheme if necessary. We also recommend waiting until well after Ontario’s rules come into force before any federal regulations are finalized or in force. This will give ample time to respond to lessons learned from the Ontario model and for industry to adapt and comply before regulations come into force. As a consequence, we see a continuing need for the Expert Review, and for further consultation.

V. JURISDICTIONAL OPERATION

The CBA Section recommends that the scope of jurisdictional operation be modest. Any federal prompt payment legislation must carefully consider the constitutionality of including projects that are not wholly federally funded or financed and constructed on federal lands. Section 91(1)(a) of the *Constitution Act, 1867* grants federal jurisdiction over federal property and public debt, but our understanding is that, generally, the regulation of construction contracts falls under provincial power pursuant to the property and civil rights powers in section 92(13).
Federal legislation should also consider existing jurisprudence, particularly to avoid conflict between provincial lien legislation and obligations on federal lands. There are no lien rights to federal lands. However provinces differ in whether holdback or trust obligations arise on projects involving federal lands (even if lien rights do not). Certainly, holdbacks can be allowed or imposed by contract in federal projects as a matter of contract law. Typically though, holdbacks are thought of as a companion concept to a lien right, where the lien represents a charge against the holdback maintained to protect, in part, downstream suppliers and subcontractors. One exception might be the imposition of a trust regime for holdbacks or on amounts owing to or received by a contractor or subcontractor (but not an owner’s trust). The CBA Section encourages careful consideration of these issues to avoid further exacerbating the patchwork of rules across the country. Stakeholders will benefit from an effective and efficient scheme for federal projects.

The CBA Section has not commented on how federal legislation would interact with Indigenous property and treaty rights, when First Nations reserve lands are incorporated into, or involved in federal projects as it is beyond our purview.

VI. CONCLUSION

The CBA Section is pleased to offer our perspective on the Expert Review and we support efforts to effect prompt payment in the construction industry. We trust that our comments are helpful and we would be pleased to discuss any of the above in more detail.
Re: Expert Review of Prompt Payment and Adjudication on Federal Construction Contracts

Dear Mr. Reynolds and Ms. Vogel;

Thank you for your letter of February 21, 2018 together with the Information Package. The Canadian Construction Association (CCA) is proud to be the national voice for the Canadian construction industry, and represents nearly 20,000 member companies employing close to 1,400,000 people through a network of 63 regional and local construction associations. CCA’s membership includes suppliers, manufacturers, service providers, civil, trade and general contractors in all sectors across Canada, from coast to coast to coast, generating close to $120 billion in economic activity annually.

With respect to payment within the construction industry the CCA’s policy (4.15 Payment) is as follows:

CCA advocates contractual payment and related terms that are fair, reflecting the industry consensus expressed in CCDC and CCA standard documents. Further, CCA advocates that project owners, prime contractors, subcontractor, suppliers, payment certifiers and other stakeholders in the payment chain comply with all statutory/legal requirements and honour commitments and contractual obligations on time, and in the spirit of the following general principles:

- Contracting parties, both payers and payees, should be responsible for understanding all agreed contractual terms affecting obligations to make and entitlement to receive payment, and
- Project owners should share with others in the project payment chain the dates on which they make payments to prime contractors to enable parties to comply with and benefit from contract payment provisions with confidence.

While CCA supports free competitive enterprise and individual freedom (CCA policy statement 1.1), CCA does not object in principle to the use of effective regulation and legislation where there is broad industry consensus that this is necessary in specific circumstances in order to correct imbalances or preserve an efficient and productive economic and commercial environment for the benefit of the whole construction industry.

Broadly, CCA endorses the balance achieved in Ontario’s new Construction Act. As the only current example in Canada of payment legislation that has, at least in its local market, achieved consensus
among industry stakeholders and government, we believe that to the extent possible federal legislation governing payment in the construction industry should be aligned with the principles and mechanisms in the Ontario Construction Act.

Further, we believe there is economic benefit to both industry and government in creating alignment in legislation and regulation between federal and provincial jurisdictions. A largely common set of rules across jurisdictions reduces risk for industry and reduces costs associated with training and compliance. We believe consistency also enables competition across Canada on a level playing field.

Given the very brief time available for our response, the four sector councils that represent the membership of the CCA had limited opportunity during our recent annual conference to consider the issues. While time has not permitted broad consultation with the membership, some common themes did emerge from this initial discussion. Our comments on the specific issues/questions on which you have invited comment are in the appendix to this letter.

We would urge you to consider approaching government to extend this Review to allow for another two months of stakeholder engagement to improve the likelihood of full engagement and consensus. We believe that with modest accommodation within the legislative drafting process (as was made in Ontario) a date of July 1, 2018 for delivery of your report and recommendations would leave ample time for government to prepare draft legislation for introduction in the fall of 2018.

Thank you for inviting the CCA to participate in this important process. We look forward to the opportunity to meet with you to discuss our comments, and we will make our best efforts to support your work in the time available.

Sincerely,

Mary Van Buren
President
Canadian Construction Association

Cc
Brendan Nobes, Chair, CCA General Contractors Council
John Rasenberg, Chair, CCA Trade Contractors Council
Henry Borger, Chair, CCA Civil Infrastructure Council
Yvan Houle, Chair, CCA Manufacturers, Suppliers & Services Council
Ray Bassett, 3rd National Vice-Chair, Co-Chair of the Government-Industry Working Group – Prompt Payment Initiative
Appendix

1. Payment Legislation Questions

1.1 What kinds of contracts should it apply to? What kinds of work should it apply to?

- Contracts with a Government of Canada (GoC) department, agency, crown corporation or special agency ([https://www.canada.ca/en/government/dept.html](https://www.canada.ca/en/government/dept.html)) for

- Any “improvement” (as described in the Ontario Construction Act) and/or any “supply of services” (as described in the Ontario Construction Act, but including RP1 and RP 2 services contracts) related to an improvement to any land owned or directly or indirectly controlled by the Government of Canada (or its departments, crown corporations, agencies or special agencies), and an improvement to the interest of the Government of Canada in any land (i.e. tenant improvement and/or repair);

- Projects on First Nations lands should be bound under this legislation, even though contracts would/may not include the GoC as a party.

- “improvement” should include IT/energy improvements/retro fit work.

- Terms should be clearly defined. For example, we use the term “GoC” in this Appendix in the same sense the term “owner” is used in the Ontario Construction Act. In this context it stands for any department, agency, Crown Corporation or special agency of the Government of Canada, but also the “SPV” in a federal P3 transaction (following the realignment in the Ontario Construction Act) as well as a First Nations entity that contracts for federally funded construction. Similarly, “subcontractor” should clearly include suppliers.

- Contracts would be deemed amended to comply (i.e. no contracting out).

1.2 Should there be any exclusions or different treatment for certain types of projects? (e.g. P3 projects)?

- No exclusions (i.e. include P3 projects, IPD and Real Property 1& 2 contracts.) With respect to transition,

  - RP 1 & 2 contracts should be grandfathered but only until expiry of the current term – i.e. exercising an option to extend would bring those contracts under the new
legislation.

- Legislation should apply to “subcontracts” under an RP 1 & 2 contract immediately upon proclamation. For example (based on the Ontario model), even though the RP 1 “prime” contract may not fall under the federal legislation (and would not benefit from the 28-day payment requirement), a new subcontract signed after proclamation would benefit from a requirement for payment within 7 days the date the RP 1 contractor receives payment from the GoC.

- allow procurements initiated prior to proclamation to continue under old rules (as in Ontario).

- The accommodation in the Ontario Construction Act for AFP / P3 procurements to the effect that the SPV is deemed to be the contractor, the project agreement is deemed to be the contract, the design-build contractor is deemed to be a subcontractor, and the design-build agreement is deemed to be a subcontract, should be followed.

1.3 What levels of contract should it apply to in the construction pyramid?

- Prime, subcontract, sub-subcontract and suppliers.

1.4 What should be the trigger for starting the clock running on a payment period?

- Submission by the (prime) contractor of a “proper invoice”, following the Ontario model.
- The contractor’s proper invoice should trigger the clock.

1.5 What is a reasonable payment period? Should these periods differ for parties at different levels of the construction pyramid?

- Follow the scheme in the Ontario Construction Act – namely, 14 days for owner to deliver notice of non-payment, 28 days for owner to pay undisputed amounts, 7 days from receipt of payment for contractor to pay subcontractors and suppliers included in the proper invoice, 7 days from receipt of payment for subcontractors to pay other subcontractors.

1.6 What, if any, limitations should be placed on the parties to a construction contract in respect of their freedom to contract in relation to invoicing terms?

- There should be no limitations placed on the parties in agreeing on invoicing terms. Where invoicing terms are not agreed in a contract then follow the Ontario Construction Act model and default to a monthly basis.
• Require a general contractor to notify subcontractors and suppliers during the bidding process if (but only if) the invoicing terms on the prime contract are other than monthly.

1.7 Should certification be permitted as a pre-condition to the delivery of a proper invoice? Are there any other pre-conditions that cause concern?

• The solution in the Ontario Construction Act permitting certification as a pre-condition to delivery of a proper invoice on public-private partnership projects is a reasonable exception. Otherwise, this should not be permitted.

1.8 On what basis can payment be withheld and when? Should there be any limits on a set off (e.g. in relation to other projects)?

• The scheme in the Ontario Construction Act is reasonable, including:
  • Undisputed amounts should be paid in normal timelines;
  • GoC can withhold a disputed amount if it disputes entitlement on a contractor invoice;
  • Contractor can withhold payment to subcontractor or supplier because GoC has not paid all or part of the contractor’s invoice – subject to proper notice of non-payment to the subcontractor or supplier and undertaking to commence adjudication with GoC (follow applicable Ontario scheme);
  • Contractor can only withhold payment to a subcontractor or supplier of disputed amounts (regardless of whether the GoC has paid the contractor) if the contractor disputes the subcontractor’s or supplier’s entitlement. Undisputed amounts must be paid.

• Set-off by the GoC should be restricted to amounts arising under the Contract.

1.9 Should payment information be posted? If so, where?

• GoC should utilize its existing websites to post public notices of:
  • Date on which a proper invoice is submitted;
  • Date on which payment is made to a contractor;

• CCA would support disclosure of other information on a ‘by request’ basis that would have been required by applicable provincial lien legislation (i.e. Section 39(1), especially subsections 1 and 2 of the Ontario Construction Act.)

1.10 What should the consequences be of a failure to pay?
CCA would support the approach in the Ontario Construction Act, namely
- The right to commence an adjudication;
- Mandatory statutory interest;
- The right to suspend work (without breach) if an adjudicator’s determination is not paid within 10 days;
- Resumption of work after suspension would be conditional on payment of a determined amount, interest, reasonable costs incurred by the payee as a result of the suspension of work.

2.0 Adjudication

2.1 Who can require adjudication and when?
- CCA would support the approach in the Ontario Construction Act.

2.2 Who can adjudicate a dispute?
- Adjudicators should have significant (i.e. at least 7 years) relevant and Canadian experience in the construction industry, and may include but should not be limited to those in the legal, engineering or architectural professions, experienced construction and project managers and construction executives.

2.3 How should an adjudicator be nominated?
- Follow the Ontario model.

2.4 What is the role of an authorized nominating authority?
- To the extent that some agency would be required to administer the roster of adjudicators, CCA would support the idea of an authorized nominating authority (ANA).
- CCA would also support placing this authority in the first instance with a GoC Minister to ensure it can be executed and delegated.
- Some considerations, however, include:
  - CCA generally would support GoC delegating this to the private sector through a procurement process.
  - Careful consideration should be given to adequate funding for an ANA to ensure that its resources and effectiveness are not dependent on its volume of work, especially during the start-up phase and accommodate any surges in demand. In other words, a
2.5 What types of disputes should be adjudicated? Should there be limits to the quantum of the disputes that are subject to adjudication?

- CCA would support the “targeted” adjudication approach in the Ontario Construction Act, with the focus being on issues around payment.

- CCA would also support adjudication of disputes other than payment if the parties agree.

- CCA would support the Ontario approach to consolidation of adjudications initiated at different payment levels where there are common facts.

- Within the CCA membership there are two views on the question of whether adjudication of disputes should or should not be mandatory if the amount of the dispute exceeds a set threshold.
  
  o There is support among CCA’s general contractor members for setting a threshold proportional to the value of a contract or subcontract, beyond which adjudication would require the agreement of the parties. It is felt that some disputes are too complex or of too high a value to resolve on an interim binding basis, and that the consequences of an adverse determination are worse than the delay associated with the judicial process.

  o CCA’s subcontractor and supplier members favour the Ontario approach with no thresholds on adjudication.

- There is a concern over security for payment of an adjudicator’s determination and security for recovery should a judicial review be granted and succeed. There is concern expressed by CCA’s general contractor and larger subcontractor members that they may be required to pay an adjudicator’s determination initially, then succeed in a judicial review, but be unable to collect given the passage of time.

2.6 What should an adjudication process look like?

- CCA’s Councils have not reached consensus on the degree of discretion that should be given to an adjudicator to determine the process. It is acknowledged that the role of the
adjudicator as ‘inquisitor’ with broad power to investigate and to design a process that is proportional to the dispute in hand is a strength of the adjudication process. There is concern though that broad discretion creates uncertainty and, therefore, risk, including financial risk. For example, the costs to the parties (i.e. direct expense and loss of productivity) associated with participating in the process will be determined largely by the process that the adjudicator designs and will be difficult to predict, budget and manage, especially for smaller and medium sized firms.

- The time period to initiate an adjudication should be limited to a number of days, (i.e. to 14 days). Referring to the Ontario model, in a situation in which the owner pays the proper invoice in full, but the contractor disputes a subcontractor’s entitlement to payment (either in whole or in part) based on subcontract terms (i.e. other than pay when paid), and issues a notice of non-payment to the subcontractor, the subcontractor should be required to initiate an adjudication of the dispute with the contractor within, say, 14 days or else forfeit its right to adjudicate (except by agreement).

- The adjudication process should include the right and a timeline for the respondent to make an initial submission to the adjudicator. In the Ontario model the participation and timelines for submissions (if any) by the respondent are within the discretion of the adjudicator.

2.7 How should the costs of an adjudication process be addressed?

- CCA would support the Ontario model.

2.8 What should the process for enforcing adjudication decisions look like?

- CCA would support the approach in the Ontario Construction Act (section 13.20) for enforcing a determination as if it were an order of the court upon filing of the determination with the court.

3.0 Jurisdictional Aspects

What kinds of projects would federal legislation implementing prompt payment and adjudication apply to?

3.1. Are there potential conflicts between such federal legislation and provincial legislation?

- For the transparent and efficient functioning of the construction market in Canada, it is important that industry (general contractors, subcontractors, suppliers) must be able to easily identify whether their contract or subcontract is subject to provincial payment/lien legislation.
or federal payment legislation.

- Potential conflicts between other federal legislation (other than payment legislation – i.e. federal insolvency legislation and its impact on deemed trusts under provincial lien legislation) we believe are beyond the scope of this Review.

3.2 If so, in view of the doctrine of paramountcy, is there any constraint on the federal legislation?

- No comments.

3.3 Would some combination of federal legislation and amendments to standard form contracts be appropriate?

- While we would expect legislation to deem contracts amended to comply, revisions to standard contracts should be made by industry and GoC following enactment of federal legislation to promote clear understanding and avoid uncertainty and unnecessary disputes.

- A federal scheme for prompt payment and adjudication should be contained within the legislation. There is no consensus that an effective outcome would be achieved by placing some elements in legislation and other elements in contracts.

3.4 Are there any operational concerns that federal legislation could be different than provincial/territorial legislation (i.e. would there be different rules applicable to a federal construction site as opposed to a provincial/territorial construction site)?

- CCA would support efforts by the GoC to align federal legislation with provincial legislation, primarily with the Construction Act in Ontario as the only example at present. We believe alignment on issues like triggers and payment timelines, adjudication process and administration of a roster of adjudicators, and enforcement of determinations, will allow industry to better manage internal processes, training risk management, cash flow and capital planning, and enable competition across Canada on a level playing field.

- Where there are competing and different schemes across provincial, territorial and federal jurisdictions, contractors doing business in more than one jurisdiction, and small and medium sized enterprises looking to expand their businesses incur additional cost in designing business processes, training, risk management.

3.5 From an operational perspective, should the federal government defer to provincial/territorial prompt payment legislation where it exists?
• CCA would support separate federal payment legislation, even where provincial legislation exists. We believe this would help avoid uncertainty in the market.

4.0 Any other comments, suggestions

• CCA would support a recommendation that the GoC discontinue its practice of keeping a blanket holdback of 10% (or 5% with bonds), with a recommendation therefore that no holdback be retained down the payment chain. Where holdback to manage performance risk (E.g. warranty, manuals, as-builds, commissioning, etc.) is negotiated by the GoC in a prime contract (or by a general contractor on a subcontract or supply contract) these amounts should be clearly itemized and dealt with in the normal course of the invoicing and payment process.

• Consideration should be given to introducing a trust regime applying to funds received by a general contractor, subcontractor, supplier and other “payors” down the chain. The GoC would not be a trustee. In the absence of a lien remedy, and with no other security for payment that is mandatory under the legislation, a trust regime aligned with that in the Ontario Construction Act would heighten accountability within the payment chain and increase the overall effectiveness of legislation.
March 28, 2018

To: Singleton Reynolds

Attn: Mr. R. Bruce Reynolds and Ms. Sharon Vogel

Re: Federal Construction Contracts
   Expert Review of Prompt Payment and Adjudication
   Stakeholder Submission

Dear Mr. Reynolds and Ms. Vogel,

We refer to your letter dated February 21, 2018 and supporting information.

Firstly, thank you for engaging the Canadian Institute of Quantity Surveyors as a stakeholder as part of the Federal Review that the Government of Canada has engaged you to undertake. We are pleased that initiatives at the Provincial are being considered at the Federal level.

Having reviewed the Information Package, we are pleased to join other stakeholders in participating in the process of consultation as you deliver your mandate. Therefore, we hereby provide our responses to your questions including what we consider to be substantive issues.

The profession and ethos of Quantity Surveying is internationally recognized and by way of introduction, the Canadian Institute of Quantity Surveyor was established in 1959 and currently has over 2,000 members spread across all the provinces and territories of Canada. Further:

A. **Members & Employers:** Our members include Professional Quantity Surveyors (PQS), Construction Estimator Certified (CEC) and other aspiring professionals including those attending multiple academic institutions. Our members work with Owners, Developers, Financial Institutions, Contractors, Subcontractors, Suppliers, Legal, Insurance and other professionals.

B. **Federal Contracts:** Our members continue to work alongside fellow professions such as project/construction managers, engineers and architects that support construction contracts carried out by the Government of Canada, including Public Works Canada, Defense Canada and multiple layers of public bodies and custodians of public funds at the federal, provincial and municipal levels.

C. **Professional Support:** Our members are involved during the design, procurement and construction - our member contribution to federal construction contracts extends from the process of project assessment/realization, procurement, administration of contracts, including preparing estimates, cost plans, changes, claims, payments and the review and resolution of contractual issues.
We would respond as follows in relation to the specific questions in respect of prompt payment.

1. What kinds of contracts should it apply to? What kinds of work should it apply to?

   **Response:** Prompt payment should apply to all forms (bespoke and industry standard) of construction contract used by the Federal Government.

2. Should there be any exclusions or different treatment for certain types of projects? (e.g. P3 projects)?

   **Response:** No.

3. What levels of contract should it apply to in the construction pyramid?

   **Response:** This should be treated as it has been in the Construction Act (Ontario).

4. What should be the trigger for starting the clock running on a payment period?

   **Response:** Where an independent payment certifier is used, a certificate from the payment certifier or in other instances a proper invoice. To avoid challenges around what a “proper” invoice constitutes, the term “proper” should be defined and an industry developed template encouraged.

5. What is a reasonable payment period? Should these periods differ for parties at different levels of construction pyramid?

   **Response:** A reasonable payment period is 15 to 45 calendar days based on where the contracting parties sits within the construction pyramid.

6. What, if any, limitations should be placed on the parties to a construction contract in respect of their freedom to contract in relation to invoicing terms?

   **Response:** Invoicing terms should be left to the parties, as commercial entities, recognizing the reasonable periods stated above.

7. Should certification be permitted as a pre-condition to the delivery of a proper invoice? Are there any other pre-conditions that cause concern?

   **Response:** Certification should be permitted as a pre-condition where the payment certifier is independent.

   In all other instances, the term “proper” invoice as a pre-condition requires definition (terminology) and clarity (template).
8. On what basis can payment be withheld and when? Should there be any limits on a right of set off (e.g. in relation to other projects)?

Response: Payment can be withheld for set off that satisfies the notice and assessment (quantification/evaluation) provisions in relation to a specific project and contract.

Set off from one project to another project that are both subject to separate contracts (recognising public funds) should be allowable subject to strict and established criteria.

9. Should payment information be posted? If so, where?

Response: Yes, suitable publications to be determined.

10. What should the consequences be of a failure to pay?

Response: Pre-determined damages, similar to Liquidated Damages.

We would respond as follows in relation to the specific questions in respect of adjudication:

11. Who can require adjudication and when?

Response: Any contracting party, at any time from the award of a contract up to Substantial Performance.

12. Who can adjudicate a dispute?

Response: A professional that is qualified as a subject matter expert academically, professionally and by experience in the matter that is the subject of a dispute. Such a professional having basic legal/dispute resolution training and being registered as a Construction Adjudicator.

13. Question: How should an adjudicator be nominated?

Nomination is agreement between the parties once a dispute arises or by a nominating body subject to a request by the parties that are in dispute.

14. What is the role of an authorized nominating authority?

Response: The role of the authorized nominating authority is to keep a list of adjudicators, nominate suitable candidates as adjudicators, hear complaints around adjudicators, establish a code of conduct for adjudicators and enforce discipline.

15. What types of disputes should be adjudicated? Should there be limits to the quantum of the disputes that are subject to adjudication?
Response: By way of example, typical disputes to be adjudicated are: disputes around the following: Scope of work, Quantities, Rates, Alleged Changes, Schedule Extensions, Evaluation of Interim Progress Payments and such similar items. The quantum of the disputes should be as addressed in the Construction Act (Ontario).

16. What should an adjudication process look like?

Response: As the Construction Act (Ontario). Process should be pre-defined with timelines and limited provision for challenge.

17. How should the costs of adjudication process be addressed?

Response: Shared equally by the parties. Adjudicator should be authorized to award costs in exceptional circumstances.

18. What should the process for enforcing adjudication decisions look like?

Response: Summary judgement with limited room for appeal.

We would respond as follows (where possible) in relation to the specific questions in respect of the jurisdictional operation of the Act if any:

19. What kinds of projects would federal legislation implementing prompt payment and adjudication apply to?

Response: Projects on federal properties or tied to federal entities.

20. Are there potential conflicts between such federal legislation and provincial legislation?

Response: Yes, there is such potential.

21. If so, in view of the doctrine of paramountcy, is there any constraint on the federal legislation?

Response: No comment.

22. Would some combination of federal legislation and amendments to standard form contracts be appropriate?

Response: No comments.

23. Are there any operational concerns that federal legislation could be different than provincial/territorial legislation (i.e. would there be different rules applicable to a federal construction site as opposed to a provincial/territorial construction site)?

Response: No comments.
24. From an operational perspective, should the federal government defer to provincial/territorial prompt payment legislation where it exists?

Response: No comments.

Therefore, by way of conclusion we believe that the comments above in respect of prompt payment, adjudication and jurisdictional operation will improve the functioning of the construction industry in relation to federal projects.

Once again, thank you for engaging the Canadian Institute of Quantity Surveyors as a stakeholder and we look forward to continue our engagement in a manner that seeks to contribute to legislation for improvements in payment and dispute resolution practices.

We look forward to our forthcoming stakeholder dialogue.

Yours sincerely,
For the Canadian Institute of Quantity Surveyors

Arif Ghaffur
BSc(Hons), PQS, FRICS, MCIArb
Editor, Construction Economist
Chair of CIQS Federal Review Committee

Craig Bye
PQS(F), MRICS
Past Chair, CIQS
Member of CIQS Federal Review Committee

Arran Brannigan
LL.M., MBA, PQS, CAHP
Chair, CIQS Ontario
Member of CIQS Federal Review Committee

Copy: Mr. David Dooks – Chair, CIQS, Ms. Sheila Lennon – Executive Director
BY EMAIL

Dear Mr. Reynolds and Ms. Vogel,

Thank you again for inviting Defence Construction Canada to participate as a stakeholder in the consultations regarding the Expert Review of Prompt Payment and Adjudication on Federal Construction Contracts.

As requested, please find attached to this letter our written submission in preparation for our upcoming discussions on March 27, 2018.

We look forward to our meeting.

Best regards,

Melinda Nycholat, P.Eng.
Vice-President, Operations - Procurement
Singleton Urquhart Reynolds Vogel LLP’s Expert Review
Prompt Payment and Adjudication on Federal Construction Contracts

AREAS FOR CONSULTATION AND DISCUSSION PROPOSED BY DCC

March 22, 2018

General remarks
DCC supports the principle that contractors throughout all tiers of a construction contract should be paid promptly when they are entitled to payment. Our primary concern with a legislated solution relates to how disputes are characterized and dealt with in the adjudication process and any process must be fair and reasonable to all parties, including the Owner.

Fairness and equity in the process
The terms of the Adjudication process must provide the Owner an equal amount of time to respond as it does the Contractor for the preparation and submission of a complaint. The concern is that a Contractor will have much time to prepare a detailed complaint complete with supporting documentation before submitting it while the Owner may only have a few days to consider it and respond once adjudication has been triggered. We suggest that there should be a maximum delay in which to submit a complaint, perhaps similar to that of submitting a complaint with CITT “not later than 10 working days after the day on which the basis of the complaint became known or reasonably should have become known to the potential supplier.”

This concern is lessened if the scope of application for Adjudication does not include complex claims.

Scope of Application
We understand that claims which would be treated under any prompt payment legislation would be resolved through adjudication. We further understand that the underlying principle of prompt payment legislation is to ensure the timely flow of payment through all tiers, therefore the adjudication process needs to be very expeditious. Claims of a complex nature on the other hand require significant effort and time to research, document and analyze. Quite often, these claims also require the assistance of experts and input of multiple parties. A time sensitive adjudication process would not permit the parties to fully exercise the negotiation process with an appropriate degree of due diligence. We firmly believe that the current ADR processes in Federal construction contracts should be used for resolving complex claims. In our opinion, the Ontario Bill 142 does not adequately differentiate between complex claims and those involving simple payment disputes (re Part II, 13.5). We recommend a threshold approach to determine if a matter may be referred to Adjudication. For example, a matter may be referred to Adjudication if:

- The dispute DOES NOT involve a claim for extra expense, loss or damage incurred or sustained by the Contractor due to delay, neglect, discrepancies and ambiguities in the plans and specifications, or unforeseen conditions that require expert technical testing, analysis and testimony; and
- The value of the claim DOES NOT EXCEED $500,000.
Suspension of the Work
The ability for subcontractors to suspend work could have significant operational impact to departments and in some cases on defence projects, may impact national security. When a contract contains security requirements, the process for another subcontractor to obtain security clearance before being granted access to the site is quite lengthy. We would suggest that the legislation permit the Owner to make discretionary payments of amounts directly to a subcontractor following the decision of the Adjudicator, to avoid interruptions in the work and impact to Owner operations. However, such payments must be at the Owner’s discretion and the legislation or contractual terms must not create a duty of any kind from the Owner to the subcontractors.

In light of this, there should be a requirement for the general contractor and the subcontractors to advise the Owner of any matter submitted for Adjudication and prior to suspension of the work.

Right to set-off
The right to set-off for federal Owners should be protected. It is often the most efficient means of dealing with situations where payment deductions are warranted for costs that are incurred by the Owner as a result of the contractor’s actions or lack thereof.
Singleton Urquhart Reynolds Vogel LLP’s Expert Review
Prompt Payment and Adjudication on Federal Construction Contracts

DCC representative annual business data
March 29, 2018

- Between 1,800 to 2,400 contracts of all types awarded annually, including call-ups under SOs, SOAs totaling between $650M and $850M
- Between 900 to 1,300 construction contracts specifically awarded annually totaling between $450M and $750M
- Between 13,000 and 15,000 invoices received and paid annually covering progress, completion, changes, totaling $1B
- Average days to process an invoice is 10 to 12 days from date of receipt of the invoice (including certification process)
- Average days to pay an invoice is 30 days from date of receipt as per FAA requirements. 96% of invoices are paid within 30 days
- Between 13,000 and 15,000 Change Orders issued annually totaling between $280M and $500M
- Only 17 “complex” claims over the latest 3-year period ranging from $470K to $4.8M
  - Total claimed = $34M.
  - Total settlement amount through amicable negotiations vs. formal dispute resolution = $15M ($19M reduction)
- Currently only 1 claim in litigation (less than 10 claims in litigation over an 8 year period)
TAB 7
April 5, 2018

Singleton Urquhart Reynolds Vogel LLP
150 King St. West, Suite 2512
Toronto, ON M5H 1J9

Reference: General Contractor Alliance of Canada Submission to Expert Review of Prompt Payment and Adjudication on Federal Construction Contracts

Dear Mr. Reynolds and Ms. Vogel:

Please find attached the submission of the General Contractors Alliance of Canada in response to the information package regarding the Expert Review of Prompt Payment and Adjudication on Federal Construction Contracts.

Our responses to the questions posed broadly reflect the approach adopted under the Construction Act in Ontario. We have taken this approach for two reasons:

1. The process adopted in Ontario required cooperation and compromise involving many industry participants. The GCAC could put forward positions in this response to try to improve the position of general contractors, and other participants could do likewise in an attempt to improve their position. We see little benefit in revisiting the debate undertaken in Ontario which was comprehensive and balanced.

2. The GCAC sees significant benefits to the construction industry and to buyers of construction across Canada by having uniformity in prompt payment and adjudication legislation across jurisdictions. The Federal Government has a unique opportunity to lead the way for the provinces by developing clear and practical legislation similar to that adopted in Ontario as an example for jurisdictions considering adopting prompt payment legislation.

In our submission, we have highlighted in yellow a limited number of deviations from the approach taken in Ontario. We believe that these represent refinements that will generally be supported by both trade contractors and general contractors as well as other industry participants.

The broad support for Ontario Bill 142 was, in large measure, a result of the open and consultative approach adopted during both the development of the Striking the Balance report, but importantly, during the drafting of the legislation and supporting regulations. Prompt payment legislation is commercially complex and must function well across a broad range of project sizes and project types, and must balance the interests of a wide variety of participants including the Federal Government, general contractors, trade contractors, suppliers, architects, engineers, sureties and insurance companies, to name only a few.
We strongly urge the Federal Government to continue the consultative approach they have adopted through the development of the legislation including:

1. Retaining Reynolds and Vogel to advise the government during the development of the legislation.

2. Utilizing an advisory group including a broad representation of industry participants to provide advice and comment on drafts of the legislation.

We look forward to meeting with you to discuss this important initiative.

Regards,

GENERAL CONTRACTORS ALLIANCE OF CANADA

Matt Ainley  Eric Côté
Chair        Vice Chair
<table>
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<tr>
<th>PROMPT PAYMENT ISSUES:</th>
<th>GCAC COMMENT:</th>
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| 1 what kinds of contracts should it apply to | • As a general comment, we are supportive of the concept developed in question #25 whereby federal legislation would defer to provincial prompt payment legislation in jurisdictions where it exists and federal legislation would apply only in jurisdictions where no such legislation is in force.  
• Legislation should apply to all work which forms an improvement to real property.  
• Legislation should not attempt to limit its application based on contract type (e.g. lump sum, milestone, design-build, P3, etc.). So long as the type of work falls within the scope of the prompt payment legislation (i.e. an improvement to real property), there is no need to define or require a particular contract type in that legislation. That being said, any legislation should apply to P3 projects with appropriate modifications to accommodate the structure of P3 projects.  
• Legislation should apply to work where the Owner as defined under the contract is a federal government ministry, special agency or crown corporation. It should not apply to projects where the Federal Government is only providing funding to the project, but is not otherwise the “owner” of the project. Federal legislation should apply where the government is the beneficiary of the project notwithstanding that the government has delegated administration of the project to a third-party such as under an RP-1 or RP-2 format.  
• Legislation should not apply to maintenance work which does not extend the life of a project.  
• The government should consider how prompt payment legislation might affect projects on Indigenous lands. From a “construction industry” perspective there is no reason that prompt payment legislation could not apply, but we suggest that the government consult with Indigenous communities before enacting legislation that might affect projects involving Indigenous peoples or lands. We would be happy to participate in any such consultations in whatever capacity the government may request. |

What kinds of work should it apply to? |  |

2 should there be any exclusions or different treatment for certain types of projects? (e.g. P3 projects)? | For P3 projects:  
• Permit certification of draws as a precondition to payment to recognize the role of an independent certifier under lending arrangements.  
• Exclude facility maintenance and operations  
• **Adjudication should not apply to determination of substantial completion or achievement of milestones.** |
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<th>PROMPT PAYMENT ISSUES:</th>
<th>GCAC COMMENT:</th>
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<td>3 - What levels of contract should it apply to in the construction pyramid?</td>
<td>Should apply to all levels of the supply chain. i.e. GCs, subcontractors, 2nd and lower tier subcontractors and suppliers.</td>
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</table>
| 4 - What should be the trigger for starting the clock running on a payment period? | - Submission of a proper invoice from the contractor to the owner should be the trigger.  
- Include a provision to permit revision of an invoice with agreement of the parties and maintenance of the original invoice date. This will encourage normal course negotiation of monthly invoicing amounts rather than imposing a formal process on what is already working well. |
| 5 - What is a reasonable payment period? Should these periods differ for parties at different levels of the construction pyramid? | - 28 days for an Owner to pay  
- 7 days from receipt of payment for tiers below the Owner |
| 6 - What, if any, limitations should be placed on the parties to a construction contract in respect of their freedom to contract in relation to invoicing terms? | Parties should be permitted full freedom of contract in respect of establishing invoicing terms. |
| 7 - Should certification be permitted as a precondition to the delivery of a proper invoice? Are there any other pre-conditions that cause concern? | - No. Certification as a precondition to payment should not be permitted except in the case of P3 projects. The certification process could be subject to abuse and used as a means to delay payments by introducing artificial requirements or through unreasonable application of the certification process.  
- The GCAC would be concerned about the introduction of other preconditions on the same grounds as we are opposed certification as a precondition to payment. |
| 8 - On what basis can payment be withheld and when? Should there be any limits on a right of set off (e.g. in relation to other projects)? | All payers (not just Owners) should be permitted to withhold payment by providing a notice, with a requirement to identify the amount withheld and the reason for the withholding, and subject to the payee’s right to prompt dispute resolution (e.g. adjudication).  
- To the extent that a contract includes a retention (e.g. a contractual holdback), all payers (not just Owners) should have the same rights to withhold from the retention (and those rights should be the same as for any other payment on the project).  
- The legislation requires simple yet robust procedures for how any payer withholds payments regardless of the reason for withholding (e.g. whether or not the withholding... |
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<td>is initiated by the owner). This process must apply in all payment scenarios (e.g. regular payments, retention payments, dispute resolution awards, etc.). In particular, we recommend that there be a single form of notice (for all payers of all tiers) that includes the required information (amount and reason as described above) and that must be provided on or before the payment deadline. This would avoid the confusion that will arise if multiple forms and timelines are required.</td>
<td>• Payees must be permitted to set off in relation to other improvements under the same contract, and in respect of other contracts/subcontracts. This is an important issue for the GCAC. If this right is taken away, payers in the middle of the pyramid (contractors and upper tier subcontractors) will be placed in a position where payees can fail to perform work, but the only recourse for the payer is to go to court or arbitration (e.g. if the defect is discovered near the end of a project after the subcontract is complete). This is particularly unfair since payees will likely be able to access efficient dispute resolution (e.g. adjudication) which would be unavailable to payers in this situation unless set off between projects is allowed.</td>
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<td>9 should payment information be posted? If so, where?</td>
<td>• We support the continuation of the current practice of posting online the date of payment between the Owner and Contractor. We would also support the posting of the date of receipt by the Owner of a proper invoice received from a Contractor. We do not support the posting of payments below the level of the Contractor, or any other details about the proper invoice or about the payment from the Owner. A payee can determine the date payment is due based on the date of receipt of a proper invoice and can determine the expected payment amount based on any notice of withholding received from the Owner, Contractor or other payer. There is therefore no significant benefit to publishing additional information.</td>
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<td>10 what should the consequences be of a failure to pay?</td>
<td>In the absence of a Notice of Non-Payment: • Interest should apply at the prescribed rate • The payee should have the right to commence adjudication or other form of short and efficient dispute resolution • In the case of a failure to pay an adjudication determination, the payee should have the right to suspend work and should be entitled to delay, demobilization and remobilization costs • Other than in the case of a failure to pay an adjudication determination, parties should not be allowed to suspend work.</td>
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<td>• If a subcontractor fails to abide by an adjudication determination with respect to any amount owing to the contractor or any work that should be performed, the contractor should be allowed to suspend the subcontractor and/or terminate the subcontract for cause.</td>
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<th>ADJUDICATION ISSUES:</th>
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11 who can require adjudication and when?  
• Any party in the construction pyramid should be permitted to initiate an adjudication subject to the issue conforming to a prescribed list of matters appropriate for adjudication (see Q. #15).  
• Parties should be permitted to include an insurer under an insurance policy that relates to the improvement in an adjudication.  
• Parties should be permitted to include sureties in adjudication under both labour and material payment bonds and performance bonds. This should apply for bonds issued at all level and not just in the instance where the principal is the contractor.  
• A party should be permitted to commence adjudication at any time before the Prime Contract is complete (regardless of whether or not a subcontract has been completed).  

12 who can adjudicate a dispute?  
• Adjudicators should be individuals with a minimum of seven years work experience, 5 years of which should be Canadian experience.  
• Adjudicators who are members of relevant regulated professions should be members in good standing.  
• Adjudicators should have successfully completed a training program administered by the nominating authority prescribed in the legislation.  
• Considerations should be given to recognizing individuals accredited as adjudicators under the Construction Act in Ontario, to serve as adjudicators under similar federal legislation.  

13 how should an adjudicator be nominated?  
• An adjudicator should be proposed by the party initiating an adjudication and should require the agreement of the other party to the adjudication.  
• Should the parties fail to agree on an adjudicator, one should be appointed by a nominating authority.  

14 what is the role of an authorized nominating authority?  
The role of a nominating authority should include:  
• Certifying and regulating adjudicators and maintaining a role of certified adjudicators  
• Decertifying adjudicators  
• Providing training for adjudicators  
• Nominating adjudicators in the event that parties to an adjudication do not agree on an
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| 15 What types of disputes should be adjudicated? Should there be limits to the quantum of the disputes that are subject to adjudication? | • Payment disputes including withholdings  
• Valuation of services or materials including change orders (whether complete or contemplated) and work performed under change directives  
• Disputes involving the payment of any retention  
• Any other matter that the parties to a dispute wish to adjudicate  
• Should exclude delay claims other than direct costs associated with a delay.  
• Should include insurance matters related to performance of work under a construction contract. |
| 16 What should an adjudication process look like? | It is the position of the GCAC that the parties to a construction contract should be permitted broad discretion to agree to an adjudication procedure. However, to address circumstances where parties have not agreed to an adjudication process and in order to ensure that the process remains fair, streamlined, and accessible, the federal legislation and associated regulations should prescribe the following minimum standards to which all adjudications must adhere:  
• The party wishing to commence adjudication must serve a written notice of adjudication.  
• The notice of adjudication should provide, at minimum, a brief description of the dispute, and the quantum claimed.  
• Where there are multiple adjudications arising out of the same or related events, the contractor should retain the unfettered right to consolidate the adjudications.  
• Within 5 days of appointing the adjudicator, the party initiating the adjudication must provide to the adjudicator and the opposing party/parties:  
  o A copy of the contract/subcontract; and,  
  o Any documents upon which that party intends to rely upon in the adjudication;  
• The adjudicator must provide written reasons of his or her decision  
• The adjudicator’s written reasons must be provided within 30 days of the date upon which the party who initiated the adjudication provided their documents.  
• The legislation should provide guidance regarding when a decision of an adjudicator may be set aside on judicial review.  
• Any party who wishes to bring an application for judicial review of the adjudicator’s decision must bring a motion for leave to bring the application within 30 days of the adjudicator’s decision. |
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<td>Beyond these minimum standards, the GCAC believes that the parties should be permitted wide latitude to agree to an adjudication procedure, including but not limited to selecting their adjudicator and agreeing the process by which submissions can be made.</td>
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| 17 how should the costs of an adjudication process be addressed? | • In the case of two party adjudication, the costs should be apportioned equally between the two parties subject to the discretion of the adjudicator to make a different allocation of costs in circumstances where a party to an adjudication has acted in a manner that is frivolous, vexatious, an abuse of process or other than in good faith.  
• In the case of multiparty adjudications, the fees should be allocated on the basis of the discretion of the adjudicator considering the value of the initial claims made by each party and the value of the adjudication determination in respect of each party. |
| 18 what should the process for enforcing adjudication decisions look like? | • Right of suspension upon failure to pay an adjudication determination within a prescribed time [10 days]  
• A party should be permitted to file an adjudication determination with the court and the determination should be enforceable as if it were an order of the court. The party filing the determination should notify the other party (or parties) of the filing within a prescribed time [10 days]. |
<p>| JURISDICTIONAL OPERATIONS ISSUES: | |
| 20 What kinds of projects would federal legislation implementing prompt payment and adjudication apply to? | Please refer to Q #1. |
| 21 Are there potential conflicts between such federal legislation and provincial legislation? | No comment |
| 22 If so, in view of the doctrine of paramountcy, is there any constraint on the federal legislation? | No comment |
| 23 Would some combination of federal legislation and amendments to standard form contracts be appropriate? | Any legislation contemplated would likely only affect contracts where the Federal Government is the Owner and therefore regardless of whether or not legislation is implemented, the Federal Government is in a position to mandate the terms of prime contracts, or to mandate specific |</p>
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<td>policies that would govern prime contracts generally. Accordingly, we feel there is merit in considering implementing prompt payment principles primarily through the terms of the prime contract or government policies.</td>
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| Are there any operational concerns that federal legislation could be different than provincial/territorial legislation (i.e. would there be different rules applicable to a federal construction site as opposed to a provincial/territorial construction site)? | Yes, we feel that there is potential for operational conflict between provincial and federal jurisdictions. Examples would include:  
- Offsite fabrication where a supplier or subcontractor is not tied to the prime contract which references a federal owner.  
- Work outside the property line  
- Tenant work within a federal project that is privately owned.  
- Work for private owners situated on federal property such as work for a contractor on a military base  
- Work in federally regulated industries for non-government owners. |
<p>| From an operational perspective, should the federal government defer to provincial/territorial prompt payment legislation where it exists? | Yes. Many of the issues identified above would be addressed if federal prompt payment legislation were to defer to provincial prompt payment legislation. This would also create efficiencies and simplify administration as participants in the construction industry in a province will likely be accustomed to working with the local prompt payment legislation. |
| SOLUTIONS THAT WILL IMPROVE THE FUNCTIONING OF THE CONSTRUCTION INDUSTRY IN RELATION TO FEDERAL PROJECTS | |
| Adjudication - Sureties | Surety companies are sometimes involved in payment disputes and they should be included in any initiatives related to dispute resolution aimed at promoting prompt payment in the construction industry. This should include issues which arise under both labour &amp; material payment bonds as well as performance bonds. As well, bonds issued by contractors, subcontractors of any tier and suppliers should be included. |
| Adjudication - Insurance | Payment disputes in the construction industry frequently include insurers. There are many examples of disputes which have taken many years to resolve and hardship suffered by parties caused by delays in these payments. We urge the Federal Government to include insurers as parties eligible and subject to adjudication. |
| Development of Legislation | The broad support for Ontario Bill 142 was, in large measure, a result of the open and |</p>
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<td>consultative approach adopted during both the development of the Striking the Balance report, but importantly, during the drafting of the legislation and supporting regulations. Prompt payment legislation is commercially complex and must function well across a broad range of project sizes, project types and must balance the interests of a wide variety of participants including the Federal Government, general contractors, trade contractors, suppliers, architects, engineers, sureties and insurance companies, to name only a few. We strongly urge the Federal Government to continue the consultative approach they have adopted through the development of the legislation including:</td>
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<td>1. Retaining Reynolds and Vogel to advise the government during the development of the legislation.</td>
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<td>2. Utilize an advisory group made up of a broad representation of industry participants to provide advice and comment on drafts of the legislation</td>
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<tr>
<th>Legislative Uniformity</th>
<th>Our responses included herein to the questions posed in the consultation broadly and deliberately reflect the approach adopted in the Construction Act in Ontario. We have taken this approach for two reasons:</th>
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<td>1. The process adopted in Ontario required cooperation and compromise involving many industry participants. The GCAC could put forward positions in this response to try to improve the position of general contractors and other participants could do likewise in an attempt to improve their position. We see little benefit in revisiting the debate undertaken in Ontario which was comprehensive and balanced.</td>
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<td>2. The GCAC sees significant benefits to the construction industry and to buyers of construction across Canada by having uniformity in prompt payment and adjudication legislation across jurisdictions. The Federal Government has a unique opportunity to lead the way for the provinces by developing clear and practical legislation as an example for provinces considering adopting similar legislation.</td>
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<th>Mandatory Holdback</th>
<th>The GCAC is opposed to the elimination of the holdback for the following reasons:</th>
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<td>1. The broad form bonds currently employed for Federal Government projects permit 2nd tier and lower subcontractors and suppliers to claim against the L&amp;M bond posted by the general contractor. Under the bond, claims from these lower tier participants are capped at the value of the holdback funds retained. If the holdback were eliminated, either the protection afforded the 2nd tier claimants would be eliminated, or general contractors would be exposed to a risk which would be extremely difficult for them to control.</td>
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<td>2. After expiration of the claims period, holdback funds serve as a security holdback which is often required to deal with issues and deficiencies which manifest themselves after completion of a general or trade contractor's work. It would be a significant risk to general contractors and owners if these funds were not retained.</td>
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Submission of
The National Trade Contractors Coalition of Canada (NTCCC)
to the Expert Review of Prompt Payment and Adjudication
on Federal Construction Contracts

March 2018
Submission to:
The Expert Review of Prompt Payment and Adjudication on Federal Construction Contracts

March 2018

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1. National Trade Contractors Coalition of Canada (NTCCC)

The National Trade Contractors Coalition of Canada (NTCCC) was established in 2004. The members of the NTCCC are:

- Mechanical Contractors Association of Canada,
- Canadian Electrical Contractors Association,
- Canadian Masonry Contractors Association,
- Canadian Automatic Sprinkler Association,
- Canadian Roofing Contractors Association,
- Ontario Sheet Metal Contractors Association,
- Thermal Insulation Association of Canada,
- Interior Systems Contractors Association of Ontario,
- Canadian Institute of Steel Construction,
- Contractors Division of the Heating, Refrigeration and Air Conditioning Contractors of Canada.

The NTCCC’s member associations represent over 12,000 contractors.

Trade contractors account for the preponderance of the approximately 1 million workers who are employed by Canada’s construction industry¹. Trade contractors also sponsor the vast majority of construction industry apprentices. Additionally, trade contractors bear the primary responsibility for ensuring that employees on construction sites have the training that they need to work safely. Trade contractors also account for at least 80% of the construction industry’s contributions to workers’ compensation systems and the EI system.

To cover their payrolls, pay their suppliers, and meet their obligations to governments, trade contractors depend crucially on cash-flow. Interruptions in cash-flow threaten the ability to trade contractors to continue to operate. This, in turn, puts jobs, workers’ benefits, apprenticeships, and contributions to workers’ compensation systems and the EI system at risk, not to mention the impact of tax revenues. Therefore, it is a key goal of the NTCCC to see that the principles of prompt payment, as embodied in Ontario’s recently adopted Construction Act, are adopted at the federal level.

The NTCCC welcomes the appointment of the Expert Review. We appreciate the opportunity to make this submission.

¹ Statistics Canada, CANSIM, Table No. 281-0023
2. Pervasiveness of Payment Problems on Federal Projects

Payment interruptions are a systemic problem in the construction industry. In 2015, Prompt Payment Ontario commissioned Ipsos Public Affairs to administer a survey of Ontario trade contractors. The survey generated statistically reliable data on the incidence and consequences of payment delays. A total of 535 trade contractors participated in the survey. Of these, 184 reported that they had undertaken work for the federal government or its agencies within three years of the survey (i.e., between 2013 and 2015).

Figure No. 1 shows the proportion of contractors who undertook work for a particular type of owner and who reported that, excluding statutory holdbacks, the time between certifying or approving a payment and receiving that payment was ‘always’ or ‘often’ greater than 30 days. As can be seen from Figure No. 1, the federal government is not an exception to the problem of payment delay: 25.2% of contractors reported that payment was ‘often’ more than 30 days after certification or approval while 46.7% reported that payment was always more than 30 days.

Figure No. 2 reports the proportion of contractors who reported that their receipt of approved or certified payments was ‘often’ or ‘always’ taking more than 90 days after the submission of the invoice. As can be seen from Figure No. 2, more than a fifth of the contractors who undertook federal work reported that, even when statutory holdbacks are excluded, the time between certifying or approving a payment and receiving that payment was ‘always’ or ‘often’ greater than 90 days.
The incidence of payment requiring more than 90 days is particularly important. Most contractors can arrange for bank financing for their operations by pledging their receivables as collateral if the age of those receivables is less than 90 days. However, receivables that are over the 90-day threshold are generally not acceptable to banks as security for demand loans. To finance their continued operations using these over-90-day receivables, contractors are obliged to access credit through non-bank channels. These lenders charge a substantially higher interest rate as well as administration fees.

Figure No. 2
Percentage of Contractors by Type of Owner or Developer who reported receiving Payment ‘Often’ or ‘Always’ more than 90 days after Certification or Approval
Prompt Payment Ontario Survey, 2015
(Total Sample, n=535) (Federal Projects Sample, n=107)

It should be stressed that the payment periods reflected in Figures No. 1 and No. 2 are not the period of time required to obtain certification or approval, but the period of time contractors must wait for payment after receiving certification or approval. The monies in question are monies that are indisputably owed to the contractors for work performed. The contractor has already paid the wages of workers, paid the required contributions to workers compensation and EI, made remittances to benefit plans, and also (usually) paid materials suppliers.

Figure No. 3 summarizes how contractors evaluated the risk of payment delay when working on federal government projects. Late payment risk was assessed on a 10-point scale with ‘1’ representing no risk of payment delay and ‘10’ indicating that there was always a risk of payment delay. Based on their experience of doing federal projects, over a third of contractors who worked on these projects estimated a high level or late payment risk for federal work (i.e., risk was ranked as ‘8’, ‘9’, or ‘10’). More than half of the responding contractors attributed late payment to ‘bureaucratic delays’.2

2 Contractors were asked to rank the importance of ‘bureaucratic delays’ as a cause of late payment on a 10-point scale where ‘1’ represented ‘not important at all’ and ‘10’ represented extremely important. More than half (54.7%) ranked ‘bureaucratic delay’ as ‘8’, ‘9’ or ‘10’. This finding applied to work undertake for all levels of government. However, the survey results do not show markedly different results by levels of government.
The experience-based perception of late payment risk illustrated in Figure No. 3 has important implications. All of these implications are negative:

First, some contractors decline to bid on federal projects because of the late payment risk. In the Prompt Payment Ontario survey, a quarter of contractors who worked on federal projects indicated that the risk of late payment had discouraged them from bidding on some federal projects. Late payment risk diminishes the size of the bidding pool and presumptively increases construction costs.

Second, many contractors who do bid on federal project work factor in the cost of financing payment delays. Survey data indicate that overall (n=535), 61.1% of contractors incorporate an ‘additional contingency’ into their bid to reflect the risk of late payment. Thus, *the federal government and its agencies often will pay a premium for payment delay, regardless of whether payment is actually delayed.*

Third, faced with late payment risk, contractors avoid taking on additional financial obligations, such as the cost of acquiring or leasing new machinery and equipment. *Survey data show that 57.4% of contractors regard to the perception of late payment risk or the incidence of late payment. The ‘all levels of government’ finding is therefore indicative of the importance of ‘bureaucratic delay’ at the federal level.*
delayed or avoided investing in new machinery or equipment. Productivity is reduced as a result.

Fourth, contractors take on fewer permanent employees, including apprentices, so as to reduce the fixed costs that they need to finance by drawing on non-bank lending channels.

Fifth, late payment has a cascading effect. Survey data indicate that late payments have forced almost three-quarters (72.1%) of contractors to extend their line of credit. Late payment has forced some contractors to miss paying their hourly employees (5.0%), their salaried employees (11.6%), their remittances for benefits (13.6%), their CRA source deduction remittances (17.8%), their HST remittances (20.0%), their lease or rental obligations (27.9%), their bank requirements (19.1%), their payments to suppliers (60.9%), and their payments to subcontractors (52.1%).

Almost a quarter (24.7%) of contractors in the Prompt Payment Ontario survey reported that their business faced a risk of insolvency as a result of being forced to wait an unreasonable length of time for payment.

It is the submission of the NTCCC that late payment in the construction industry is destructive and pervasive. Projects involving the federal government are not an exception to this problem. There needs to be a solution to the problem on federal projects.

Ontario’s Construction Act sets out the principles and standards that should inform a federal solution.
3. Follow the Money

NTCCC submits that the principle that should govern the design of federal prompt payment regime is ‘follow the money.’ Any construction project undertaken with federal monies or for the benefit of the federal government or its agencies should be subject to federal prompt payment obligations.

- Where the federal government or one of its agencies is directly undertaking a construction project, all contracted work on the project should be subject to federal prompt payment legislation.

- Where the federal government or one of its agencies has engaged a third party to operate as a facility manager and that facility manager enters into construction contracts, federal prompt payment legislation should identify the facility manager as an agent of the federal government who is subject to prompt payment obligations in the same manner as would be the federal government or one of its agencies.

- Where the federal government or one of its agencies is funding a construction project, in whole or in part, but is not a direct party to the construction contract, the requirements set out in federal prompt payment legislation should be incorporated into the grant or transfer agreement such that federal prompt payment obligations bind the entity that receives the federal monies. If the entity receiving the federal monies is also subject to provincial or territorial prompt payment legislation, the provincial or territorial legislation would take precedence if and only if that legislation provides for a higher standard than the federal prompt payment regime. However, if the provincial or territorial legislation establishes a lower standard than the federal prompt payment regime, the federal prompt payment rules would apply.

- On P3 projects, where the federal government or one of its agencies has commissioned a project, but the federal government or one of its agencies is not funding the project during its construction phase, the agreement between the federal government or its agency and the P3 consortium should bind the consortium to apply federal prompt payment rules.

- Federal prompt payment legislation should apply to construction projects on reserve lands where the federal government or one of its agencies is the contracting party or where the band council or one of its entities (e.g., a band development corporation) is the contracting party.

Federal monies should only be used to support construction projects that are covered by federal prompt payment rules.
4. Principles of Prompt Payment on Federal Projects

Ontario’s Construction Act sets the standard for enacting prompt payment. It is imperative that federal legislation and federal procurement policy reflect these standards. **It is especially important that federal legislation not water down, reduce or diminish in any way the prompt payment standards established by Ontario’s Construction Act.**

Prompt Payment Obligations

1. The obligations to make timely, prompt payment of construction payables should be enacted in legislation.

2. Prompt payment obligations should be mandatory. The parties to a construction contract should not be free to amend or vary those obligations by contract.

3. Prompt payment obligations should apply to all projects undertaken using federal monies. This includes projects that are undertaken directly by the federal government or a federal agency. It also includes projects that are undertaken by a transfer or grant partner using federal monies. Prompt payment should also apply to P3 projects where the federal government or a federal agency has commissioned the project, but federal monies may not be directly involved. Prompt payment should also apply to all construction undertaken on reserve lands. The applicability of prompt payment obligations should not be contingent on the existence of any prompt payment legislation in the province or territory where the project is undertaken.

4. Prompt payment obligations should extend, without qualification, through all levels of the subcontracting pyramid.

Prompt Payment Timelines

5. Prompt payment by the federal government, federal agency or transfer/grant partner to the prime contractor should mean payment within 28 days of delivery of a proper invoice.

6. Prompt payment by a prime contractor to a subcontractor, and so on down the sub-contracting pyramid, should mean each payee is paid within 7 days of a payer receiving the corresponding payment from its payer.

7. The parties to a construction contract should be allowed to negotiate the timing for delivery of a proper invoice or payment application. Contracts may involve performance milestones as

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3 This submission follows the terminology in Ontario’s Construction Act. A ‘proper invoice’ refers to a statement of the amount owing rendered by a prime contractor to an owner. A ‘payment application’ refers to a statement of the amount owing rendered by one contractor to another contractor, e.g., by a subcontractor to a prime contractor or by a sub-subcontractor to a subcontractor.
conditions for invoicing. However, payment obligations triggered by such milestones should be subject to the time limits as those set out above.

8. While payers should remain free to require certification as part of the payment process, certification should not be a precondition to a proper invoice and should not affect the triggering date governing the payment period. Any certification should take place during the prescribed payment period. NTCCC accepts that there could be an exception to this principle in the case of P3 projects, as is the case under Ontario’s Construction Act

Disputes

9. Payment obligations should be subject to dispute, either in whole or in part.

10. In the event of a dispute, the disputing payer should give notice of intention to withhold payment to its payee within 14 days of receipt of a proper invoice if the disputing payer is the owner. If the disputing payer is a prime contractor or subcontractor, the disputing payer should give notice of intention to withhold payment within 7 days of its receipt of a notice of intention on the part of the owner to withhold payment.

11. If the owner does not issue a notice of non-payment, or the dispute is between a prime contractor and a subcontractor, the contractor should give notice of its intention to withhold payment to its payee within 35 days after delivery of a proper invoice to the owner.

12. A notice of intention to withhold payment must set out the detailed reason(s) for withholding payment, including the amount in dispute.

13. If there is a failure to deliver a notice of intention to withhold payment within the time prescribed, the payer should be obliged to pay the invoice in full.

14. If only a portion of an invoice is disputed, the portion not in dispute should be paid within the time prescribed.

Adjudication of Payment Disputes

15. A payee who challenges the reasons set out in the notice of intention to withhold payment should have the right to seek adjudication of the payment dispute.

16. An adjudication should be commenced immediately upon application by the payee. The adjudication process should be concluded within a short period of time following commencement of the adjudication process, e.g., 30 to 40 days.

17. The adjudicator should be independent, impartial and appropriately qualified, and should have the same immunity from suit as pertains to a judge.
18. The decision of the adjudicator should be binding and enforceable on an interim basis. Any payment prescribed by an adjudicator’s order should be made within 10 days after the decision has been communicated to the parties. However, both parties to a payment dispute should retain the right to have the disputed matter reviewed at the end of the project, by litigation or arbitration if they have agreed to arbitrate.

19. The qualification and selection of adjudicators, and all ancillary matters necessary to regulate the adjudication process, should be prescribed by regulation.

20. There should be a publicly accessible web portal that lists adjudications that are in process and which contains all adjudication decisions.

**Right to Suspend Work**

21. In the event of a default in the payment obligation to a payee following upon a decision by an adjudicator, the payee should have the right to suspend work, and this suspension of work should not constitute any breach of contract.

22. In the event that a payee resumes work on a project following a suspension, the payee should be entitled to reasonable remobilization costs.

**Payment of Interest**

23. Interest at a prescribed rate should be payable on all late payments.

**Holdbacks**

24. Since provincial lien legislation does not apply to projects where the owner is a federal entity, statutory holdbacks are not an issue. However, where holdbacks are mandated contractually, federal prompt payment legislation should provide:

   a) that the percentage of the total contract amount which an owner may hold back for warranty purposes should be reasonable in relation to the risk of deficiencies;

   b) for each segment of the construction project undertaken by a particular trade, the holdback period should not exceed 12 months from the completion of that segment of the work;

   c) a prime contractor should be allowed to hold back for warranty purposes an amount that does not exceed in percentage terms the hold back that is allowed in the contract between the owner and the prime contractor;

   d) monies held back for warranty purposes by a prime contractor should be released within 15 days of the prime contractor receiving from the owner the

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4 See Section 9 for additional discussion on holdbacks and the rationale for these principles.
holdback monies applicable to the work completed by that sub-contractor. The same principle should apply to holdback between a sub-contractor and a sub-sub-contractor.

e) contractors should have the right to substitute a surety bond for any such holdback.

Surety Bonds

25. Performance and labour and material payment bonds should be required on all projects undertaken by the federal government, its agencies, its grant and transfer partners and federally authorized P3 consortia.
5. No Deference to Jurisdictions with Inferior Standards

NTCCC submits that Ontario’s *Construction Act* sets the standards for prompt payment and that these standards should apply to all construction in Canada. Those standards should not be watered down or diminished in any way. Federal legislation should reflect or exceed the standard established by Ontario’s *Construction Act*.

It is NTCCC’s hope and expectation that all other provinces and territories will enact prompt payment legislation that aligns with the standards in Ontario’s *Construction Act*. However, **should a province or territory enact legislation that establishes inferior protections governing the timelines for payments to contractors, there should be no deference on federal projects to that province or territory’s watered-down approach to prompt payment.**

It may be suggested that federal practice should align with the standards enacted by a particular province or territory in which the project is being undertaken. The argument is that it would be confusing to contractors to operate under one set of standards for federal projects and another set of standards for projects that fall under provincial jurisdiction. However, **contractors already operate under different standards for labour relations, employment standards (e.g., statutory holidays), fair wage schedules, occupational health and safety, employment equity and environmental protection. Moreover, federal procurement practices do not defer to the practices of other jurisdictions.** The reality is that all contractors are aware that the rules on federal projects often differ from the rules on other projects. If contractors can adapt to different rules on labour relations, employment standards, fair wage schedules, occupational health and safety, employment equity and environmental protection, they can adapt, if necessary, to different rules on prompt payment. Indeed, different rules are likely to be inherent in federal work since there is no ability to apply a lien to federal projects.

Deferring to provincial or territorial standards would not necessarily simplify compliance. An unintended implication of deferring to provincial standards is that the construction of a project, such as a bridge, that spans two provinces could be subject to two different sets of payment rules, depending on which side of the boundary line the concrete was poured. That would be absurd.

We conclude, therefore, that **the advantages of requiring a federal prompt payment standard for all federally funded or commissioned projects, irrespective of any differing standards that might govern under local provincial or territories legislation, far outweigh any perceived disadvantages, and there should be no deference to such local standards.** If alignment with *equivalent* provincial or territorial standards is deemed to be important, then it is suggested that the federal prompt payment legislation should include a schedule of provinces and territories whose prompt payment standards are judged to be at least equivalent to the federal standards in all key respects.
6. Scope and Application of Prompt Payment

This submission follows the terminology in Ontario’s *Construction Act*.

- A ‘proper invoice’ refers to a statement of the amount owing that is rendered by a prime contractor to an owner.
- A ‘payment application’ refers to a statement of the amount owing that is rendered by one contractor to another contractor, e.g., by a subcontractor to a prime contractor or by a sub-subcontractor to a subcontractor.

A. What kinds of contractors should prompt payment apply to? What kinds of work should prompt payment apply to?

*Application to all construction contractors:*
Prompt payment should apply to all contractors, of every tier, as well as suppliers and design consultants involved in construction projects.

*Meaning of ‘construction’*
A ‘construction contract’ is defined in the *Government Contract Regulations* (SOR87-402) of the *Financial Administration Act* as follows:

> “construction contract means a contract entered into for the construction, repair, renovation or restoration of any work except a vessel and includes:
> (a) a contract for the supply and erection of a prefabricated structure,
> (b) a contract for dredging,
> (c) a contract for demolition, or
> (d) a contract for the hire of equipment to be used in or incidentally to the execution of any contract referred to in this definition.”

NTCCC believes that this definition of construction is appropriate, except that we would not exclude ‘vessels’. Trade contractors located in Canada’s shipbuilding centres frequently engage in this type of work, and there is no reason why those engaged in the construction, remodelling or repair of a vessel should be excluded from prompt payment protection.

*Scope of Coverage:*
Prompt payment protection should apply to:

a) The federal government and its departments when they contract for construction,

b) Agencies of the federal government established by statute or regulation when they contract for construction,
c) Entities that receive capital grants from the federal government for the purpose of construction,
d) Entities that receive transfer payments from the federal government for the purpose of construction,

Prompt payment protection also should apply to any construction contractor who is providing services that benefit the federal government, one of its agencies or one of its grant or transfer partners, regardless of whether the federal government, one of its agencies or one of its grant or transfer partners is a direct contracting party. What matters is that the federal government, one of its agencies or one of its grant or transfer partners is the beneficiary of the construction services. This point is particularly relevant to P3 projects and to facility management contracts.

**P3 Projects:**
In some types of P3 projects, the proponents finance the construction. They may be recompensed upon completion of the project or through revenues generated by operating the asset. In these circumstances, the federal government is the beneficiary of the project. Prompt payment obligations should apply.

**Facility Management Contracts:**
In recent years, the federal government has outsourced the ongoing management of its facilities by entering into ‘facilities management’ contracts with companies that, in turn, contract with construction contractors for work which includes capital improvements to the property. A significant issue under the current system is that when a construction contractor’s payment from the facility manager is delayed, the federal government asserts that it is not responsible since it has paid the facility manager and the payment dispute is thereby effectively isolated to one between the construction contractor and the facility manager, with no effective recourse to the entity receiving the benefit of the unpaid work.

This has become a significant issue within the industry, and it is essential that the contracting activity of facilities managers be subject to prompt payment obligations. Otherwise, the objectives of prompt payment are easily lost in this sector.

**B. Should there be any exclusions or different treatment for certain types of projects (e.g., P3 projects)?**

There should be no exclusions. When federal funds are used to pay for construction or when the federal government is the beneficiary of a construction project, prompt payment obligations should be automatic.

P3 projects should be covered by prompt payment obligations. A distinguishing feature of P3 projects is that payment is often tied to milestones. Ontario’s *Construction Act* allows for this practice but requires prompt payment when those milestones have been achieved.
C. **What levels of contract should prompt payment apply to in the construction pyramid?**

For reasons that we believe are obvious, prompt payment should apply at all levels of the construction pyramid. Funds flow from the owner to the prime contractor and thence to the subcontractors and sub-subcontractors. Any interruption in this flow of funds, at any level, forces payment delays on subordinate levels of the construction pyramid, resulting in the problems described earlier in this submission.

D. **What should be the trigger for starting the clock running on a payment period?**

The clock should start to tick when a prime contractor submits a proper invoice to an owner.

Federal legislation could define “proper invoice” in the same manner as Ontario’s *Construction Act*. Alternatively, federal legislation could model the definition used in the Government of Canada’s “General Conditions of a Service Contract”, which provides as follows:

**TP3 Invoice Submission**

3.1 Invoices must be submitted in the Contractor’s name. The Contractor must submit invoices for each delivery; invoices must only apply to the Contract. Each invoice must indicate whether it covers partial or final delivery.

3.2 Invoices must show:

3.2.1 the date, the name and address of the client department, deliverable and/or description of the Work, contract number;

3.2.2 details of expenditures in accordance with the Basis of Payment, exclusive of Goods and Services Tax (GST) or Harmonized Sales Tax (HST) (such as per diem rate, fixed price and level of effort, subcontracts, as applicable);

3.2.3 deduction for holdback, if applicable;

3.2.4 the extension of the totals, if applicable; and

3.2.5 if applicable, the method of shipment together with date, case numbers and part or reference numbers, shipment charges and any other additional charges.

3.3 If applicable, the GST or HST must be specified on all invoices as a separate item. All items that are zero-rated, exempt or to which the GST or HST does not apply, must be identified as such on all invoices.

3.4 By submitting an invoice, the Contractor certifies that the invoice is consistent with the Work delivered and is in accordance with the Contract.
E. What is a reasonable payment period? Should these periods differ for parties at different levels of the construction pyramid?

Owner to Prime Contractor: 28 days after submission of proper invoice

Prime Contractor to Subcontractor(s): a payment application must be paid within 7 days of receiving payment from the Owner

Subcontractor to Sub-subcontractor(s): a payment application must be paid within 7 days of receiving payment from the Prime Contractor. This time period applies down the construction pyramid to further subcontract relationships.

It is important to maintain symmetry in the payment time periods between the prime and subcontractors and between subcontractors and sub-subcontractors to ensure that funds flow in a predictable and reliable fashion.

F. What, if any, limitations should be placed on the parties to a construction contract in respect of their freedom to contract in relation to invoicing terms?

As per Ontario’s Construction Act, the parties to a construction contract should be entitled to negotiate the frequency of invoice submissions, including invoicing on a milestone basis. The frequency of invoices should set out in the tender documents, failing which the default should be that invoices may be submitted once per month.

G. Should certification be permitted as a pre-condition to the delivery of a proper invoice? Are there any other pre-conditions that cause concern?

Generally, certification should not be a permitted precondition to the delivery of a proper invoice.

It is perfectly legitimate for an owner to require certification as a condition for payment. However, the 28-day period following submission of an invoice to an owner by a prime contractor is sufficient time for the payment certification process to be completed. The payment certification process should not add to the payment period between submission of an invoice and payment.

Payment certifiers are usually third parties engaged by an owner to verify that the basis for payment has been met. It is the common experience of contractors that the firms that supply payment certification services to owners sometimes under-resource their assignments or fail to take adequate account of project scheduling and thereby add unreasonable delay into the payment process. If it is clear from the outset that payment is due within 28 days, then the companies that provide payment certifying services will resource their assignments appropriately. The 28-day payment period is sufficient for verification procedures to be implemented. In the absence of a bona fide dispute about the basis for payment, the 28-day payment period should apply.

NTCCC recognizes that certification may be appropriate in the context of P3 projects. The general principle advocated here may be subject to an exception for those undertakings.
H. On what basis can payment be withheld and when? Should there be any limits on a right of set off (e.g., in relation to other projects)?

*Withholding Payment because of an Invoice Deficiency*

It is legitimate for payment to be withheld when a contractor submits an invoice that is not compliant with the requirements for a proper invoice. In this situation, the payer should advise the contractor immediately that the invoice is deficient and indicate the additional information required to rectify the deficiency.

*Withholding Payment because of a Performance Deficiency*

It is legitimate for payment to be withheld when a contractor has not met the basis for payment set out in the contract. However, contractors need to be protected from gratuitous assertions of deficient performance which are simply a pretext for payment delay. The procedures set out in Ontario’s Construction Act are fair and reasonable. When a payer disputes that the contractor has met the basis for payment, the payer must: (a) provide written notice of intention to withhold payment, (b) identify the deficiencies justifying the withholding, and (c) limit the amount of payment withheld to an amount that is in reasonable proportion to the magnitude of the deficiency. Notice to withhold payment because of a claimed performance deficiency should be given within 14 days of receiving the proper invoice.

*Withholding Payment because of a Payment Interruption*

If a payee receives from a payer a notice of intention to withhold payment, it is legitimate for that payee to withhold payment from its payees until payment has been received. To exercise this right to withhold payment, a payer must give notice of intent to its payees, and also must take the issue of non-payment from its payer to immediate adjudication. Interest should be payable on the withheld payment.

*Set-Off*

All construction projects should be treated as stand-alone projects. The financial obligations that arise from one project should have no bearing on the financial obligations arising from another project. It is essential that payment disputes that pertain to one project not affect the flow of funds in another project. NTCCC accepts the one exception to this principle set out in Ontario’s Construction Act, in the situation where the payer is insolvent.

I. Should payment information be posted? If so, where?

The federal government should establish a website on which every federally-funded construction project should be listed. The website should indicate when a progress payment has been made by the owner to the prime contractor and the amount of that payment. Because all of these projects are public sector projects, it is appropriate to disclose payment information in a timely manner.
J. **What should the consequences be of a failure to pay?**

*Failure to Pay because of an Invoice Deficiency*
No consequences should arise from a failure to pay because of an invoice deficiency.

*Failure to Pay because of a Claimed Performance Deficiency*
If a performance deficiency is properly claimed, the contractor seeking payment can rectify the performance per the information in the notice to withhold payment. If the contractor disputes the claimed performance deficiency, the dispute should be referred to the adjudication process which will determine whether the basis for payment has been met.

*Failure to Pay because of a Payment Interruption*
Interest should be payable after the payment period. A contractor should have the right to suspend work upon any failure to pay following an adjudication.

*Unexplained Failure to Pay*
Interest should be payable after the payment period. A contractor should have the right to suspend work upon any failure to pay following an adjudication.

*Refusal to Pay Pursuant to an Adjudication Decision directing Payment to be made*
Interest should be payable after the payment period. A contractor should have the right to suspend work.
7. Adjudication

A. Who can require adjudication and when?

Any payee whose payment has been withheld should have the right to commence an adjudication. An adjudicator’s affirmation that payment has not been made should be required before a contractor exercises the right to suspend work.

B. Who can adjudicate a dispute?

Akin to the process being implemented in Ontario, the federal government should establish an Authorized Nominating Authority (ANA) governing the appointment, training and other ancillary aspects governing a roster of adjudicators. Adjudicators would be assigned by the ANA to a dispute on the basis of their availability, proficiency in the official language(s) of the parties, and regional access.

In addition, the federal government should consider allowing the use of adjudicators who are already roster members of a provincial ANA, as, for example, will be the case in Ontario.

C. How should an adjudicator be nominated?

An adjudicator should be nominated by the party seeking the adjudication, or alternatively appointed by the ANA.

D. What is the role of an authorized nominating authority?

The role of the ANA should be modelled on the Ontario’s Construction Act.

E. What types of disputes should be adjudicated? Should there be limits to the quantum of disputes that are subject to adjudication?

The types of disputes subject to adjudication should be those enumerated in section 13.5 of Ontario’s Construction Act along with any other matter that the Minister of Justice may refer to an adjudicator.

In addition, the scope of adjudication should include any other matter that the Minister of Justice may refer to adjudication.

There should be no limit to the quantum of disputes subject to adjudication.

F. What should an adjudication process look like?

Time is of the essence in an adjudication process. The procedures should reflect this overriding requirement.

An adjudicator should be appointed within seven days of a dispute being referred to adjudication.

Within five days of the appointment of an adjudicator, the party seeking the adjudication should be required to file a written statement of its claim and the rationale for the claim. The party
responding to the claim should be required to file a written response within five days of the statement of claim being filed.

The adjudicator should have wide powers to determine the adjudicative process, including the delivery of written submissions only or the use of oral evidence and submissions. Generally, NTCCC recommends the provisions of section 13.12 of Ontario’s Construction Act in this respect.

Upon application by any party, an adjudicator should have the authority to consolidate disputes into a single adjudicative process.

An adjudicator should be empowered to recommend mediation of a dispute, provided that such mediation not prejudice the validity of the adjudication process, or absent consent of all parties, the timing of such adjudicative process.

The adjudicator should be required to render a written decision within 30 days of being appointed.

There should be a publicly accessible web portal that lists adjudications that are in process and which contains all adjudication decisions.

G. How should the costs of an adjudication process be addressed?

The costs of adjudication should generally be borne equally by the payer and the payee(s) who are parties to the dispute. There should be an exception in the case of adjudications which are determined to have been frivolous, vexatious, and abuse of process or other than in good faith.

H. What should the process for enforcing adjudication decisions look like?

An adjudicator’s decision should be binding. In the event that one party does not comply with the adjudicator’s decision, the other party should be able to enforce the decision in the same manner as an order of the court.

The adjudicator’s decision should be subject to judicial review in only the limited instances enumerated in section 13.18 (5) of Ontario’s Construction Act. Otherwise, such decision should be binding upon the parties, subject to their right to have such decision reviewed at the end of the project in such court or arbitration proceedings as may be available.
8. Jurisdictional Issues

A. What kinds of projects would federal legislation implementing prompt payment and adjudication apply to?

The principle should be that federal prompt payment legislation and policy should apply to any project constructed with federal monies or constructed for the benefit of the federal government or any of its agencies. Specifically, prompt payment legislation and policy should apply to:

a) The federal government and its departments when they contract for construction,

b) Agencies of the federal government established by statute or regulation when they contract for construction,

c) Entities that receive capital grants from the federal government for the purpose of construction,

d) Entities that receive transfer payments from the federal government for the purpose of construction,

e) P3 projects, and

f) Facility management contractors operating as agents of the federal government or its agencies.

B. Are there potential conflicts between such federal legislation and provincial legislation?

To the extent federal legislation differs from provincial legislation, there is the potential for conflict. In this case, NTCCC believes that any construction project initiated by the federal government or its agencies for their own benefit should be indisputably subject to federal legislation. While this is fundamentally a legal question, NTCCC believes that there is no constitutional impediment to the enactment of prompt payment legislation governing federal works.

In the case of projects that are funded by the federal government, but where the federal government is not a party to the construction contract, the obligations in federal prompt payment legislation should be contractual terms in the grant or transfer agreement such that the entity receiving the funds is bound to the same prompt payment obligations that are in federal legislation. If provincial or territorial prompt payment legislation establishes higher standards, those higher standards would take precedence over the contractual terms. However, if provincial or territorial prompt payment legislation establishes lower standards, the higher contractual standards would apply.
C. If so, in view of the doctrine of paramountcy, is there any constraint on the federal legislation?

NTCCC does not believe that federal legislation would be constrained as a result of any conflict between it and provincial legislation. Ideally, federal legislation should work in harmony with provincial law, but to the extent there may be conflict between the two, federal legislation should prevail. See above comments.

D. Would some combination of federal legislation and amendments to standard form contracts be appropriate?

While some amendment to the standard contract forms used by the federal government would likely be necessary, these changes should be in response to the requirements of the legislation proposed. The objectives of prompt payment and adjudication should, in any event, be achieved by legislation on all projects that are within federal jurisdiction. Equivalent contractual solutions should be used only where federal legislative jurisdiction does not apply.

E. Are there any operation concerns that federal legislation could be different than provincial/territorial legislation (i.e., would there be different rules applicable to a federal construction site as opposed to a provincial/territorial construction site)?

Contractors already operate under different standards for:

- labour relations (*Canada Labour Code: Part I*)
- employment standards (e.g., statutory holidays) (*Canada Labour Code: Part III*),
- fair wage schedules (former *Federal Fair Wages and Hours of Labour Act*),
- occupational health and safety (*Canada Labour Code: Part II*),
- employment equity (Federal Contractors Program)\(^5\), and
- environmental protection (*Canada Environmental Protection Act*).

Current federal procurement practices do not defer to the practices of other jurisdictions. Nor do federal security clearance requirements, where they apply, defer to the practices of other jurisdictions.

\(^5\) The Federal Contractors Program (FCP). FCP ensures that contractors who do business with the Government of Canada seek to achieve and maintain a workforce that is representative of the Canadian workforce, including members of the four designated groups under the *Employment Equity Act*: women, Aboriginal peoples, persons with disabilities, and members of visible minorities. The Program applies to provincially regulated contractors that:

- have a combined workforce in Canada of 100 or more permanent full-time and permanent part-time employees; and
- have received an initial federal government goods and services contract valued at $1 million or more (including applicable taxes).
All contractors are aware that the rules on federal projects often differ from the rules on other projects. If contractors can adapt to different rules on labour relations, employment standards, fair wage schedules, occupational health and safety, employment equity and environmental protection, they also can adapt, if necessary, to different rules on prompt payment.

F. From an operational perspective, should the federal government defer to provincial/territorial prompt payment legislation where it exists?

On projects that are covered by federal prompt payment legislation, there should, in general, be no deference to the legislation of any province or territory. On projects which are federally funded, but not federally undertaken, federal prompt payment obligations should be implemented through equivalent contractual requirements. We would propose to use the provincial or territorial adjudication procedures where those apply. In all other respects, on such projects, provincial or territorial legislation would only apply when that legislation establishes standards that exceed the contractual requirements.
9. Other Issues

Construction Projects on Reserve Lands

Jurisdiction over “lands reserved for the Indians” is vested in the federal Crown by virtue of subsection 91(24) of the Constitution Act, 1867. There should, therefore, be no ambiguity that federal prompt payment legislation would apply to construction projects on reserve lands where the federal government or one of its agencies is the contracting party. Where the band council or one of its entities (e.g., a band development corporation) is the contracting party, federal legislation could apply, but the legislation should make this explicit.

Holdbacks

In the federal context, there is no need to address issues involving the statutory holdbacks prescribed under provincial lien legislation. However, there is a need to address contractually-mandated holdback practices.

A 12-month warranty period is an industry standard, found, for example, in the Defence Construction Canada’s “Standard Construction Contract Documents” (DCL 250 (R2017-01). The prescription of a holdback to secure a warranty obligation has become prevalent in public contracts.

Although trade contractors are perfectly prepared to price the financing of these holdbacks into their bids, we suggest that some regulation of holdback practices may be appropriate. An early-completing contractor, such as an excavator or structural steel supplier, should not have to wait what may be years before receiving the return of their holdback, just as the governmental owner should not have to pay the financing costs which will inevitably be incorporated into contractors’ prices for a level of protection which is unnecessary.

Where holdbacks are mandated contractually, federal prompt payment legislation should provide:

a) that the percentage of the total contract amount which an owner may hold back for warranty purposes should be reasonable in relation to the risk of deficiencies;

b) for each segment of the construction project undertaken by a particular trade, the holdback period should not exceed 12 months from the completion of that segment of the work;

c) a prime contractor should be allowed to hold back for warranty purposes an amount that does not exceed in percentage terms the holdback that is allowed in the contract between the owner and the prime contractor;
d) monies held back for warranty purposes by a prime contractor should be released within 15 days of the prime contractor receiving from the owner the holdback monies applicable to the work completed by that sub-contractor. The same principle should apply to holdback between a sub-contractor and a sub-sub-contractor.

e) Contractors should have the right to substitute a surety bond for any such holdback.

All of these measures would improve the cash-flow of contractors without significantly weakening the warranty protection of the federal owner.
10. Conclusion

Payment interruptions and payment delays are systemic problems in Canada’s construction industry. Federal projects are not an exception to this unfortunate fact.

Payment delay and payment interruption have serious, negative consequences for the companies and workers in the construction industry, for suppliers to the construction industry and for governments as purchasers of construction services. Survey data show that almost a quarter (24.7%) of contractors faced a risk of insolvency as a result of being forced to wait an unreasonable length of time for payment.

Ontario’s Construction Act sets out the principles and standards that should inform a federal solution. Any construction project undertaken with federal monies or for the benefit of the federal government or its agencies should be subject to federal prompt payment obligations.
TAB 9
Public Services and Procurement Canada

Response to Singleton Urquhart Reynolds Vogel LLP’s Expert Review of Prompt Payment and Adjudication on Federal Construction Contracts

March 21, 2018

www.pspc-spac.gc.ca
Introduction

Public Services and Procurement Canada welcomes the opportunity to provide comments and responses to the questions posed in the “Expert Review – Information Package” sent on February 21, 2018.

In this document, you will find:

- Initial comments on Prompt Payment.
- Some background information on recent actions taken by Public Services and Procurement Canada on Prompt Payment in the Construction Industry.
- Public Services and Procurement Canada Responses to your specific questions asked.
- Early draft work on adjudication that PSPC had initiated.

In Person Meeting

Although every effort has been made to place key positions down on paper, Public Services and Procurement Canada would welcome the opportunity to further discuss this complex issue with you directly.

Point of Contact for Clarifications

Should you have any questions on our response, or would simply like to discuss the issues raised, please feel free to contact Public Services and Procurement Canada via Mr. Shawn Gardner. Mr. Gardner is the Senior Director, Real Property Services Management Contracting Directorate and can be reached by telephone at (613) 736-2919 or by e-mail at shawn.gardner@pwgsc-tpsgc.gc.ca.
Initial Comments by Public Services and Procurement Canada on Prompt Payment in the Construction Industry

Public Services and Procurement Canada (PSPC) recognizes that timely cash flow throughout the construction payment chain is fundamental to a healthy construction industry. This enables companies to realize the competitive profit margins necessary to fuel growth, employment, and to create the capacity in Canadian firms to build the infrastructure that is critical to the economic prosperity of Canada. Furthermore, delayed payment throughout the payment chain on federal construction projects erodes Government buying power, increases financial risks and costs for construction enterprises, and stifles economic growth. It is believed that although construction projects may be completed as intended, the money invested may not have generated the intended socio-economic benefits.

PSPC believes that prompt payment within the construction industry is an important issue that needs to be addressed.

It should be noted that the Government of Canada is only one of the industry’s many commercial construction “clients” and represents a very small percentage (1%) of the overall industry business volume. PSPC is the largest procurer of construction services for the federal government by value (75.6%). Using 2015-16 data, PSPC does in excess of $1.9 billion of business annually with the private sector, and approximately .013% of late payment interest has been paid on this business volume.

PSPC currently pays for work done and goods delivered to site in accordance with Treasury Board Policy on 30 days from receipt of a valid invoice, and then pays interest beyond that timeframe. Payment is made on time, almost always, as per government policy (Directive on Payment). In fact, analysis has shown that payment was delivered to our construction prime contractors on time over 96% of the time. In addition, should PSPC disagree with a submitted invoice, payment will be made on the amount not in dispute within the payment period and measures are taken to resolve the dispute for the outstanding amount as quickly as possible.

As PSPC expends taxpayer dollars, significant oversight and due diligence must be exercised when making payments. Unlike the private sector, PSPC must meet obligations specified in the Financial Administration Act when making government payments or risk committing a criminal offense. Invoices for payments are processed on a project basis and involve a multitude of touch points for validation and certification. For example, the invoice payment process includes validation to certify completion/delivery of work, clarifications and follow-up with suppliers for invoice errors/discrepancies, oversight requirements, processing in financial systems, cheque issuance, etc. It should be noted that the quality of invoices submitted to PSPC is often not great and this can cause challenges to paying on time. Better attention by industry to the submission of an accurate and complete invoice would be beneficial. If the invoice is to be the trigger for payment, then the invoice must be complete.
It is of concern to PSPC if payment is not promptly flowing to all tiers of the construction supply chain. We have, and will continue, to look at ways to ensure that we are paying our prime contractors on time and would like to ensure that this money flows down the chain. It is hoped that the information provided in this document will support the preparation of recommendations to the development of an effective legislative solution.
Background on some recent actions taken by Public Services and Procurement Canada on Prompt Payment in the Construction Industry

At the 50th annual joint meeting of the Canadian Construction Association (CCA) and the Government of Canada on April 11, 2016, the CCA raised the issue of “Prompt Payment”. Included in these discussions were the costs to both the Government of Canada and industry related to the current payment structure, as well as potential contractual and non-contractual solutions to address prompt payment issues.

The Government of Canada was asked to:

- Take, and be seen to be taking, a leadership role;
- Engage in dialogue with the CCA to identify, assess and implement possible improvements;

A Government-Industry Working Group was in fact established. In November 2016, an Engagement Strategy was agreed to by all participating groups (i.e. PSPC, Defense Construction Canada (DCC) and the CCA). In that Engagement Strategy, the problem definition was identified along with the Working Group Scope and Objectives. It also contained considerations from the Government. Excerpts from the document are included below (a full copy is available at the following link:


**Problem Definition**

*Delayed payment throughout the payment chain on federal construction projects erodes Government buying power, increases financial risk and cost for construction enterprises and stifles economic growth. It is believed that although construction projects may be completed as intended, the money invested may not have generated the intended socio-economic benefits.*

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

*From the perspective of the CCA’s membership, which includes thousands of small- and medium-sized enterprises, along with some of the largest construction organizations in North America, timely cash flow throughout the construction payment chain is fundamental to a healthy construction industry. Delay in payments anywhere in the supply chain on construction projects reduces profit and the creation of capital. This restricts innovation, and investment in plant, machinery and equipment.*
Payment delay also increases the cost for companies to finance their operations and drives up the cost of construction overall, which in turn reduces the buying power of government. The impact of payment delay on small- and medium-sized enterprises can be disproportionately severe, and even a minor delay in payment of one or two invoices can put smaller businesses under severe financial stress.

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

**Working Group Scope**

The Working Group will strive to identify possible solutions to the payment problem. It will focus initially on whether a given solution, if implemented, would likely improve the timeliness of payment throughout the payment chain and meet the needs of the industry. Then, for those solutions thought to generate the best results, the Working Group will consider an implementation plan, assessing the costs, feasibility/sustainability and constraints of these potential solutions against the expected benefits.

As solutions are developed the Working Group will, as a first or “pilot” phase, prioritize those solutions that can be implemented within the program of construction contracts having values over $100,000 and which are managed directly by PSPC or Defence Construction Canada (DCC).

As a second phase, the Working Group will consider whether and how any of these solutions could also be implemented or be modified to allow implementation in other contracts including: construction contracts issued by other government departments, future cycles of RP-n procurements, etc.

The Working Group acknowledges the integrity of existing contracts, and agrees that the scope of the Working Group does not extend to changes or even recommended changes to any existing Government of Canada contract, and potentially related policy or regulation.

**Working Group Objective**

To jointly explore possible actions by the Government of Canada and/or industry to improve payment terms and practices within federal contracts, at all level of the supply chain including the Government of Canada, the prime contractors, subcontractor, sub-subcontractor and suppliers.

There is consensus in the Working Group that a well-functioning market that enjoys timely payment on federal construction projects would have at least the following characteristics:
• Contractual payment terms throughout the federal construction project supply chain/pyramid that are fair. The CCA has proposed that the benchmark for fairness should be industry standard contract/subcontract documents endorsement by CCA and the Canadian Construction Documents Committee (CCDC).

• Undisputed amounts, including holdback amounts, throughout the construction project supply chain/pyramid are paid in accordance with fair contract/subcontract payment terms.

• There is sufficient transparency around the dates on which payments and holdback amounts are made/released to enable stakeholders within the payment pyramid to exercise remedies in a timely manner.

• The Government of Canada continues to manage fair and efficient payment processes within its contractual control, and where it does not have control, leads by example to influence good payment practices throughout the payment chain.

• The construction industry at all levels is knowledgeable about available contractual and legal mechanisms, and acts with confidence to ensure timely cash flow throughout the industry.

Along with the Engagement Strategy, a 14-point action plan was created by the Working Group and meetings since the working group’s creation have been using that plan to make/track progress on tackling the prompt payment issue. The action plan is available at the following site: http://www.tpsgc-pwgsc.gc.ca/biens-property/divulgation-disclosure/papsdic-apppci-eng.html

As a result of its involvement in this Government-Industry Working Group, PSPC has implemented many measures to try and improve the promptness of payment within the Construction Industry. One of the first things to be implemented was the development and posting of prompt payment principles related to construction related payments. These are:

**Prompt payment principles**

*PSPC advocates that construction-related payments should follow these 3 principles:*

**Promptness:**
*The department will review and process invoices promptly. If disputes arise, PSPC will pay for items not in dispute, while working to resolve the disputed amount quickly and fairly*
**Transparency:**

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

**Shared responsibility:**

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

Another key result of PSPC’s involvement in this Government-Industry Working Group was the launch of the PSPC website increase transparency around construction contract payments, announced on June 8, 2017. The prompt payment website features PSPC payments against construction contracts valued at $100,000 and above made since May 1, 2017. It allows the sorting of payments by contract number, project number, company name, or payment date and is updated weekly to keep the information current as payments are being issued to contractors. This initiative was welcomed by provincial counterparts and the construction industry.

The latest initiative implemented by PSPC is one that you are very familiar - the commissioning of Singleton Urquhart Reynolds Vogel LLP to lead an industry engagement initiative on a potential federal legislation aimed at improving the timeliness of payments for federal construction contracts throughout all tiers of the construction industry. This engagement will build off of the recently completed Bill 142 (the *Construction Lien Amendment Act*) in Ontario as the basis for discussion. The results of this engagement will be presented in your recommendations report for the federal government’s consideration related to the development of an effective legislative solution.
Public Services and Procurement Canada Responses to your specific questions asked

Stakeholder Submissions

a description of the stakeholder group including the nature of its membership (if it is an association) and what it does;

Through its origins in the former Department of Public Works that predate Confederation, PSPC has helped build Canadian landmarks from coast to coast to coast. Proud of our expertise and history, PSPC is committed to serving Canadians, business and government ethically, efficiently and cost-effectively.

PSPC manages one of the largest and most diverse portfolios of real estate in the country. We are the Government of Canada’s real estate expert and provide federal departments and organizations with affordable, productive work environments and a full range of real property services as well as strategic and expert advice that supports the Government of Canada in the delivery of programs to Canadians. We are involved in all aspects of real property, from initial investment strategies, the construction and leasing of facilities, to the maintenance, repair and disposal of real property assets. The department includes and engages real property professionals specializing in office accommodation, architecture, engineering, real estate and asset and facility management.

PSPC also procures goods and services (including construction) on behalf of federal departments and agencies at the best value for Canadians. Procurements range from office supplies to military ships to security systems to construction and everything in between. Acquisitions Branch assists with identifying the goods or services to be procured; selecting the most effective procurement approach; developing appropriate evaluation criteria; calling for, receiving and evaluating bids; negotiating contracts; debriefing unsuccessful bidders; and administering contracts.

a summary of the experiences of the stakeholder group in addressing issues associated with promptness of payment, or a lack of prompt payment, and in resolving disputes using litigation and alternative dispute resolution;

PSPC was most recently approached by the CCA in April of 2016 whereby the CCA expressed concerns about the issue of prompt payment. PSPC agreed to co-chair and participate in a Government-Industry Working Group on the issue of prompt payment in the construction industry with the CCA and Defence Construction Canada. One of the first items that PSPC undertook was to look at its own payment history. This review demonstrated that PSPC was making construction payments on time in over 96% of cases. In fact, in an effort to ensure firms were paid according to the payment practices
of the Government of Canada, some firms were actually being paid in advance of the period. PSPC follows the Government of Canada payment policy of payment on 30 days from receipt of a valid invoice and confirmation of goods/services received.

PSPC’s policy related to invoices in which an amount is in dispute is to pay the amount not in dispute as per the contract terms. The amount in dispute can then be resolved according to the mechanisms in the contract (e.g. Alternative Dispute Resolution terms ranging from negotiation to mediation or arbitration). Where the dispute is found to be in the favour of the contractor, interest is paid based on when payment was due to when payment was actually made.

PSPC has had, for many years, mechanisms to ensure payment is made. For example, with every invoice submitted by the Prime Contractor, there is a contractual obligation for the Prime to submit a Statutory Declaration confirming that all its lawful obligations have been met. Furthermore, for contracts with an estimated value of $100K or more, there is a contractual requirement for the Prime to provide contract security. Different security types are permitted (although the most common is surety bonds – Performance Bond and Labour and Material Bond). As bonds are seen as very secure, holdback throughout the construction contract is only 5% whereas holdback is 10% for any other kind of contract security.

Interestingly, there have been very few complaints over the years from firms suggesting that payment was delinquent from the Prime. In those few situations where a complaint was raised, the firm was typically directed to the surety bond provider and no further complaints were received.

Thus, the issue of prompt payment was not seen as a critical item for PSPC until it was raised by construction associations (specifically, the CCA and the National Trade Contractors Coalition of Canada (NTCCC)). As PSPC was paying its prime contractors as per the contracted conditions, it was assumed that all firms down the supply chain were doing so equally well. Lack of prompt payment to sub tiers was invisible to PSPC.

PSPC, as part of the Government-Industry Work Group on Prompt Payment in the Construction Industry has been working on a 14-point action plan. One of those items was posting of payments. At the request of the CCA and NTCCC, PSPC implemented a website that enables the public to see when PSPC has paid its prime contractors (for construction contracts estimated to be $100K or greater). Industry had suggested that this information would greatly help lower tiers to see when payment had been made to the Prime and thus when payment could be expected at the lower tiers. Although this website has been active since June 2017, it has seen very little actual activity – it is unclear as to why (e.g. is this a communication issue or simply an idea that seemed appropriate theoretically but when put into reality, may not be as beneficial as expected?).
**Prompt Payment Questions**

what kinds of contracts should it apply to? What kinds of work should it apply to?

PSPC believes that work of all types should be paid for promptly as per the agreed terms and conditions of the relevant contract.

Caution should be exercised in defining to what extent federal legislation should apply. For example, it is recommended that federal legislation should NOT apply to construction work which received federal funding when that work is being exercised by a Province/Territory, municipality, aboriginal group, etc… Federal grant money used in construction should be governed by the laws and regulations under which the contract is issued as opposed to the source of funds.

It is also suggested that federal legislation would likely be more appropriately limited to federal government departments that typically do construction contracts under their own contracting authority. This could be defined as Schedule 1 departments listed in the Financial Administration Act. Defence Construction Canada work would likely be a good addition to the list because of the work that organization does. Other Crown Corporations should likely be excluded as they tend to follow provincial laws and regulations when doing construction work.

It is important that there not be confusion when determining when the law would apply or not. As an example, federal construction work being done to fit-up a floor in a leased building should not fall under federal legislation when work on the floor above and below would fall under provincial law.

When work is being done on PSPC custodian property but is being done through a property management firm (e.g. the existing RP-1 service contracts), then it is recommended that the construction work should not fall under proposed federal legislation; however, it is expected that new large-scale contracts with a construction component, executed after the effective date of the new federal legislation, would fall under said legislation.

should there be any exclusions or different treatment for certain types of projects? (e.g. P3 projects)?

Not all commodities are the same and there are factors unique to each commodity that will impact when a payment should be made. Even within construction itself, there are elements that will have an impact on the speed in which payment is made. A key foundation of making a construction payment is to ensure that the work being paid for has in fact been delivered and is in compliance with the drawings and specifications. This typically requires a professional (e.g. architect, engineer, etc…) to visit the site for an inspection after delivery of the invoice. Large complex construction projects require greater time and effort to ensure compliance than simple low complex jobs. Likewise, location of work can have an impact on inspection (remote location construction work often requires time for the professional to get to the site to do the inspection and back to the office to document the findings). As delivery methods for construction get more complex, then so too does the mechanism to determine what payment is due. For
example, a typical design-bid-build is a common delivery method and thus procedures are in place for certifying work done and issuing payment. A design-build approach has the consultant and contractor working together meaning certification of work done by the Owner is more difficult. Construction Management is another form that creates complexity in the payment process. Perhaps at the most extreme is the P3 delivery model. Regardless of the delivery model, payment should be done promptly. The question becomes is prompt payment defined the same way in all delivery models?

what levels of contract should it apply to in the construction pyramid?

It seems appropriate that everyone in the construction pyramid should be entitled to prompt payment. For some reason, there seems to have developed this culture that payment happens only when the Owner pays the Prime and then that money works its way down through the supply chain. The challenge with this is that the small supplier may be the first to do the work and the last to be paid – potentially with weeks/months of waiting for payment. In most other industries, it is normal to receive payment 30 days after delivery of services or goods – regardless of where you are in the pyramid. For example, when we as individuals go to a store such as Home Depot, we cannot expect to walk out of the store with supplies and say we will pay for the goods when we get our next paycheck.

what should be the trigger for starting the clock running on a payment period?

There must be a combination of two things. The first is the submission of a valid invoice and the second is acceptance of the work (goods/services) identified on the invoice. The trigger cannot be solely on the submission of an invoice as this would allow completely false invoices to be issued and then an expectation of payment. Therefore, there must be some validation of what is being requested and confirmation that it meets what was specified. There should be a time limit on how long someone has to review the work (otherwise that individual could delay payment indefinitely). There should also be some process (such as adjudication) to settle payment disagreements quickly.

what is a reasonable payment period? should these periods differ for parties at different levels of the construction pyramid?

Federal work would likely suggest a slightly different payment period than other work. First of all, the payment period should likely remain at, or very close to, the 30 day period. This allows the certification of work at remote locations (Government of Canada has a lot of this kind of work compared with other owners) while still respecting the Financial Administration Act which makes signing off of acceptance/receipt of goods/services a criminal act if done incorrectly. At the same time, there should be no concern that the Federal Government will not pay the prime because of lack of funds or bankruptcy. This would suggest that payment throughout all tiers could be locked to a specific timeframe and not dependent on payment by the Owner to the Prime.
what, if any, limitations should be placed on the parties to a construction contract in respect of their freedom to contract in relation to invoicing terms?

The freedom to contract seems an obvious thing to allow as this would permit unique situations /conditions to be considered. However, it is not clear if this freedom to contract is an element of the current lack of prompt payment issue. For example, if a firm at a higher level puts in a payment period of 180 days and pays on the 180th day – is that prompt payment? Because of the nature of the construction industry, it has been suggested to PSPC that elements of the industry abuse the power of the larger vs smaller firm and thus hold payment (sometimes beyond what is contracted but sometimes, by simply putting in very long payment terms in the contract with the sub). The question then becomes, how does one protect a small, lower tiered firm from a “bully” firm if one provides freedom to contract specific payment terms? At the same time, the freedom to contract provides flexibility to address some items that may not be appropriate for a 30 day payment term (e.g. milestone billing)

should certification be permitted as a pre-condition to the delivery of a proper invoice? are there any other pre-conditions that cause concern?

IF payment is based on the submission of a valid invoice AND some time to certify that the goods/services are as per the drawings and specs, then there should be no need for a pre-condition of the submission of an invoice.

on what basis can payment be withheld and when? Should there be any limits on a right of set off (e.g. in relation to other projects)?

Payment must be withheld if the goods/services do not meet the requirements of the drawings and/or specifications. The Federal Government does use right of set-off (as required by federal legislation) when someone has not paid their federal taxes. Thus, the concept of right of set-off is a given. PSPC has in fact used right of set-off when costs were incurred on one project and the contractor abandoned the site but was able to recover the costs on another project done by that same contractor. Although recognizing that this could have an impact down the chain, there must be the ability to collect rightfully owed funds.

should payment information be posted? If so, where?

PSPC, at the request of industry (CCA and NTCCC) started posting payment information on a PSPC website (link is: http://www.tpsgc-pwgsc.gc.ca/biens-property/divulgation-disclosure/psdic-ppci-eng.html). This site provides a Procurement Identification Number, a Project Number, the name of the Prime Contractor in receipt of payment, and the Payment Date. Additional information is being considered for this site (e.g. province/region of work, actual payment amount, etc…). Although industry highly recommended that this site be established, the use to date has been marginal. It takes a great deal of work on a weekly basis to update and thus further upgrades are on hold until there is evidence that the site is being of use. As the site was being developed, an alternative considered was to require the Prime Contractor to post a notice at the construction site of when it received payment from PSPC. As a Labour and Material bond must be posted at the site (and is confirmed by the design professional as part of
their inspections), so too could the payment notice. This approach could also be applied
to other tiers on the construction site (i.e. when the prime pays its subs, the subs must
post a payment notice at the job site). The advantage of a web site over a notice on the
construction site is that anyone can see the website whereas the notice at the
construction site is only available to those with access to the site. Another concern with
the notice approach (whether it be web or on the construction site), how does a lower tier
firm even know that the work it is doing is related to a federal construction project? For
example, perhaps the firm is building millwork that is shipped to a contractor’s shop –
thus how would the cabinetmaker know to look for payment notices (on the construction
site or web)? Further, how would the sub-sub-sub know who the Prime is and which
government department issued the work (DCC and PSPC have different payment notice
sites). Although in theory it would be great to have just one site to post all construction
payments, this seems very complicated and possibly expensive when one starts looking
into the complexities.

what should the consequences be of a failure to pay?

This is likely the hardest question of the entire document. One would have thought that if
a firm was not paid promptly on a previous job, then that firm would either not bid to the
offending firm again or build a financing cost into its price to cover the cost of a delayed
payment. In extreme situations where payment is not coming, then the expensive and
time consuming court action would need to be sought. However, once again, one would
think that once a firm is brought to court for non-payment, then other firms would tend to
avoid the offending firm. In theory, industry itself would correct the lack of prompt
payment through its own bidding practices. But this is obviously not the case as industry
is looking to Government to enact laws to drive the industry behaviour that it, itself cannot
do on its own. This would suggest that the legislation must contain some consequence to
failure to pay promptly. The courts are the usual mechanism when legislation is broken,
but this solution is known to be slow and costly (otherwise, the courts would have been
used by now).

Some in industry suggest that if payment is delinquent, then the victimized firm should be
able to withdraw from the construction site with no penalty. At first glance, it seems
obvious that a firm that is not being paid should be able to abandon the work until it is
paid. But when the hierarchal structure of the construction industry is considered, this
could result in other firms being penalized through no fault of their own. For example, a
Prime Contractor is responsible for completing the work as per the contract – but if a third
tier firm does not pay a fourth tier firm and the fourth tier firm walks off the job, other subs’
work may be delayed because they build on the work to be completed by the firm that left
the site. Furthermore, the Prime Contractor could miss the overall schedule and be held
liable for costs and damages.

In order for the legislation to work, there must be consequences for failure to following it
BUT the consequences cannot negatively impact other innocent firms (by them incurring
other unrecoverable costs or loss of work).
Adjudication

who can require adjudication and when?

It seems appropriate that adjudication should be available to anyone that believes payment is being improperly withheld. The adjudication would become an option as soon as the individual/firm that is certifying the invoice is as per drawings and specifications determines that a lower amount than invoiced is to be paid AND this cannot be resolved in an amicable way within a short period (perhaps two working days).

The challenge becomes what happens if there is an adjudication at a higher or lower level – does the decision have influence on others not part of the adjudication? For example, if a cabinet maker is not paid a portion of the invoice by the carpenter because the Prime is withholding some money because the Federal Government’s professional determined that the installed cabinets are not fully in compliance with the drawings and specs, where is the adjudication held? What happens if the manufacturing drawings done by the cabinet maker and approved by the carpenter exactly match what was contracted for between those two organizations but somehow mistakenly does not match what is specified in the original drawings and specifications? (In other words the withholding by Government of Canada and the Prime may be appropriate, but inappropriate for the carpenter to withhold funds from the cabinet maker).

Adjudication seems the right form of dispute resolution when dealing with issues around disagreements around payment BUT there is a limit. Complex delay claims should never be resolved through adjudication but instead the normal contract specified dispute resolution process used (adjudication timelines are too aggressive for such a complex dispute).

who can adjudicate a dispute?

For adjudication to be quick and efficient, an adjudicator needs to be knowledgeable in the subject matter of the dispute. This would suggest that different adjudicators may be required on a single project if there are multiple disputes on different topics. Unlike mediation/arbitration where the mediator/arbitrator is trying to help the two parties come to an agreement (and thus little if any knowledge of the construction issue itself required), an adjudicator is making an informed decision that both parties have to live with until either there is agreement or a decision through a different dispute resolution process. Using the UK model, it seems appropriate that adjudicators come from different professional associations (e.g. architects, engineers, etc…). It may be possible that the dispute is related to wording in the contract and thus a lawyer/retired judge may be an appropriate adjudicator in those cases.

how should an adjudicator be nominated?

Although it may be possible to have the two parties that are in disagreement come up with an adjudicator that both are satisfied with, it is unlikely that this will be an easy process as the two parties are already in dispute. The concept of coming up with an adjudicator before the dispute happens (i.e. while the two parties are still in the “honeymoon state”) does not recognize the fact that adjudicators need to be
knowledgeable in the specific field of the dispute - it would seem a lot of effort to identify 
adjudicator A for these kinds of issues and adjudicator B for these other kinds of issues 
and adjudicator C etc….

It therefore seems appropriate that there be one or more adjudication bodies that could 
be approached to provide an adjudicator when the need arises. These bodies would 
ensure that the adjudicators are licensed/certified and trained. The adjudication body 
would then assign an adjudicator appropriate to the issue in dispute.

There would likely be a cost to having an adjudication authority provide a name but this 
cost could be shared by the two parties.

Perhaps the bigger issue is how is an adjudicator licensed/certified? It would seem 
appropriate that large financial decisions that can have a significant impact on one or 
more parties should be qualified to do the job. It is then important for those seeking an 
adjudicator to know that the individual is qualified to do the role.

what is the role of an authorized nominating authority?

As stated above, the authorized naming authority would do the following:

- provide training to its adjudicators
- ensure they are licensed/certified to do the adjudication service
- provide a name of an adjudicator that is knowledgeable on the issue in dispute
- if there is more than one possible adjudicator, then the authorized nominating 
  authority could oversee a process to have the parties select their preferred 
  adjudicators in order of preference and then assemble the results from an 
  independent third party perspective and choose the best ranked from the 
  submissions of the two sides.

what types of disputes should be adjudicated? Should there be limits to the quantum of 
the disputes that are subject to adjudication?

Adjudication should be seen as one tool in the dispute resolution toolbox. Not all 
disputes will lend themselves to adjudication, just as not all disputes lend themselves to 
mediation or arbitration or simple negotiation.

Adjudication should be limited to those disputes around payment that require quick 
determinations to allow payment to continue to flow AND for which the decision is not 
based on complex issues requiring significant paperwork to support one position or 
another. For example, a delay claim would not fit under adjudication because it does 
not meet either of the conditions above (e.g. the delay claim has built up over 
weeks/months and deals with work previously paid for to some degree – thus the 
urgency of payment is not paramount. Additionally, to substantiate a delay claim 
requires a great deal of documents, schedules, etc… to allow one side or the other to 
prove/disprove the delay.)
Adjudication on the other hand likely works very well when there is a dispute as to whether some item is at one percentage of completion vs another. Cash flow is dependent on this decision and more importantly, a quick decision is required because the situation will have changed in just a few weeks as progress continues to be made.

what should an adjudication process look like?

See appendices A and B. Appendix A shows a simple flow chart of a possible adjudication process. Appendix B is an early draft of a possible adjudication process that was being drafted for consideration in PSPC construction contracts with the Prime Contractor. Note that this process recognized that there were no authorized adjudicator naming body and thus a process was included to have the two parties identify an adjudicator.

how should the costs of an adjudication process be addressed?

Like any dispute, the issue should be resolved where possible by discussions between the two parties. In order to ensure both parties make an attempt, the costs of adjudication should be borne equally by the two parties in the dispute. However, if the adjudicator believes that one side or the other was being difficult and unfair, then the adjudicator should have the right to assign a different percentage of costs from the normal 50%-50% split.

what should the process for enforcing adjudication decisions look like?

This is unknown. It is clear that there must be enforcement otherwise the decisions will be ignored. PSPC’s understanding is that with a decision of an adjudicator, it may be relatively quick to get support from the courts – but PSPC is unsure what the costs would be to get the courts to enforce an adjudication decision and what relatively quick means in timing.
Jurisdictional Operation of the Act

What kinds of projects would federal legislation implementing prompt payment and adjudication apply to?

This (and the related questions) is something that PSPC is currently considering. Ideally, the rules on a federal construction site would match the rules of a construction site that may be on private land across the street. Clarity and consistency of rules is critical in the construction industry. Consistency is also advantageous as firms at lower tiers, may not realize that the work they are doing is related to a federal construction contract and thus with different rules than all the other work being done. Although firms in the National Capital Region are used to different rules, most contractors elsewhere in Canada do not see enough federal construction work to make a distinction. This can get more complex as PSPC continues to outsource its property management and project delivery services to the private sector. In these cases, a private sector firm is issuing its own contracts under its own authority to meet its contractual obligations with PSPC. Some of this work will result in construction work on federal property BUT the work is not federal work and the contracts issued are not federal construction contracts. This work should likely follow provincial/territorial legislation.

Are there potential conflicts between such federal legislation and provincial legislation?

Federal legislation will in some way apply to federal construction work being done across the country. There will therefore be consistency on the Federal construction sites; however, this could mean that there are inconsistencies with the way things are done in the provinces/territories. Other than Ontario through its recently enacted Bill 142, other provinces/territories do not currently have legislation dealing with prompt payment. There is a high risk that the various legislations that will likely follow will have elements that are unique to a given province/territory meaning that there will be a conflict with Federal legislation somewhere. For example, Bill 142 suggests the subs should be paid no later than seven days after payment being made at the next tier up – Alberta on the other hand, is suggesting 10 days in its contractual structure. Ideally, if each province and territory had a prompt payment legislated requirement, the federal government could contractually require firms working on the federal site to follow the provincial/territorial requirements – thus eliminating any confusion or contradictions with work being done on non-federal land right next door.

If so, in view of the doctrine of paramountcy, is there any constraint on the federal legislation?

When there are differences between legislations, issues arise (especially at the lower tiers). For example, let’s assume a supplier is providing stainless steel sinks. The supplier is providing the sinks to a plumbing contractor that will install these sinks into two different construction projects (one a federal construction project and the other with a private owner). The payment (and related) terms come under which legislation (federal or provincial) as the supplier only had a single supply contract with the plumber?
Would some combination of federal legislation and amendments to standard form contracts be appropriate?

A possible federal legislation could be to require construction contracts issued by the Government of Canada to consider prompt payment. If legislation exists in the province/territory of work, the federal legislation could require the federal construction contract incorporate the provincial/territorial processes/timelines. This would mean that federal legislation has been created but puts the implementation down at the contract level which allows for the greatest flexibility to address provincial/territorial differences. Industry may see this as legislation with no real teeth and may not see this as a leadership piece of legislation being requested.

Are there any operational concerns that federal legislation could be different than provincial/territorial legislation (i.e. would there be different rules applicable to a federal construction site as opposed to a provincial/territorial construction site)?

This is in fact the concern of PSPC that federal legislation will not be consistent with provincial/territorial legislation. Added to this, legislation tends to be complex and time consuming to enact and tends to be inflexible once enacted. Once federal legislation is enacted, it will likely be years before it is considered for amendment. It is also worth pointing out that when Federal legislation and Provincial legislation exist on the same issues, confusion does commonly exist. Environmental legislation is a clear example – contractors not used to working on federal sites often carefully meet provincial regulations only to find out that there are different federal requirements. This confusion often adds costs for the contractor and can negatively impact the overall schedule.

From an operational perspective, should the federal government defer to provincial/territorial prompt payment legislation where it exists?

Not sure if this can be done. Ideal situation would be to have all provincial/territorial /federal legislation be consistent. Perhaps there would be a way to have the federal legislation apply only if there is no provincial/territorial legislation in place?
Early draft work on adjudication that PSPC had initiated.

The following information is provided to show work that PSPC had initiated related to adjudication. This should not be seen as a definitive position but rather a working document that may be of some benefit as you look at the adjudication issue. As an example, the draft contract clauses presented assumed that there was no adjudication body to assign adjudicators and thus, a process was developed to have the two parties self-identify an adjudicator. It would be preferred if there was a body that provided an appropriate adjudicator as the concept that two parties already in dispute are going to agree to an adjudicator quickly and efficiently is simply not likely to happen.
GC8.10 (2017-08-30) Rules for Adjudication

The following outlines the rules for the adjudication of disputes.

GC8.10.1 Applicability

1. Where an adjudication process related to construction has been established by a Province or Territory in which the Work is being performed, it shall be used along with its methodology to appoint an Adjudicator.
2. Where no adjudication process exists, the following rules for adjudication shall be applied.
3. By mutual agreement, the parties may change or make additions to the Rules for Adjudication.

GC8.10.2 Notice of Adjudication

1. Any party to this contract may refer a dispute to adjudication and shall give every other party to the contract a written notice of adjudication that includes:
   a. The nature and a brief description of the dispute;
   b. Details of where and when the dispute has arisen;
   c. The nature of the redress sought;
   d. The names and addresses of the parties to the contract.

GC8.10.3 Appointment of an Adjudicator

1. Where an appropriate registry of adjudicators has been established within a Province or Territory in which the Work is being performed, it shall be used along with its methodology to appoint an Adjudicator.

2. In cases where no registry exists or the Provincial or Territorial registry cannot be used, and where the parties have not previously entered into a contract with an adjudicator:
   a. the party submitting the Notice of Adjudication will provide a list of three potential adjudicators to the other party.
   b. The name of the preferred adjudicator will be identified by the party in receipt of the Notice of Adjudication.

   1. If none of the three names are seen as preferred, the party in receipt of the Notice of Adjudication will provide a list of three potential adjudicators to the party who submitted the Notice of Adjudication.
   2. The name of the preferred adjudicator will be identified by the party who issued the Notice of Adjudication.
   3. If none of the three names are seen as preferred by the party who issued the Notice of Adjudication, then both parties will select one name from their list of potential adjudicators and the two names will be put into a “hat” and one randomly selected to act as the Adjudicator.
   c. Each potential adjudicator identified shall be impartial and independent of the parties, preferably with knowledge of the subject matter of the dispute.
3. The party who submitted the Notice of Adjudication shall contact the selected potential adjudicator to request they act as the Adjudicator. A copy of the Notice of Adjudication will be provided to the selected potential adjudicator.

4. The selected potential adjudicator identified in accordance with the process defined in 2 b. shall indicate a willingness to act in the role within two days of receiving the request.

5. The party that issued the Notice of Adjudication will use reasonable efforts to negotiate a contract with the selected potential adjudicator on behalf of the parties, which contract shall incorporate or otherwise comply with the provisions of these Rules. If negotiations are unsuccessful, or if for other reasons the selected potential adjudicator is unwilling or unable to enter into a contract to act as Adjudicator, the process in 2 b. shall be repeated until an Adjudicator accepts the role.

6. The parties agree that, upon successful completion of the negotiations referred to in paragraph 5., they shall jointly enter into a contract with the Adjudicator, which contract shall be in a form agreed to by the parties.

**GC8.10.4 Powers of the Adjudicator**

1. The Adjudicator shall:
   1. act impartially in carrying out the duties of adjudication and shall do so in accordance with any relevant terms of this contract and shall reach a decision in accordance with any applicable law in relation to the Work; and
   2. avoid incurring unnecessary expense.

2. 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, the Adjudicator may:
   1. Decide the matters in dispute;
   2. Use his/her own knowledge and/or experience;
   3. Request any party to the dispute to provide documents that the Adjudicator may reasonably require, including any written statement from any party to the dispute supporting or supplementing the Notice of Adjudication;
   4. 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;
   5. Meet and question any of the parties to the dispute and their representatives;
   6. Subject to obtaining any necessary consent from a third party, make any site visits and or inspections deemed appropriate, whether accompanied by the parties to the dispute or not;
   7. Subject to obtaining any necessary consent from a third party, carry out any tests or experiments;
   8. Obtain and consider such representations and submissions as required and appoint experts, assessors or legal advisors;
   9. Give directions as to the timetable of adjudication, any deadlines, or limits as to the length of written documents or oral representations to be complied with; and
   10. Issue other directions in relation to the conduct of the adjudication.

3. The parties shall comply with any request or direction of the adjudicator in relation to the adjudication.
4. If, without showing sufficient cause, a party fails to comply with any request, direction or timetable of the Adjudicator made in accordance with the Adjudicator’s powers, fails to produce any document or written statement requested by the Adjudicator, or in any other way fails to comply with a requirement under these provisions relating to adjudication, the Adjudicator may:
   1. Continue the adjudication in the absence of that party or of the document or written statement requested,
   2. Draw such inferences from that failure to comply as the circumstances may, in the Adjudicator’s opinion, be justified; and
   3. Make a decision on the basis of the information before the adjudicator attaching such weight as the Adjudicator thinks fit to any evidence submitted outside any period the Adjudicator may have requested or directed.

5. The Adjudicator may take into account any other matters which the parties to the dispute agree should be within the scope of the adjudication or which are matters under the contract which the Adjudicator considers are necessarily connected with the dispute. The Adjudicator may:
   1. Open up, revise and review any decision taken or any certificate given by any person referred to in the contract unless the contract states that the decision or certificate is final and conclusive,
   2. Decide that any of the parties to the dispute is liable to make a payment under the contract and when that payment is due and the final date for payment,
   3. Having regard to any term of the contract relating to the payment of interest, decide the circumstances in which, and the rates at which, and the periods for which simple or compound rates of interest shall be paid.

6. The Adjudicator may, with the consent of all the parties to the dispute, adjudicate at the same time on more than one dispute under the same contract.

7. The Adjudicator may, with the consent of all the parties, adjudicate at the same time on related disputes under different contracts, whether or not one or more of the parties is a party to those disputes.

**GC8.10.5 Process for Adjudication**

1. Within seven days of the appointment of an adjudicator, the party that submitted a Notice of Adjudication will refer the dispute in writing (the “referral notice”) to the Adjudicator.
2. The referral notice shall be accompanied by copies of, or relevant extracts from, the construction contract and such other documents as the referring party intends to rely upon.
3. The referring party shall, at the same time as the referral notice and accompanying documents are sent to the Adjudicator, send copies of those documents to every other party to the dispute.
4. Upon receipt of the referral notice, the Adjudicator must inform every party to the dispute of the date that it was received.
5. The party not making the referral may send to the Adjudicator within seven days of the date of the referral, with a copy to the other party, a written statement of the contentions on which it relies and any material the party wishes the Adjudicator to consider.
6. The Adjudicator and any party to the dispute shall not disclose to any other person any information or document provided in connection with the adjudication which the party supplying it has indicated is to be treated as confidential, except to the extent that it is necessary for the purposes of, or in connection with, the adjudication.

7. Any party to the dispute may be assisted by, or represented by, such advisers or representatives (whether legally qualified or not); however, where the Adjudicator is considering oral evidence or representations, a party to the dispute may not be represented by more than two people, unless the Adjudicator gives directions to the contrary.

8. The Adjudicator shall consider any relevant information submitted by the parties to the dispute and shall make available to them any information to be taken into account in reaching the decision.

9. The Adjudicator shall reach a decision not later than:
   1. Twenty-eight days after the receipt of the referral notice, or
   2. Such period exceeding twenty-eight days but never longer than 45 days after the receipt of the referral notice as the parties to the dispute may, after the giving of that notice, agree.

GC8.10.6 Adjudicator’s Decision

1. As soon as possible after a decision has been reached, the Adjudicator shall deliver a copy of that decision to each of the parties to the contract.

2. If requested by one of the parties to the dispute, the Adjudicator shall provide reasons for the decision. OR The Adjudicator shall not be obliged to give reasons for his decision.

3. The Adjudicator may correct an issued decision to remove a clerical or typographical error arising by accident or omission within five days of the original delivery of the decision to the parties.
   a. As soon as possible after correcting a decision, the Adjudicator must deliver a copy of the corrected decision to each of the parties of the contract.
   b. Any correction of a decision forms part of the decision.

4. Where the Adjudicator fails, for any reason, to reach a decision in accordance with the timeframes of these adjudication rules, any of the parties may serve a fresh notice and request a new Adjudicator. The parties shall supply the new Adjudicator with copies of all documents where had been made available to the previous Adjudicator.

GC8.10.7 Effects of the Decision

1. The decision of the Adjudicator shall be binding on the parties until the dispute is finally determined by legal proceedings, arbitration or by an agreement in writing between the parties made after the decision of the Adjudicator is given.

2. In the absence of any directions by the Adjudicator relating to the time for performance of the decision, the parties shall be required to comply with any decision of the Adjudicator immediately on delivery of the decision to the parties.

3. If either party does not comply with the decision of the Adjudicator, the other party shall be entitled to take legal proceedings to secure such compliance pending any final determination of the referred dispute pursuant to 1. above.
GC8.10.8 Payment for the Adjudicator

1. The parties shall bear the cost of the Adjudicator’s fees and reasonable expenses in equal proportions unless the Adjudicator in the decision states that the payment of the fees and reasonable expenses is to be apportioned differently between the parties.
2. The parties shall be jointly and severally liable for any sum which remains outstanding following the making of any determination on how the payment shall be apportioned.
3. The parties to the dispute may at any time agree to revoke the appointment of the Adjudicator. The Adjudicator shall be entitled to the payment of such reasonable amount as the Adjudicator shall determine by way of fees and expenses incurred.
4. Where the revocation of the appointment of the Adjudicator is due to the default or misconduct of the Adjudicator, the parties shall not be liable to pay the Adjudicator’s fees and expenses.

GC8.10.9 Liability of the Adjudicator

1. The Adjudicator shall not be liable for anything done or omitted in the discharge of purported discharge of the functions of adjudicator unless the act or omission is in bad faith, and any employee or agent of the Adjudicator shall be similarly protected from liability.
TAB 10
EXAMEN D’EXPERT DU PAIEMENT SANS DÉLAI ET DE L’ARBITRAGE EN CE QUI CONCERNE LES CONTRATS DE CONSTRUCTION FÉDÉRAUX

Rencontre du 10 avril 2018
EXAMEN D'EXPERT DU PAIEMENT SANS DÉLAI
ET DE L'ARBITRAGE EN CE QUI CONCERNE
LES CONTRATS DE CONSTRUCTION FÉDÉRAUX

Rencontre du 10 avril 2018
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PRÉAMBLE

La Coalition contre les retards de paiement dans la construction (ci-après la « Coalition ») salue l'initiative du gouvernement fédéral d'effectuer des consultations publiques à travers le Canada afin de mettre en place une législation qui permettra de diminuer les délais de paiement dans l'industrie de la construction, lesquels ne cessent d’augmenter d’année en année.

La Coalition est un regroupement d’associations d’entrepreneurs en construction qui a vu le jour à l’automne 2013 et qui veut mettre un terme à l’augmentation injustifiée des délais de paiement dans ce secteur.

La Coalition représente l’ensemble des entrepreneurs généraux et spécialisés, lesquels sont impliqués dans toutes les étapes d’un projet de construction.

Il s’agit d’un fait historique puisque pour la première fois l’ensemble des entrepreneurs généraux et spécialisés sont réunis pour une même cause.

Voici donc les membres de la Coalition :

- Association de la construction du Québec (ACQ)
- Corporation des maîtres électriens du Québec (CMEQ)
- Corporation des maîtres mécaniciens en tuyauterie du Québec (CMMTQ)
- Corporation des entrepreneurs généraux du Québec (CEGQ)
- Association des constructeurs de routes et grands travaux du Québec (ACRGQTQ)
- Association des professionnels de la construction et de l’habitation du Québec (APCHQ)
- Fédération québécoise des associations d’entrepreneurs spécialisés en construction (FQAESC), composée des organisations suivantes :
  - Association de vitrerie et fenestration du Québec (AVFQ)
  - Association d’isolation du Québec (AIQ)
  - Association provinciale des entrepreneurs en systèmes intérieurs Québec (APESIQ)
  - Association des entrepreneurs en maçonnerie du Québec (AEMQ)
  - Corporation des entreprises de traitement de l’air et du froid (CETAF)
  - Association des maîtres peintres du Québec (AMPQ)
  - Association des entrepreneurs en revêtements métalliques du Québec (AERMQ)
  - Corporation des maîtres entrepreneurs en installations contre l’incendie (CMEICI)
  - Regroupement des entrepreneurs en coffrage du Québec (RECQ)
  - Association québécoise des Entrepreneurs en Infrastructure (AQEI)

Le but ultime de la Coalition est de trouver une solution à la problématique des délais de paiement dans l’industrie de la construction et c’est dans ce contexte qu’elle vous soumet ses commentaires.
INTRODUCTION

En 2014, la Coalition a mandaté la firme Raymond Chabot Grant Thornton dans le but de réaliser une étude (jointe au présent document) afin d’avoir un portrait complet des impacts économiques qu’entraînent les délais de paiement.

Complétée en 2015, cette étude comprend les éléments suivants :

- Un portrait de l’industrie de la construction au Québec;
- Description de la problématique;
- Impacts économiques des retards de paiement;
- Survol des lois et normes dans d’autres pays;
- Impacts économiques des solutions proposées par la Coalition.

Cette étude a révélé, entre autres, que les délais de paiement sont en moyenne de 80 jours au Québec. Or, le délai normal est de 30 jours dans la majorité des contrats. Chaque retard ajoute une pression indue aux entreprises, notamment sur leurs liquidités. C’est un phénomène qui nuit à la performance et à la compétitivité de toute l’industrie et qui pousse même des entreprises à la faillite.


Les membres de la Coalition ont proposé des solutions qui ont été quantifiées par Raymond Chabot Grant Thornton et qui ont démontré que 76.47 % de la problématique des délais de paiement serait réglée si ces solutions étaient appliquées. Fait important, ces solutions ont été adoptées à l’unanimité par tous les membres de la Coalition, chaque membre ayant pris le temps de consulter les entrepreneurs qu’ils représentent. Autrement dit, ces solutions ont été approuvées par l’ensemble des entrepreneurs généraux et spécialisés du Québec.

La Coalition a pris soin de joindre au présent document l’intégralité de ces solutions (ci-après « paramètres proposés »). D’ailleurs, c’est en se référant à l’étude et aux paramètres proposés que la Coalition vous exposera ses commentaires.
DESCRIPTION DES ACTIVITÉS DE LA COALITION

La Coalition contre les retards de paiement dans la construction regroupe tous les acteurs de l’industrie de la construction. Cette Coalition, née à l’automne 2013, a pour but de mettre un terme à l’augmentation injustifiée des délais de paiement dans l’industrie de la construction. Cette action collective est historique puisque pour la première fois tous les entrepreneurs généraux et spécialisés du Québec se sont regroupés, ensemble, pour une même cause.

Depuis 2013, la Coalition a fait plus de 40 rencontres avec différents intervenants gouvernementaux tels que le Conseil du trésor avec qui nous avons des échanges fréquents ainsi que d’autres titulaires de charge publique concernés par l’enjeu. Selon les intervenants, les rencontres ont eu lieu avec des hauts fonctionnaires et/ou des membres de cabinet ministériel. Mentionnons notamment :

- Conseil du Trésor
- Ministère des Affaires municipales et de l’Occupation du territoire
- Ministère de l’Énergie et des Ressources naturelles
- Ministère des Transports
- Ministère du Travail, de l’Emploi et de la Solidarité sociale
- Société québécoise des infrastructures
- Opposition officielle
- Deuxième groupe d’opposition
- Ville de Montréal

Outre les titulaires de charge publique mentionnés précédemment, les représentants de la Coalition ont rencontré plusieurs organisations socioéconomiques concernées de près ou de loin par l’enjeu des retards de paiement. Les organisations ci-dessous ont toutes été rencontrées et elles offrent publiquement leur appui aux démarches de la Coalition :

- Conseil du patronat du Québec
- Les ELLES de la construction
- Fédération des chambres de commerce du Québec
- Institut canadien de la construction en acier
- Institut canadien de plomberie et de chauffage
- Mechanical contractors association of Canada

Les nombreuses démarches déployées sans relâche par la Coalition durant ces années ont finalement permis de faire un premier gain important en décembre dernier. En effet, le 1er décembre 2017, un projet de loi (Loi favorisant la surveillance des contrats des organismes publics et instituant l’Autorité des marchés publics) a été adopté dans lequel il est prévu de mettre en place des projets-pilotes concernant les contrats publics et qui, à leurs termes, mèneront à une réglementation visant à faciliter les paiements aux entrepreneurs et aux sous-entrepreneurs.
La Coalition souhaite aussi qu’il y ait d’importantes avancées au regard de la problématique des délais de paiement au niveau fédéral.

RÉSUMÉ DE L’EXPÉRIENCE DE LA COALITION

Les paramètres proposés par la Coalition ont été élaborés afin de faciliter et d’éviter les retards indus de paiement des contrats de travaux de construction, et ainsi limiter les conséquences néfastes occasionnées par de longs délais de paiement. Pour ce faire, la Coalition a établi les principes de base suivants :

- Chronologie précise des demandes de paiement
- Mécanismes clairs, avec des conditions strictes, pour la suspension/résiliation des contrats en cas de défaut
- Identification des conditions de report de l’exigibilité du paiement
- Intervenant-décideur : mécanisme permettant un règlement plus rapide, moins coûteux et menant à une décision exécutoire.

Ces principes de base ont guidé la rédaction des paramètres proposés, auxquels la Coalition vous référera tout au long de ce document.

PAIEMENT SANS DÉLAI

À quels types de contrats la législation doit-elle s’appliquer ?
À quels types de travaux doit-elle s’appliquer ?

Les paramètres de la Coalition, qui ont été initialement pensés dans un cadre de législation provinciale, proposent que tous les contrats, publics et privés, soient soumis aux nouvelles mesures de délais de paiement. Transposant sa réflexion au niveau fédéral, la Coalition croit que tous les contrats fédéraux devraient être visés, sous réserve de ceux mentionnés à la question suivante. La Coalition vous réfère aux articles 3.1 et 3.2 des paramètres proposés concernant les contrats visés ainsi qu’à l’article 9 de la Loi sur le bâtiment\(^1\), lequel contient la définition de travaux de construction :

\(^1\) Loi sur le bâtiment, L.R.Q. C. B.1-1.
Devrait-il y avoir des exclusions ou des traitements différents pour certains types de projets (p. ex. projets P3) ?

Afin de ne pas alourdir les petits contrats, la Coalition propose d’exclure les contrats d’une valeur totale inférieure à 25 000 $ ainsi que les contrats relatifs aux petits bâtiments. La Coalition vous réfère aux articles 3.3 et 3.4 des paramètres proposés :

À quels niveaux de contrats devrait-elle s’appliquer dans la pyramide de la construction ?

Tous les niveaux d’entrepreneurs qui exécutent des travaux de construction devraient être inclus aux nouvelles mesures concernant les délais de paiement.
Quel devrait être l’élément déclencheur pour démarrer le compte à rebours d’un délai de paiement ?

La Coalition est d’avis que la demande de paiement devrait être le point de départ de la computation des délais tel que le mentionnent les articles 8, 9 et 10 des paramètres proposés :

« 8. Présentation de la demande

8.1 Les demandes de paiement mensuel doivent être communiquées conformément à l’échéancier suivant :

a) L’entrepreneur communique sa demande de paiement mensuel au donneur d’ouvrage à compter du dernier jour du mois et, au plus tard, dans les cinq (5) jours suivant cette date;

b) Le sous-traitant communique sa demande de paiement mensuel à l’entrepreneur le 25ème jour du mois;

c) Le sous-traitant communique une demande de paiement mensuel à un autre sous-traitant à une date qui permettra à cet autre sous-traitant de se conformer au présent paragraphe.
9. Approbation des demandes de paiement mensuel

9.1 Une demande de paiement mensuel est présumée approuvée 10 jours après le jour où elle est reçue, sauf si, à l’intérieur de ce délai de 10 jours, le débiteur ou son mandataire remet, à celui qui demande le paiement, un avis de refus indiquant que la totalité ou une partie de la demande est refusée.

9.2 L’avis de refus doit être écrit et doit contenir les informations suivantes :

a) La portion refusée de la demande de paiement mensuel;

b) Les travaux visés par l’avis de refus;

c) L’ensemble des motifs au soutien du refus total ou partiel de la demande de paiement mensuel;

d) Les dispositions contractuelles ou légales sur lesquelles est basé le refus total ou partiel de la demande de paiement mensuel.

9.3 La présomption de l’article 9.1 peut être écartée par le débiteur lorsque, suite à la transmission de sa propre demande de paiement, il a lui-même reçu un avis de refus fondé sur un motif qu’il peut invoquer à l’encontre de celui qui demande le paiement en transmettant une copie de l’avis de refus que le débiteur a lui-même reçu.

9.4 Lorsqu’une demande de paiement mensuel est refusée totalement ou partiellement au titre du paragraphe 9.1, le débiteur ne peut retenir plus que la partie du paiement refusée, tel qu’indiqué dans l’avis de refus.

9.5 Le montant du paiement refusé ne peut excéder ce qui est nécessaire pour :

a) Permettre l’achèvement des travaux à parachever et corriger les déficiences relevant de la responsabilité du demandeur du paiement, conformément à l’article 2111 du Code civil du Québec;

b) Couvrir les seules créances des sous-traitants et fournisseurs pour leurs travaux et matériaux fournis au bénéfice du demandeur du paiement, qui ont été facturés au cours des mois précédant le mois visé par la demande de paiement, et dont la quittance n’a pas été fournie à la date de la demande, dans la mesure où ceux-ci ont dénoncé par écrit leur contrat au donneur d’ouvrage et au propriétaire de l’ouvrage s’il est différent;

c) Couvrir le montant des dommages subis par le débiteur dans la mesure où ils relèvent de la responsabilité du demandeur du paiement.

9.6 Sous réserve de la retenue conventionnelle, le débiteur doit payer le montant de tout paiement refusé en application du présent article lors du prochain paiement mensuel à condition que le demandeur du paiement lui démontre que la cause invoquée pour le refus de paiement n’existe plus.

Lorsqu’il s’agit du paiement final, le débiteur doit payer le montant de tout paiement refusé au plus tard dans les dix (10) jours après le jour où le demandeur du paiement lui démontre que la cause invoquée pour le refus de paiement n’existe plus.
10. Échéancier de paiement

10.1 Nonobstant les articles 2111, 2114 et 2122 du Code civil du Québec, le donneur d’ouvrage doit verser à l’entrepreneur son paiement mensuel approuvé ou présumé approuvé au plus tard le 20e jour du mois suivant le mois visé par la demande de paiement mensuel.

10.2 L’entrepreneur doit verser à ses sous-traitants leur paiement mensuel approuvé ou présumé approuvé au plus tard le 25e jour du mois suivant le mois visé par la demande de paiement mensuel.

10.3 Chaque sous-traitant dispose d’un délai de cinq (5) jours suivant la date limite à laquelle il doit recevoir un paiement mensuel pour verser à ses propres sous-traitants leur paiement mensuel approuvé ou présumé approuvé.

Qu’est-ce qu’un délai de paiement raisonnable ?
Ces délais devraient-ils différer pour les parties à différents niveaux de la pyramide de la construction ?

La Coalition vous réfère aux articles 8, 9 et 10 des paramètres proposés à la question précédente, ainsi qu’à la ligne de temps contenue à la page 63 de l’étude.

Quelles limites, le cas échéant, devraient être imposées aux parties à un contrat de construction en ce qui concerne leur liberté contractuelle relative aux conditions de facturation ?

La Coalition est d’avis que les nouvelles mesures du gouvernement fédéral en matière de délais de paiement devraient être d’ordre public et conséquemment, toute disposition contraire à ces mesures devrait être nulle et remplacée de façon à respecter celles-ci tel que le mentionne l’article 4.1 des paramètres proposés.

« 4.1 Toute disposition d’un contrat visé par la présente loi qui est en contradiction avec l’un ou l’autre de ses articles est réputée modifiée de manière à la rendre conforme à celle-ci. »

La certification devrait-elle être autorisée à titre de condition préalable à la livraison d’une facture appropriée ? Y a-t-il d’autres conditions préalables qui posent problème ?

La Coalition est d’avis qu’aucune certification ne doit être exigée avant la remise d’une facture. Une stipulation à cet effet dans un contrat doit être nulle et sans effet.
Sur quelle base le paiement peut-il être retenu et quand ? Devrait-il y avoir des limites à un droit de compensation (p.ex. par rapport à d’autres projets) ?

D’entrée de jeu, la Coalition est d’avis qu’aucune compensation ne doit être faite entre différents projets. La compensation peut être faite, mais seulement dans le cadre d’un même contrat.

À l’égard de la retenue contractuelle, la Coalition vous réfère à l’article 5 des paramètres proposés, lesquels mentionnent la valeur maximum d’une retenue contractuelle et les circonstances donnant ouverture à une telle retenue.

« 5. Retenues

5.1 Le contrat entre les parties peut prévoir des modalités de retenue conventionnelle sur la valeur des travaux réalisés, mais une telle retenue ne peut excéder 10% du prix du contrat.

5.2 Un entrepreneur ou un sous-traitant ne peut imposer à son sous-traitant un taux de retenue conventionnelle supérieur à celui qu’il se voit lui-même imposer si ledit sous-traitant lui fournit des cautionnements ou une autre sûreté équivalente.

5.3 Par ailleurs, lorsqu’une retenue conventionnelle s’applique, les droits de retenue prévus aux articles 2111 et 2123 du Code civil du Québec ainsi que les autres droits de retenue envisagés dans la présente loi ne pourront être exercés qu’en cas d’insuffisance du montant de la retenue conventionnelle. »

De plus, la Coalition vous invite à prendre connaissance des articles 9.2 et 9.5 des paramètres proposés, lesquels traitent du refus de paiement et de sa justification. Un aspect intéressant non négligeable selon la Coalition.

« 9.2 L’avis de refus doit être écrit et doit contenir les informations suivantes :

a) la portion refusée de la demande de paiement mensuel;

b) les travaux visés par l’avis de refus;

c) l’ensemble des motifs au soutien du refus total ou partiel de la demande de paiement mensuel;

d) les dispositions contractuelles ou légales sur lesquelles est basé le refus total ou partiel de la demande de paiement mensuel.

9.5 Le montant du paiement refusé ne peut excéder ce qui est nécessaire pour :

a) permettre l’achèvement des travaux à parachever et corriger les déficiences relevant de la responsabilité du demandeur du paiement, conformément à l’article 2111 du Code civil du Québec;

b) couvrir les seules créances des sous-traitants et fournisseurs pour leurs travaux et matériaux fournis au bénéfice du demandeur du paiement, qui ont été facturés au cours des mois précédant le mois visé par la demande de paiement, et dont la quittance n’a pas été fournie à la date de la demande, dans la mesure où ceux-ci ont dénoncé par écrit leur contrat au donneur d’ouvrage et au propriétaire de l’ouvrage s’il est différent;

c) couvrir le montant des dommages subis par le débiteur dans la mesure où ils relèvent de la responsabilité du demandeur du paiement. »
Les renseignements relatifs au paiement devraient-ils être publiés ?
Dans l’affirmative, où ?

La Coalition est d’avis que l’information n’a pas besoin d’être publiée. Les paramètres proposés, plus spécifiquement ceux à propos de la chronologie précise des demandes de paiement, permettent à l’entrepreneur et au sous-traitant de savoir exactement le moment où ils seront payés. L’information publiée devient alors inutile.

Quelles devraient être les conséquences d’un défaut de paiement ?

L’une des conséquences proposées par la Coalition est l’arrêt ou la suspension des travaux de construction. À ce sujet nous vous référons aux articles 11 et 12 des paramètres proposés.

« 11. Droit de suspendre les travaux ou de résilier le contrat

11.1 L’entrepreneur ou le sous-traitant, à qui un paiement mensuel approuvé ou présumé approuvé n’a pas été versé à l’intérieur des délais prévus à la présente loi, peut suspendre l’exécution de son contrat dans la mesure où il respecte les conditions suivantes:

a) il remet au débiteur un préavis écrit de son intention de suspendre l’exécution de son contrat si le paiement n’est pas effectué dans les sept (7) jours;

b) le débiteur n’a pas effectué le paiement à l’intérieur du délai de sept (7) jours;

c) une fois écoulé le délai de sept (7) jours, il remet au débiteur un avis écrit marquant le début de la suspension de l’exécution de son contrat.

11.2 Nonobstant l’article 2126 du Code civil du Québec, l’entrepreneur ou le sous-traitant qui a suspendu l’exécution de son contrat en vertu du paragraphe 11.1 peut résilier son contrat dans la mesure où il respecte les conditions suivantes:

a) il remet au débiteur un préavis écrit de son intention de résilier son contrat si le paiement n’est pas effectué dans les sept (7) jours;

b) le débiteur n’a pas effectué le paiement à l’intérieur du délai de sept (7) jours;

c) une fois écoulé le délai de sept (7) jours, il remet au débiteur un avis écrit de résiliation de son contrat.

11.3 L’entrepreneur ou le sous-traitant qui transmet à son débiteur un préavis ou un avis en application des paragraphes 11.1a) ou 11.1c) ou des paragraphes 11.2a) ou 11.2c) doit en transmettre, au même moment, une copie à ses sous-traitants.

11.4 Le sous-traitant qui reçoit, en application de l’article 11.3, un avis marquant le début de la suspension de l’exécution du contrat de son débiteur ou un avis de résiliation du contrat de son débiteur doit suspendre ses travaux et transmettre copie de l’avis reçu à ses propres sous-traitants qui doivent faire de même.
11.5 Après trente (30) jours de suspension de leur propre contrat, suite à la réception d’un avis en application de l’article 11.3, les sous-traitants pourront résilier ce contrat en transmettant à leur débiteur un préavis écrit de sept (7) jours de leur intention de résilier.

11.6 L’entrepreneur ou le sous-traitant qui transmet à un sous-traitant copie d’un avis de résiliation qu’il a transmis à son débiteur au titre du paragraphe 11.2c a le droit de résilier le contrat de son sous-traitant en transmettant un avis écrit à cet effet.

Le sous-traitant pourra faire de même à l’égard de ses propres sous-traitants.

11.7 En cas de reprise des travaux à la suite d’une suspension, le débiteur qui était en défaut devra défrayer les coûts de démobilisation et de remobilisation raisonnables qui ont été engagés par celui qui a donné l’avis, et par tout autre intervenant, ainsi que tous les coûts inhérents découlant de la suspension des travaux.

Ces frais doivent être ajoutés à la prochaine demande de paiement mensuel et ils ne sont sujets à aucune retenue.

11.8 Lorsqu’un intervenant-décideur est saisi d’un différend conformément à la partie IV de la présente loi, l’entrepreneur ou le sous-traitant voit son droit de suspendre les travaux ou de résilier le contrat, tel que prévu aux articles 11.1 et suivant de la présente loi, suspendu jusqu’à ce que l’intervenant-décideur rende sa décision.

12. Prolongement de l’échéancier de projet

12.1 Dans les cas où le projet est sujet à une ou des échéances, les délais ou échéances sont automatiquement reportés ou prolongés afin de tenir compte de la durée de suspension ou de résiliation intervenue en application de l’article 11. »

Une autre conséquence proposée par la Coalition est l’imposition d’intérêts suite à un non-paiement tel que prévu à l’article 16 des paramètres proposés :

« 16. Intérêts sur les paiements en souffrance

16.1 Tout paiement exigible portera intérêt au taux légal majoré de l’indemnité additionnelle prévue à l’article 1619 du Code civil du Québec.

16.2 Le taux d’intérêt stipulé au paragraphe 16.1 constitue un taux minimum, malgré toute stipulation contraire.

Les parties sont cependant libres de convenir d’un taux plus élevé.

16.3 Les intérêts doivent être calculés à compter du moment où un paiement devient exigible suivant les dispositions de la présente loi. »

La dernière conséquence proposée par la Coalition serait de faire appel à un intervenant-décideur tel que mentionné aux articles 22 et suivant des paramètres proposés et dont il est question dans la section suivante.
ARBITRAGE

Qui peut demander un arbitrage et à quel moment?

Toutes les parties au différend (ce qui inclut toute la chaîne de sous-traitants) peuvent faire appel à l'intervenant-décideur. Les parties peuvent soumettre le différend en tout temps en cours d’exécution, c’est-à-dire de la signature du contrat jusqu’à la fin de celui-ci. La fin du contrat général ou de sous-traitance survient lorsque toutes les parties au contrat ont rempli leurs obligations. La Coalition vous réfère à l’article 22.1 des paramètres proposés.

« 22. Droit de soumettre un différend à un intervenant-décideur

22.1 Une partie à un contrat visé par la présente loi peut, en tout temps, soumettre à un intervenant-décideur tout différend découlant de l’application, de l’interprétation, de l’exécution ou de la terminaison du contrat. »

Qui peut arbitrer un différend ?

La Coalition est d’avis que les personnes pouvant agir comme intervenant-décideur doivent être agréées par un organisme certifié. Au Québec, il y a le ministère de la Justice ou l’institut de médiation et d’arbitrage au Québec (IMAQ). La Coalition vous réfère aux articles 23.1 et 23.2 des paramètres proposés.

« 23. Qualification de l’intervenant-décideur

23.1 Seules les personnes agréées par le ministre de la Justice pourront agir comme intervenants-décideurs. Les modalités d’agrégation des intervenants-décideurs seront prescrites par règlement adopté en vertu de la présente loi.

23.2 L’intervenant-décideur qui a un intérêt à l’égard de l’une ou l’autre des parties doit dénoncer cet intérêt et, le cas échéant, il ne pourra agir si l’une ou l’autre des parties s’y oppose. »

Comment un arbitre devrait-il être désigné ?

L’intervenant-décideur doit être désigné par les parties lors de la conclusion du contrat, ou, à défaut, lors de la transmission de l’avis d’intention de soumettre un différend à l’intervenant-décideur. Pour les détails, la Coalition vous réfère aux articles 25 et suivants des paramètres proposés.

« 25. Désignation de l’intervenant-décideur

25.1 Les parties à un contrat assujetti à la présente loi doivent convenir, au moment de la conclusion du contrat, de la désignation d’un intervenant-décideur qui sera appelé à trancher tout différend entre elles en application de la présente partie.

25.2 À défaut de désignation d’un intervenant-décideur conformément à l’article 25.1, la partie qui transmet l’avis d’intention prévue à l’article 24 doit proposer une liste de trois (3) candidats potentiels dont elle aura au préalable vérifié la disponibilité.
25.3 Le destinataire de l’avis d’intention dispose alors d’un délai de cinq (5) jours afin d’indiquer, dans un écrit adressé à la partie adverse, qu’il accepte l’un des candidats proposés, ou afin de transmettre une liste de trois (3) autres candidats potentiels dont elle aura au préalable vérifié la disponibilité.

25.4 À défaut d’entente quant au choix de l’intervenant-décideur dans les deux (2) jours suivant la réponse du destinataire, chacune des parties pourra demander au représentant désigné par le ministre de la Justice de nommer, dans les cinq (5) jours de la demande, un intervenant-décideur qui sera chargé de trancher le différend.

25.5 Dans l’éventualité où la partie qui reçoit l’avis d’intention fait défaut de transmettre une réponse à l’intérieur du délai prévu à l’article 25.3, la partie ayant donné l’avis pourra choisir l’intervenant-décideur de son choix parmi les trois candidats proposés par elle.

25.6 La partie qui choisit un intervenant-décideur suivant l’article 25.5 devra faire signifier par huissier un avis de ce choix à la partie adverse.

25.7 Après qu’ait été désigné l’intervenant-décideur, toute communication d’une partie avec l’intervenant-décideur et toute communication de l’intervenant-décideur avec une partie doit également être transmise à l’autre partie. »

### Quel est le rôle d’une autorité de désignation autorisée?

L’Autorité compétente devra s’assurer de la compétence de l’intervenant-décideur et devra nommer l’intervenant-décideur à défaut d’entente entre les parties. La Coalition vous réfère aux articles déjà mentionnés ci-dessus, soit les articles 23.1 et 25.4 des paramètres proposés.

### Quels types de différends devraient faire l’objet d’un arbitrage?

**Devrait-il y avoir des limites au montant des différends soumis à l’arbitrage?**

Tout différend découlant de l’application, de l’interprétation, de l’exécution ou de la terminaison du contrat peut être soumis à l’intervenant-décideur. La Coalition est d’opinion que cela ne doit pas se limiter à des différends portant uniquement sur les aspects monétaires. La Coalition vous réfère à l’article 22.1 des paramètres proposés, lequel est mentionné ci-dessus.

### À quoi devrait ressembler un processus d’arbitrage ?

L’intervenant-décideur a l’entièrè discrétion à l’égard de la procédure encadrant l’adjudication tel que le mentionne l’article 27.1 des paramètres proposés.

« 27. Pouvoirs de l’intervenant-décideur

27.1 À l’égard du différend qui lui est soumis, l’intervenant-décideur aura entière discrétion pour gérer l’administration de la preuve et l’audition des parties. Il pourra entre autres y appeler un tiers comme partie s’il juge que sa présence est nécessaire pour permettre une solution complète du différend. »
De quelle manière devrait-on aborder la question des coûts d'un processus d'arbitrage?

Les parties sont responsables à 50 % des frais d'honoraires à moins de circonstances exceptionnelles. Nous vous référons aux articles 32.1 et 32.2 des paramètres proposés.

« 32. Honoraires et frais de l'intervenant-décideur

32.1 Toute disposition prévue à un contrat de travaux de construction relative à la répartition entre les parties de tous ou d'une partie des honoraires et frais de l'intervenant-décideur, des parties ou des experts est nulle et sans effet. Chaque partie est responsable du paiement de ses honoraires et frais et ceux de ses experts.

32.2 L'intervenant-décideur a discrétion afin d'ordonner la répartition entre les parties de ses honoraires et frais encourus dans le cadre de son mandat. Nonobstant cette répartition, les parties demeurent solidairesment responsables des honoraires et frais de l'intervenant-décideur et ce, jusqu'à parfait paiement. »

À quoi devrait ressembler le processus d’application des décisions d’arbitrage?

Selon les paramètres proposés, la décision de l'intervenant-décideur est exécutoire immédiatement. Toutefois, elle n'est pas finale. Afin d'obliger une partie à obtempérer, la décision pourrait être homologuée devant les tribunaux de droit commun. La Coalition vous invite à consulter les articles 28.5, 29.1 et 29.2 des paramètres proposés.

« 28.5 La décision de l'intervenant-décideur est exécutoire de façon immédiate, sans pour autant être finale, à moins d'une décision finale ou interlocutoire d'un tribunal de droit commun.

29. Non-respect de la décision de l'intervenant-décideur

29.1 En cas de défaut d'une partie d'obtempérer à une décision d'un intervenant-décideur, l'autre partie pourra s'adresser aux tribunaux de droit commun pour faire homologuer la décision.

29.2 Aux fins de la procédure d'homologation de la décision de l'intervenant-décideur, les règles édictées aux articles 946 à 946.6 du Code de procédure civile du Québec sont applicables en y faisant les adaptations nécessaires.

Toute conclusion monétaire de la décision de l'intervenant-décideur sera réputée être majorée de 10% au cas de nécessité pour une partie de s'adresser aux tribunaux civils pour en obtenir l'homologation ou l'exécution. »
L’APPLICATION DE LA LOI

D’entrée de jeu, concernant cette section de la consultation, les membres de la Coalition tiennent à préciser qu’ils ne possèdent pas les compétences adéquates en droit constitutionnel pour offrir des réponses concrètes au groupe de consultation. Nous laissons le tout aux experts du domaine.

Toutefois, la Coalition tient à préciser qu’au Québec, depuis plusieurs années, l’industrie de la construction travaille à l’harmonisation des lois et des règlements encadrant les municipalités et les organismes publics. Aussi, plusieurs actions ont été posées afin d’élaborer et d’instaurer une standardisation des contrats des organismes publics. L’harmonisation de la législation et l’uniformité des documents favorisent une meilleure compréhension des règles applicables par tous les intervenants de l’industrie, partant du donneur d’ouvrage et allant jusqu’au fournisseur de matériaux. Une meilleure compréhension signifie une meilleure application et un plus grand respect des règles applicables. C’est pourquoi la Coalition croit qu’il est primordial qu’il existe une harmonisation entre les lois fédérales et les lois provinciales.

Par ailleurs, les paramètres proposés par la Coalition ont été élaborés en ayant à l’esprit une loi d’ordre public afin que les nouvelles dispositions soient contraignantes pour tous. Ayant ceci à l’esprit, la Coalition est d’opinion que toutes les nouvelles mesures fédérales encadrant les délais de paiement devraient être contenues dans une loi.

Ainsi, ces dispositions s’appliqueront à tous les projets fédéraux (organismes et ministères, incluant BGIS et les sociétés œuvrant sous la juridiction fédérale tel que Bell Canada).

La Coalition espère que ces quelques points aideront le groupe de consultation dans leur démarche.
CONCLUSION

En conclusion, une législation encadrant les délais de paiement est, certes, un élément essentiel à l’amélioration des rapports entre les différents intervenants de l’industrie. Cet élément s’inscrit toutefois en cours d’exécution ou à la fin des travaux. Ce faisant, une réflexion devrait aussi être effectuée pour les éléments situés en amont du contrat de construction. Une meilleure préparation des documents contractuels en fonction de la détermination des besoins du donneur d’ouvrages, de son budget, son échéancier, des conditions du milieu, ainsi qu’un délai de production convenable pour les professionnels contribueront à élaborer des plans et devis complets, lesquels faciliteront par la suite le travail des entrepreneurs. Une plus grande communication entre les différents intervenants de l’industrie aidera aussi davantage à mener à bien un projet de construction. En d’autres mots, le développement de bonnes pratiques par tout un chacun favorisera la productivité de l’industrie de la construction et tous y gagneront.
Rencontre du 10 avril 2018
Ensuring the Certainty and Timeliness of Payment on Federal Government Construction Contracts

Date: March 29, 2018

Submitted to: The Expert Review of Prompt Payment and Adjudication on Federal Construction Contracts

Submitted by: The Surety Association of Canada
Thank you for inviting the Surety Association of Canada (SAC) to participate in the Expert Review of Prompt Payment and Adjudication on federal construction contracts (the “Review”) as a stakeholder. Thank you as well for providing the Review’s Information Package for Stakeholders (“Information Package”) in February of this year.

The Surety Association of Canada is the national voice for the Canadian surety industry. Our members include surety companies, surety brokers, reinsurers and other surety industry participants across Canada. Our head office is located in Mississauga, Ontario.

The member companies of SAC are privileged to enjoy the confidence of construction organizations across the country, both as clients and as beneficiaries of the surety bonds underwritten by the industry. Most construction organizations are familiar with the process of maintaining a surety credit facility, providing bonds on some or all of their contracts, and relying on bonds provided by others when problems arise. We are proud to observe that suretyship is an integral part of the construction fabric across Canada.

Sureties have become increasingly concerned about what seems to be a “culture of non-compliance” that has developed around payment requirements in construction contracts. More and more, payors across the construction industry have come to regard a requirement to pay within a specified time as simply a guideline rather than a contractual obligation; extending the payment times to 60, 90 or even 120 days from invoice. The hardships created by this laissez-faire approach become more debilitating as one proceeds down the construction chain where the burden of non-payment comes to rest on that group of smaller trades and suppliers that can least afford to manage it.

As the industry charged with resurrecting failed projects and compensating unpaid subcontractors and suppliers, surety companies have a clear line of sight to the impact on construction organizations when cash flow is interrupted on a contract. In the moment, it matters little whether the interruption is being caused by genuine disputes, aggressive business practices, insolvency, or causes beyond the control of the parties to the transaction. As a key stakeholder and active participant in the process leading to the passage of Bill 142 in Ontario (the Ontario Act), SAC brings a unique set of experiences and resources to the current process.

The federal government’s contractual arrangements and payment protocol creates unique challenges for contractors, subtrades and suppliers in the event that payment is delayed or withheld. We strongly support the broad mandate of the Review and the opportunity it presents to consider improvements to the overall legislative and commercial framework within which construction companies undertake work for the Government of Canada.

Perhaps most importantly, the health and success of the surety industry, and its ongoing ability to provide surety credit capacity to the marketplace depends on the health of construction organizations. A robust, clear, accessible and cost efficient legislative framework is essential to enable construction organizations to plan, execute, and create infrastructure, jobs and prosperity.
In preparation for our scheduled meeting with you on March 29, 2018 we offer this submission to supplement our discussion. While we invite the Review to consider all of our commentary, we would offer the following highlights:

➢ In general, SAC strongly recommends that the Review be guided by the approach and direction taken by Ontario in drafting and passing of the Ontario Act. We understand that significant differences; legal, policy and cultural, exist between the federal contracting regime and those of the various provinces and territories. As well, stakeholders from other jurisdictions will undoubtedly provide valuable insights and input worthy of consideration. That said, we submit that the overall framework of the Ontario model will work well in the federal context and it will not be necessary to reinvent the legislative wheel.

➢ SAC would urge the Crown to extend the engagement of the Review consultants to provide input into the drafting of its recommendations into legislation. The Ontario experience demonstrated that the expertise and background of the consultants and their support staff will provide invaluable assistance and greatly enhance the chances of a successful outcome.

➢ SAC would support a recommendation that the new prompt payment protocol apply universally to any and all construction work taking place on any federally owned or controlled facilities; either domestic or foreign.

➢ SAC would support recommendations involving a modest abridgment of freedom to contract that lead directly to a significant improvement in prompt cash flow throughout the construction payment chain, and that do not unduly preclude parties from agreeing and enforcing meaningful commercial terms.

➢ SAC would support a recommendation that the payment period be initiated by the receipt of a proper invoice and that certification of the work not be a pre-condition to the delivery of such an invoice.

➢ SAC would generally support a recommendation for an adjudication regime set up in a manner similar to that outlined in Section 13 of the Ontario Act and the accompanying regulations.

➢ SAC would support a recommendation that the adjudication provisions be applied to disputes under both performance and payment bonds, and that any surety related disputes also be included in a consolidated adjudication where appropriate; subject to the surety’s participation.

➢ As to the jurisdictional operation of legislation, SAC would support the position that because the federal government has jurisdiction over Crown property, anything that is integral to Crown property or the creation of that property is within federal jurisdiction. Hence the federal legislation should be paramount in such instances.
➢ SAC would support a recommendation for mandatory performance and labour and material payment bonds as set out in Section 85 of the Ontario Act. We submit that the combination of these two instruments will bring stability to the process and ensure the certainty and timeliness of payment. Consider as well:
  o A payment bond is the only instrument dedicated to the sole purpose of paying claimants and its proceeds cannot be diverted for other purposes. What’s more, it’s the only remedy that places money into the hands of unpaid trades and suppliers in real time.
  o Under the federal regime, where payees have no ability to lien and are not protected by holdbacks or trust provisions, the need for payment bond protection is even more compelling than in provincial jurisdictions.
  o SAC’s Ontario experience has led to the development of responsive products that and processes that address the prompt payment objectives of the review. These efforts can be leveraged to produce similar results for the federal regime.
  o As the recent study by the Canadian Centre for Economic Analysis demonstrates, the use of performance and payment bonds in tandem provides important economic benefits, enhancing GDP, creating jobs and driving the recovery of revenue; thus enhancing the objectives of strengthening the construction industry and fostering responsive payment practices.

Again, we thank the Review for the opportunity to provide our thoughts and suggestions and look forward to meeting with you on March 29th.
II

Overview of Surety Bonds in the Construction Industry

The expertise and experience of the Review, particularly in the area of suretyship, is acknowledged and, we believe, will allow the Review to take a truly industry wide perspective in meeting its mandate. Given the potential for other stakeholders to review this submission we offer the following brief summary of suretyship to provide context for our comments.

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 the Crown 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.

This protection is provided through two separate but interdependent instruments:

1. **Performance Bond** - An instrument which protects the construction project owner from financial loss should the contractor default on the contract. A performance bond guarantees that the contractor will perform the obligations under the construction contract in accordance with its terms and conditions. In the event that a project contractor defaults, a surety company will remedy the default by either completing the contract or arranging for the completion of the contract.

2. **Labour & Material Payment Bond** - An instrument which guarantees that the bonded general contractor will pay subcontractors and suppliers in full for materials and services supplied to the bonded job. Should the contractor fail to do so, the unpaid subcontractor can claim under the bond for payment of the amounts due.

To restate, performance and payment bonds are separate but co-dependent instruments that complement each other in the protections they provide. Both bonds are needed to ensure that the stakeholders are fully protected from the performance and financial risks of prime contractor failure.
In the context of any discussion surrounding prompt payment and adjudication on federal projects, surety bonds can be an invaluable tool for furthering the objectives of both. By leveraging the balance sheets of a licensed surety firm, the Crown and other stakeholders can be assured that sufficient resources will be made available to see a defaulted project through to completion and ensure monies will continue to flow to unpaid subcontractors and suppliers.
III Discussion of Issues for Consideration

SAC has reviewed the Information Package and considered the 24 questions posed regarding prompt payment, adjudication and jurisdictional issues. Given our perspective and role in the construction process, we did not see the necessity of responding to each and every question posed. Rather, we narrowed our focus to those subject areas where we could provide meaningful commentary and constructive suggestions for moving the initiative forward.

We should add however, that our decision to restrict our comments in this manner should not be interpreted as indifference to other vital issues raised by the Review. We simply felt that our comments on these issues would be somewhat redundant following the submissions of other stakeholders and would not add to the overall narrative. We would be happy to elaborate on this during our upcoming consultation session with the Review.

Before providing our responses to the specific issues raised, we offer two observations/recommendations that, based upon our earlier experience, we see as key to the success of the current review process.

Building on the Ontario Model

As a key participant in the consultation process that ultimately led to the creation and passage of the Ontario Act, SAC witnessed first-hand, the extensiveness of that process. During that period, we gained a keen appreciation for the effort and methods of the Expert Review; the breadth of the groups of stakeholders consulted, the range of issues and sub-issues considered, and the level of detail in which those issues were explored.

We fully appreciate the fact that any review of the federal payment regime will necessitate the expansion of the list of key stakeholders and indeed, we support the positive consideration of any constructive input that may be provided by participants in other jurisdictions.

In that regard, we refer to the Ontario Act and reiterate our conviction that this measure is the current state-of-the-art. While not all its provisions and enhancements are applicable in the current context, it provides the Review with a workable and responsive model that can inform the efforts to develop analogous measures at the federal level.

Post-Review Engagement of the Review Consultants

Again, looking to the Ontario Act for guidance, and looking beyond the review process, SAC would urge Public Services and Procurement Canada (PSPC) to extend the engagement of the Review consultants and equip them with a mandate to provide input into the drafting of the resultant legislation.

While this may be getting ahead of the process, we strongly believe that the contributions of Mr. Reynolds and Ms. Vogel during this second phase will be invaluable; not only for the expertise
that they bring to the subject matter, but for their experience in balancing the competing interests of the various stakeholders and their knowledge of the process. Their input was indispensable to the ultimate success of the Ontario initiative and would significantly enhance the chances of establishing a responsible and workable regime at the federal level.

Prompt Payment

SAC has been and continues to be an ardent supporter of a legislated response to the vexing challenge of timeliness and certainty of payment in the construction industry. Again, the surety industry has a vested interest in the creation of an efficient and workable prompt payment regime for federal construction contracts.

Turning to the specific questions posed by the Review in the Information Package, we offer the following commentary.

➢ **Types of Contracts**: SAC would recommend that the prompt payment provisions of any new measure should apply to any and all construction contracts where an improvement is made to any land or premises where the Crown has a proprietary or controlling interest in that land or premises. This would include all such premises be they domiciled in Canada, or on foreign soil (e.g. embassies).

We understand that it has been suggested that the legislation should extend to all construction contracts whether Crown-owned or not, which were financed in whole or in part by federal funding. While we are not opposed to such an approach in principle, we see this as administratively problematic in that it could give rise to the jurisdictional conflicts discussed in the Information Package, particularly if the asset is owned or controlled by another public body.

➢ **Exclusions/Carve-outs**: SAC would not be supportive of a recommendation that allowed for carve-outs for specified construction sectors or project types. We respectfully point out that irrespective of project size or mode of procurement, such exemptions would place subcontractors and suppliers who supplied services or materials to the project at an unfair disadvantage, depriving them of the payment protections offered by the new regime. We believe that any prompt payment measure will only be effective if applied universally.

➢ **Levels within Construction Chain**: SAC believes that the legislation should apply at all levels of the construction pyramid; to every contract or subcontract related to an improvement.

➢ **Clock Starter**: SAC believes that the appropriate clock starter for the payment period should be the delivery of a proper invoice. Also, certification of the work should not be a pre-condition to the delivery of the proper invoice.

➢ **Payment Periods**: Regarding prescribed pay periods, SAC would support a recommendation that would align pay periods with those set out in the Ontario Act; i.e. payment from owner to contractor: 28 days from receipt of proper invoice, and from contractor to subcontractor: 7 days from receipt of payment.
➢ **Freedom to Contract**: By its very nature, the adoption of an effective prompt payment/adjudication regime will necessitate some infringement on the freedom to contract. SAC would support recommendations involving a modest abridgment of freedom to contract that leads directly to a significant improvement in prompt cash flow throughout the construction payment chain, and that does not unduly preclude parties from agreeing and enforcing meaningful commercial terms.

➢ **Failure to Pay**: SAC would support a recommendation which implemented a regime similar to that under the Ontario Act. Failure of a payer to meet the required payment dates would give rise to interest charges, accrued from the date on which payment was due.

Non-payment would also trigger the right of the payee to submit the matter to adjudication with the courts being empowered to enforce the decision of the adjudicator. The right to suspend work should arise only upon the failure of the payor to abide by an adjudicator’s determination that payment is due and payable.

Again, as in the Ontario Act, SAC also supports a recommendation for mandatory labour and material payment bonds to provide security in instances where a payor contractor is unwilling or unable to make the required payments. An eligible payment bond Claimant may claim any amounts due and unpaid and be reimbursed under the terms of the bond.

**Adjudication**

As the experience in other jurisdictions suggests, the effectiveness of any effort to improve the promptness of payment on federal government contracts will be greatly enhanced if supported by a robust adjudication protocol. In that regard, we believe that the model set out in Ontario provides a solid working template for consideration by the Review.

➢ **Adjudication; Who and When**: The adjudication option should be available to any party to a contract or subcontract at all levels of the construction pyramid. The adjudication period should expire when the contract or subcontract is deemed completed.

➢ **Adjudication; Types and Quantum Limits**: Again, we refer to the regime defined in the Ontario Act which identifies seven distinct categories of issues that can be referred to an adjudicator. This list which is set out in Section 13.5 (1) of the Ontario Act focuses almost exclusively on payment and quantum issues, although it does permit the adjudication of “Any other matter that the parties to the adjudication agree to, or that may be prescribed” (Section 13.5 (1) 7).

SAC would support broadening of this list to include targeted areas where a prolonged dispute could seriously impact a contractors’ ability to execute and maintain a schedule on a project, giving rise to types of payment issues articulated in Section 13.5 (1) of the Ontario Act.
One area that might merit such consideration is surety bond disputes. While Section 13.23 of the Ontario Act provides for surety issues to be referred to an adjudicator, the proposed regulations restrict this to disputes under the payment bond only. SAC would support a recommendation to allow core performance bond issues (e.g. the existence of a default under the contract) to be subject to adjudication.

Also, SAC encourages a recommendation to allow consolidation of adjudications as set out in Section 13.8 of the Ontario Act, and further, that adjudication of the surety issues be consolidated with contractual disputes where appropriate.

➢ Adjudication; Enforcement: SAC submits that a determination by an adjudicator should be binding on an interim basis on the parties involved. Once a determination has been made and filed with the Court, the determination should be “enforceable as if it were an order of the court” (Section 13.20 (1); Construction Act of Ontario).

Jurisdictional Operations of the Act

SAC reiterates its support for a recommendation that the prompt payment and adjudication provisions of the new legislation should apply to any and all construction contracts where the Crown has a proprietary or controlling interest in that land or premises that is the subject of the improvement.

For greater clarity, this should include:

➢ Any contract undertaken by a Federal Ministry, Crown agency, or Crown Corporation or by an independent management firm (e.g. Brookfield) on behalf of same.
➢ Any such contract, be it domestic or foreign (e.g. foreign embassies).
➢ Contracts for First Nations bands on Reserve.
➢ Any contract located on land under federal control that may be administered by other authorities such as airports.

SAC would not recommend extending the scope to those contracts that may fall within other provincial or territorial jurisdictions where the Crown has provided some of all of the funding. We suggest that this could result in jurisdictional ambiguity, leading to unnecessary disputes.

More to the point, the objective should be to ensure that the Crown has paramountcy and that any ambiguity around jurisdiction or potential for conflict with provincial/territorial legislation is eliminated.

Surety Bonds on Federal Government Projects

SAC would strongly support a recommendation to include a provision analogous to Section 85 of the Ontario Act which calls for mandatory performance and payment bonds on all federal projects under the legislation. Such provision to include:
➢ Custom drafted template performance and payment bond forms to include standardized responses similar to those brought forward in Ontario. The bonds would be drafted to align with the terms of the new legislation.
➢ Threshold amounts to reflect conditions on federal contracts.
➢ A customized federal claims protocol which may be embedded in the bond or in a separate document.
➢ Provisions for disputes under bonds to be referred to adjudication and binding upon a surety; provided the surety was a party to the adjudication process.

A discussion of the role of surety bonds in facilitating certainty and timeliness of payment on federal construction projects can be found in Section IV.
Labour and Material Payment Bonds and Prompt Payment

The labour and material payment bond is designed to address timeliness of payment and to provide security for payment on construction projects. When used in tandem with a performance bond, they bring stability to the construction process and address the risk of payment defaults and delays due to contractor failure.

A Labour and Material Payment Bond is a project-specific guarantee of payment for subcontractors, suppliers and other claimants on a project. Amounts due and payable to claimants are paid in full under the bond (up to the bond limit). The payment bond is dedicated to the sole purpose of paying claimants. The bond cannot be diverted for other purposes by the company that posted the bond and cannot be used by a project owner to fund completion or pay other costs. Claimants are able to make claims directly with the surety without complex legal filings and without going through intermediaries.

Of all remedies being proposed to address prompt payment issues (e.g. interest charges, suspension of work, holdback), a labour and material payment bond is the only remedy that will put money directly into the hands of unpaid subcontractors and suppliers in real time.

Most importantly we respectfully submit that the unique challenges of the federal construction payment regime make the need for labour and material payment bonds are even more compelling. Here, trades and suppliers do not have the ability to post a lien nor do they enjoy the protection of statutory holdbacks or trusts, again leaving the payment bond as the only responsive solution to payment delays or defaults.

The Ontario Model

Section 85.1 of the Ontario Act includes provisions calling for mandatory performance and labour and material payment bonds on all public work in the province. This was implemented following a recommendation from the Expert Review which recognized the benefits provided by these instruments in furthering the ultimate objective of ensuring promptness and certain of payment; particularly in the not uncommon instance of contractor insolvency. In its report to the Attorney General of Ontario entitled Striking the Balance: Expert Review of Ontario’s Construction Lien Act, the Review wrote:

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.
In support of the provisions for mandatory surety bonds, the Ontario Act includes regulatory requirements for standardized performance bonds drafted to meet the criteria recommended by the Expert Review.

As of this writing, these regulations have not been finalized and the Ontario Ministry of the Attorney General is reviewing the template wordings that have been prepared and submitted by SAC. These proposed template performance and payment bonds are included as Appendices A and B respectively and include a number of features to bring more responsiveness and clarity to the claims process.

- Fixed timelines in both the performance and payment bonds that require a surety to respond to a notice of claim, deliver its response and pay undisputed amounts within set timeframes.
- More clarity around extent of coverage for default-related costs and costs for time extensions that are consistent with the provisions of the Ontario Act.
- The new forms reflect the SAC’s Enhanced Performance Bond and incorporate the concepts of a pre-default and post-default meetings; along with Protective Work (formerly Emergency Work) and Mitigation Work (formerly Remedial Work).
- A section in the Performance Bond that sets out a definition for “Material Change” in an attempt to bring clarity around this often-elusive concept.
- Template schedules attached to both the performance and payment bond that provide guidance to Obligees, Claimants and Sureties. This should bring more uniformity and certainty to the claims process and hopefully reduce delays caused by incomplete notices or responses.
- Protection to 2nd tier Claimants under the payment bond in the same manner as provided under the federal government payment bond.

**The CANCEA Report – The Economic Value of Surety Bonding in Canada**

The compelling case for introducing mandatory bonding into the federal construction payment protocol is strongly supported by the economic benefits that accrue from across-the-board bonding on Crown projects. A thriving economy gives rise to a healthy construction industry in a symbiotic relationship where surety bonds play a key role in bolstering the fortunes of both.

In August 2017, the Canadian Centre for Economic Analysis (CANCEA) conducted a study that examined the impact that surety protection has on key performance indicators such as GDP, job creation and revenue generation/recovery. CANCEA reviewed more than 150,000 bonded projects completed over the last twenty years by more than 10,000 construction firms. They examined the economic ripple effect of more than 3,000 contractor defaults. Their findings, published in a report entitled “The Economic Value of Surety Bonding in Canada” confirm the value proposition of public sector bonding to taxpayers by way of strengthening the broader economy and bringing stability and certainty to the public construction process.
A summary of key findings:

➢ **The Value of a Surety’s Due-Diligence**: A non-bonded construction enterprise is ten times more likely to become insolvent than bonded companies. This serves to illustrate the effectiveness of the surety risk selection process in ensuring that only qualified firms are permitted to undertake public work and the consequent economic benefits that result from this certainty around the construction delivery process.

➢ **Protection of GDP**: Even in the current stable construction environment with historically low interest rates and insolvencies at a 35-year low, surety bonds protect $3.5 million of GDP for every $1 million of premium paid on public infrastructure. In more volatile times, this impact is magnified. In the early 1990’s when the rate of construction insolvencies spiked to 6 times their current levels, surety bonds protected approximately $25 million for every $1 million in premium paid.

➢ **Protection of Jobs/Wages**: Under current economic conditions surety bonds will protect approximately 25 full time jobs or $1.5 million in wages for every $1 million in premium paid. In the tumultuous early 90’s, $1 million in surety premium on public projects protected about 200 full time jobs or $12 million in wages.

➢ **Fiscally Responsible: Revenue Recovery on Premiums Paid**: The CANCEA study has determined that some or all of the premium paid by the government for bonds on public work can be recovered through the tax revenue generated from the timeliness and certainty of the completion of the bonded asset. The analysis demonstrates that even under status quo economic conditions, governments will recover $0.40 in tax revenue for every dollar paid out in premium. In a high-risk economic environment such as seen in the early 90’s, governments show a net gain, recovering $3.00 in tax revenue for every premium dollar spent.

The study also demonstrates that the size and scope of the economic benefits generated are largely dependent upon the extent to which bonds are used to protect construction risk on public infrastructure. The optimum benefits are realized when 100% of public work is protected by both performance and payment bonds.

In addition to the national study, CANCEA also examined the economic impact of surety bonds in various provincial jurisdictions.

A copy of the CANCEA Report is attached as Appendix C.
The Surety Association of Canada believes that the protocol for flow of funds on federal construction contracts, both legislatively and commercially, is in need of changes that address the certainty and timeliness of payment. In that regard our industry pledges to continue working with other key stakeholders and the Review in a flexible manner to arrive at responsive solutions that will benefit all parties.

The surety product has evolved significantly over the last several years and will continue to move forward in response to the needs of our end-users and other industry stakeholders. On the product side, we have developed innovative bond language and modifications to standard documents which address key issues identified by the review. Also, the use of existing surety products in several of the identified subject areas will help to streamline the process and expedite the overall objective of putting money into the hands of those to whom it rightfully belongs.

Again, SAC continues to be a staunch supporter of a legislated solution to the prompt payment dilemma and compliments the Review for taking a broad consultative approach which we believe will go a long way to ensuring multi-stakeholder buy-in.

The Surety Association of Canada and its member organizations extend their appreciation to Mr. Reynolds, Ms. Vogel and the Review for their commitment and efforts. We invite the staff and other stakeholders to contact us for any additional discussion or clarification.
Appendices

Appendix A  The Economic Value of Surety Bonding in Canada – Report prepared by the Canadian Centre for Economic Analysis


Appendix A

PERFORMANCE BOND UNDER SECTION 85.1 OF THE ACT

Construction Act

No. ___________________________ (the “Bond”) Bond Amount $ ___________________________

(name of the contractor)

as a principal, hereinafter [collectively] called the “Contractor”, and

(name of the surety company)

as a surety, and duly authorized to transact the business of Suretyship in the Province of Ontario and hereinafter called the “Surety”, are held and firmly bound unto ___________________________ (name of the owner)

as obligee, hereinafter called the “Owner”, in the amount of $ ___________________________ hereinafter called the “Bond Amount”,

(Bond Amount in figures)

for the payment of which sum the Contractor and the Surety bind themselves, their heirs, executors, administrators, successors and assigns, jointly and severally in accordance with the provisions of this Bond (the “Obligation”).

WHEREAS the Contractor has entered into a written contract with the Owner dated the ______ day of ________ in the year ________ (name of month)

in the year ________ for ___________________________ (title or description of the contract)

(the “Original Contract”) and, for the purpose of specifying the conditions of the Obligation, this contract together with amendments made in accordance with its terms are by reference made part hereof and are hereinafter referred to collectively as the “Contract”;

NOW THEREFORE the condition of this Obligation is such that if the Contractor shall promptly and faithfully perform the Contract then this Obligation shall be null and void; otherwise it shall remain in full force and effect, subject to the following terms and conditions:

1. Written Notice

1.1 The Owner may make a written demand on the Surety in accordance with this Bond, by giving notice to the Surety substantially in the form attached as Schedule A (the “Notice”). Except for a Pre-Notice Meeting in accordance with Section 2.1, the Surety shall have no obligation under this Bond until it receives a Notice.

1.2 Where the Surety includes two or more companies, the Notice may be delivered to the first listed Surety on behalf of all Sureties. The first listed Surety is hereby authorized to respond to the Notice on behalf of the Sureties, and the Owner is not required to give separate Notice to each Surety and is entitled to correspond with the first listed Surety on behalf of all Sureties.

2. Pre-Notice Meeting

2.1 The Owner may, acting reasonably, request a pre-Notice conference by notifying the Surety and the Contractor in writing that it is considering declaring the Contractor to be in default under the Contract (the “Pre-Notice Meeting”). This notice and request for a Pre-Notice Meeting by the Owner does not constitute a Notice under this Bond nor is it a precondition to the giving of a Notice. Upon receipt of such request the Surety shall propose a face-to-face meeting, a telephone conference call or a meeting by any other form of electronic media between the
Contractor, the Owner and the Surety to take place at a time and place mutually convenient for all parties within seven (7) business days (or such longer time as agreed by all parties) after the Surety’s receipt of the Owner’s request for a Pre-Notice Meeting in accordance with this Section. The Owner, the Contractor and the Surety shall make reasonable efforts to arrange and attend the Pre-Notice Meeting.

2.2 The purpose of a Pre-Notice Meeting is to allow the Owner, prior to exercising its other rights under this Bond, to express any concerns about the Contractor’s performance pursuant to the Contract and to allow the Contractor to respond to such concerns. The participation of the parties in one or more Pre-Notice Meetings shall be without prejudice to their respective rights and obligations under the Contract, this Bond or applicable law, and neither the participation by any party in any Pre-Notice Meeting, nor any statement or position taken or information provided by any party during any Pre-Notice Meeting, may be relied on by any other party as a waiver or compromise of the rights or obligations of the Owner, the Surety or the Contractor under the Contract, this Bond or applicable law; including, but not limited to the Owner’s right to declare the Contractor in default under the Contract and give Notice under this Bond.

3. **Surety’s Investigation and Response**

3.1 Upon receipt of a Notice from the Owner, the Surety shall promptly initiate an investigation of the Notice (the “Investigation”), using its best efforts, to determine if the Conditions Precedent have been satisfied and to determine its liability, if any, under the Bond.

3.2 During the five (5) business days following receipt of the Notice, the Surety shall provide the Owner with an acknowledgement, substantially in the form set out as Schedule B (the “Acknowledgement”), identifying the date on which the Notice was received and requesting from the Owner the information and documentation (the “Information”) the Surety requires to continue the Investigation and, if necessary, request access to personnel who are knowledgeable about the circumstances of the Notice and to the Contract work site(s) where the work is being performed. Upon receipt of the Surety’s Acknowledgement, the Owner shall promptly provide the Surety with the requested Information and access to personnel and the work site(s).

3.3 The Surety shall within a reasonable time conduct the Investigation, but in any event no later than thirty (30) business days after receipt by the Surety of a Notice (or such longer period as may be agreed between the Surety and Owner), the Surety shall provide the Owner with its written response to the Notice, substantially in the form set out at Schedule C (the “Surety’s Position”), advising either that:

   a) The Surety accepts liability under the Bond and proposes to satisfy its Obligation by performing one of the options set out in Section 6.1; or
   
   b) The Surety does not accept liability, providing its specific reasons; or
   
   c) The Surety, based on the information and time available and taking into account genuine disputed issues as between the Owner and the Contractor that have not been resolved according to the terms of the Contract, is unable to determine whether or not one or more of the Conditions Precedent has been satisfied and, in the Surety’s sole discretion, the Surety may propose a non-binding process for collaborating with the Owner in the advancement of the completion of the work so as to mitigate the Owner’s cost to complete the Contract.

3.4 The Surety shall also, if requested by the Owner to do so, meet with the Owner to discuss the status of the Investigation. This meeting may take place via a face-to-face meeting, a telephone conference call or a meeting by any other form of electronic media as may be mutually agreed to by the Owner and Surety. In the event that the Surety denies that it has any liability pursuant to this Bond, the Surety shall explain its reasons therefor to the Owner in writing.

4. **Protective Work**

4.1 During the Investigation, if the Owner must take action which is necessary to:

   a) ensure public safety; or
   
   b) preserve or protect the work under the Contract from deterioration or damage,

   (the “Protective Work”)

the Owner may, acting with due diligence and upon giving prior written notice to the Surety, undertake such Protective Work provided that:
i. any such Protective Work which is reasonably required to mitigate the potential costs or damages of the Owner in the circumstances;

ii. Owner shall allow the Surety and/or its consultant(s) access to the Contract work site(s) during the course of the Protective Work for the purpose of monitoring the progress of the Protective Work;

iii. any such Protective Work shall be undertaken without prejudice to the rights of the Owner, the Contractor or the Surety under the Contract, this Bond or applicable law; and

iv. the reasonable costs incurred by the Owner in undertaking such Protective Work (not deducted in the calculation of the Balance of Contract Price in Section 10.1) shall be reimbursed by the Surety, subject to the Surety’s liability being subsequently established. Any payments made by the Surety in respect of the Protective Work shall form part of its Obligation under this Bond and shall reduce the Bond Amount by the amount of any such payments.

4.2 Subject to the foregoing provisions in Section 4.1, the Surety shall not raise the mere fact that the Protective Work proceeded as a defence to any claim by the Owner hereunder.

5. Post-Notice Conference

5.1 Upon receipt of a Notice, the Surety shall propose a face-to-face meeting, telephone conference call or a meeting by any other form of electronic media (a “Post-Notice Conference”) with the Owner at a mutually convenient time and place within seven (7) business days (or such longer period as may be agreed between the Surety and Owner). The Contractor may participate in a Post-Notice Conference at the invitation of the Surety.

5.2 The purpose of the Post-Notice Conference shall be to determine what interim action or work, if any, the Owner believes must be done (the “Mitigation Work”) while the Surety is conducting the Investigation in order to effectively mitigate the costs for which the Owner is seeking recovery under this Bond.

5.3 Provided the Owner provides reasonable evidence to the Surety that Mitigation Work is necessary during the Investigation and that the anticipated costs are reasonable, the Owner may proceed with the Mitigation Work subject to the following conditions:

a) Owner shall pay the reasonable costs of the Mitigation Work;

b) Owner shall keep separate records of all amounts related to the Mitigation Work for which it intends to seek recovery under this Bond, including amounts to be set off against the Balance of Contract Price;

c) Owner shall allow the Surety and/or its consultant(s) access to the Contract work site(s) during the course of the Mitigation Work for the purpose of monitoring the progress of the Mitigation Work; and

d) the Mitigation Work shall be without prejudice to the rights or obligations of the Owner, the Contractor or the Surety under the Contract, this Bond or applicable law.

5.4 If the Surety objects to any part of the Mitigation Work, including without limitation the Owner’s proposed Mitigation Work contractor(s), scope of work, cost or method of work, it shall immediately advise the Owner in writing of its objections and the reasons therefor. The Owner may still proceed with the Mitigation Work and the Surety’s objections will be addressed through negotiation with the Owner or at the trial of any action brought pursuant to this Bond.

5.5 The reasonable costs incurred by the Owner in undertaking the Mitigation Work shall be reimbursed by the Surety, subject to the Surety’s liability being subsequently established. Any payments made by the Surety in respect of the Mitigation Work shall form part of its Obligation under this Bond and shall reduce the Bond Amount by the amount of any such payments.

5.6 Subject to the foregoing provisions in this Section 5, the Surety shall not raise the mere fact that the Mitigation Work proceeded as a defence to any claim by the Owner hereunder.

6. Surety’s Options

6.1 If the Surety has accepted liability pursuant to this Bond, the Surety shall promptly select one of the following options:
a) remedy the default; or

b) complete the Contract in accordance with its terms and conditions; or

c) obtain a bid or bids for submission to the Owner for completing the Contract in accordance with its terms and conditions and, upon determination by the Owner and the Surety of the lowest responsible bidder:

i. arrange for a contract between such bidder and the Owner; and

ii. make available as work progresses (even if there should be a default, or a succession of defaults, under the contract or contracts of completion, arranged under this paragraph) sufficient funds to complete the Contractor’s obligations in accordance with the terms and condition of the Contract including any applicable value-added taxes for which the Surety may be liable, less the Balance of Contract Price; or

d) pay the Owner the lesser of: (1) the Bond Amount, or (2) without duplication, the Owner’s Direct Expenses plus the Owner’s proposed cost of completion of the Contract and any applicable value-added taxes for which the Surety may be liable; less the Balance of Contract Price.

6.2 The option selected by the Surety is referred to in this Bond and the Schedules as the “Surety Option”.

7. **Owner’s Direct Expenses**

7.1 Where the Surety is liable under this Bond, then the Surety shall be liable for the following fees and expenses, without duplication (the “Owner’s Direct Expenses”):

a) reasonable professional fees incurred by the Owner to complete the Contract which are a direct result of the Contractor’s default and which would not have been incurred but for the default of the Contractor;

b) reasonable external legal fees incurred by the Owner to complete the Contract, which are a direct result of the Contractor’s default and which would not have been incurred but for the default of the Contractor, with the exception of legal fees incurred by the Owner in defending a claim or action by the Contractor, or incurred by the Owner in pursuing an action against the Contractor;

c) reasonable, miscellaneous and out-of-pocket expenses incurred by the Owner to complete the Contract which are a direct result of the default of the Contractor and which would not have been incurred but for the default of the Contractor;

d) direct costs incurred as a result of an extension of the duration of the supply of services or materials used or reasonably required for use in the performance of the Contract, which are a direct result of the default of the Contractor and which would not have been incurred but for the default of the Contractor;

e) reasonable costs of the Protective Work; and

f) reasonable costs of the Mitigation Work.

7.2 For the purpose of Section 7.1(d), the “direct costs” incurred are the reasonable costs of performing the Contract during the extended period of time, including costs related to the additional supply of services or materials (including equipment rentals), insurance and surety bond premiums, and costs resulting from seasonal conditions, that, but for the extension, would not have been incurred.

7.3 The Surety shall not be liable under this Bond for:

a) any liquidated damages under the Contract;

b) if no liquidated damages are specified in the Contract, any damages caused by delayed performance or non-performance of the Contractor, except as provided in Section 7.1(d); or

c) any indirect or consequential damages, including but not limited to costs of financing, extended financing, hedging arrangements, loss of or deferral of profit, productivity or opportunity, or head office overhead costs.

7.4 If the Surety is liable under this Bond then, at the Owner’s option, Owner’s Direct Expenses may be deducted by the Owner from the Balance of the Contract Price as defined hereinafter or will be promptly reimbursed by the Surety subject to the other terms, conditions and limitations of this Bond and will reduce the Bond Amount.
8. **Material Changes**

8.1 The Contractor and the Owner may change, amend or modify the Original Contract, without the prior written consent of the Surety, provided such change, amendment or modification does not:

a) materially alter the nature of the Original Contract;

b) individually or in the aggregate, increase the Original Contract price, inclusive of any applicable value-added taxes, by more than twenty-five (25) percent; or

c) extend the scheduled duration for completion of the Original Contract by more than twenty-five (25) percent.

8.2 In the event that the Contractor and the Owner fail to obtain the prior written consent of the Surety, as required under Section 8.1, the Surety reserves any and all of its rights and remedies under this Bond, at common law and in equity.

9. **Conditions Precedent**

9.1 The Surety shall have no liability or Obligations under this Bond unless all of the following conditions precedent (the "Conditions Precedent") have been satisfied:

a) The Contractor is, and is declared by the Owner to be, in default under the Contract;

b) The Owner has given such notice to the Contractor of a default of the Contractor, as may be required under the terms of the Contract;

c) The Owner has performed the Owner's obligations under the Contract; and

d) The Owner has agreed to make available the Balance of Contract Price to the Surety or as directed by the Surety.

10. **Balance of Contract Price**

10.1 The term “Balance of Contract Price” means the total amount payable by the Owner to the Contractor under the Contract, including any adjustments to the price in accordance with the terms and conditions of the Contract, or other amounts to which the Contractor is entitled, reduced by any amounts deducted by the Owner for the Owner's Direct Expenses under Section 7.4 and all valid and proper payments made to or on behalf of the Contractor under the Contract.

10.2 The Balance of Contract Price shall be used by the Owner to first mitigate against any potential loss to the Surety under this Bond and then under the Labour & Material Payment Bond, and the Owner shall assert all rights and remedies available to the Owner to the Balance of Contract Price to mitigate any loss to the Surety.

11. **Limitations on the Surety's Liability**

11.1 Notwithstanding anything to the contrary contained in this Bond or in the Contract, the Surety shall not be liable for a greater sum than the Bond Amount under any circumstances.

11.2 The Surety's responsibility to the Owner under this Bond in respect of any Surety Option or Owner's Direct Expenses shall not be greater than that of the Contractor under the Contract.

12. **Right of Action**

12.1 No right of action shall accrue on this Bond to or for the use of any person or corporation other than the Owner named herein, or the heirs, executors, administrators or successors of the Owner.

13. **Commencement of Action**

13.1 It is a condition of this Bond that any suit or action must be commenced before the expiration of two (2) years from the earlier of: (a) the date of substantial performance of the Contract as defined under the Construction Act (the "Act"); or (b) the date on which a Notice is received by the Surety under this Bond.

13.2 The Owner, the Contractor and the Surety agree that any suit or action is to be made to a court of competent jurisdiction in Ontario and agree to submit to the jurisdiction of such court notwithstanding any terms to the
contrary in the Contract.
14. Common Law Rights
14.1 The rights and obligations of the Owner, the Contractor, and the Surety under this Bond are in addition to their respective rights and obligations at common law and in equity.

15. Notices
15.1 All notices under this Bond shall be delivered by registered mail, facsimile, or electronic mail at the addresses set out below, subject to any change of address in accordance with this Section. Any notice given by facsimile or electronic mail shall be deemed to have been received on the next business day or, if later, on the date actually received if the person to whom the notice was given establishes that he or she did not, acting in good faith, receive the notice until that later date. Any notice given by registered mail shall be deemed to have been received five (5) days after the date on which it was mailed, exclusive of Saturdays and holidays or, if later, on the date actually received if the person to whom the notice was mailed establishes that he or she did not, acting in good faith, receive the notice until that later date. A change of address for the Surety is publicly available on the Financial Services Commission of Ontario website (see: https://www5.fsco.gov.on.ca/Licensing/LicClass/eng/lic_companies_class.aspx). The address for the Owner or the Contractor may be changed by giving notice to the other parties setting out the new address in accordance with this Section.

16. Headings for Reference Only
16.1 The headings and references to them in this Bond are for convenience only, shall not constitute a part of this Bond, and shall not be taken into consideration in the interpretation of this Bond.

IN WITNESS WHEREOF, the Contractor and the Surety have Signed and Sealed this Bond this ______________ day of __________________________ in the year __________.

[Owner proper name]  
By: ____________________________________________  
Name: ___________________________________________  
Title: ___________________________________________  
Address of Witness: ___________________________________________

Witnessed by:  
[Contractor proper name]  
By: ____________________________________________  
Name: ___________________________________________  
Title: ___________________________________________  
Address of Witness: ___________________________________________

[Surety corporate name]  
By: ____________________________________________  
Name: ___________________________________________  
Attorney-in-fact: ___________________________________________  
I have authority to bind the corporation.

By: ____________________________________________  
Name: ___________________________________________

* IF THERE ARE TWO OR MORE COMPANIES IN PARTNERSHIP OR JOINT VENTURE, JOINTLY AND SEVERALLY BOUND, INSERT THE NAME OF EACH PARTNER OR JOINT VENTURE PARTY, AND INSERT THE WORD “COLLECTIVELY” AFTER THE WORD “HEREINAFTER” IN THE FIRST LINE.

** IF THERE ARE TWO OR MORE SURETY COMPANIES, JOINTLY AND SEVERALLY BOUND, INSERT THE “[Name of the surety company], a corporation created and existing under the laws of [Place of incorporation],” FOR EACH SURETY, FOLLOWED BY “each as a surety and each duly authorized to transact the business of Suretyship in the Province of Ontario and hereinafter collectively called the “Surety”.”

*** INSERT THE CROWN, A MUNICIPALITY OR A BROADER PUBLIC SECTOR ORGANIZATION, AS APPLICABLE, OR SUCH OTHER PARTY DEEMED TO BE THE OWNER UNDER THE ACT, AND ENTERING INTO THE PUBLIC CONTRACT WITH THE CONTRACTOR.
SCHEDULE A
Form of Notice

[date]

[Surety name]
[Surety address]
[Surety address]
[Surety’s electronic/email address]

Attention:

Re: .................................................................................................................................
Bond No: ...........................................................................................................................
Contractor: ......................................................................................................................
Owner: ..............................................................................................................................
Contract: ...........................................................................................................................

Dear Sir/Madam,

We hereby notify you that the Contractor is in default of the captioned Contract. In general terms the details of the default are as follows:

[insert description of the Contractor Default]

We have given such notice of this default to the Contractor as is required under the Contract and enclose a copy for your records, and confirm that we have honoured our obligations under the Contract.

We call on you as Surety to honour your obligations under the Bond. We represent and warrant that we have in our possession the original, executed Performance Bond and herein enclose a copy.

Please provide us with potential dates and times to conduct the Post-Notice Conference under Section 5.1 of the Bond.

OPTIONAL: In the circumstances we plan to proceed with work and incur expenses necessary in the circumstances to ensure public safety or to preserve or protect the work under the Contract from deterioration or damage, referred to as the Protective Work under Section 4.1 of the Bond, and will provide you with information and access to discuss and observe this work. In the interim the following is a general description of the anticipated Protective Work:

OPTIONAL: To assist you in your Investigation we enclose with this Notice the documents and information indicated in Appendix A to this Notice. [In addition to Appendix A, the Owner is encouraged to provide any information or material that may expedite the Investigation.]

We look forward to receiving your acknowledgment of this Notice no later than five (5) business days of receipt and your request for any additional documentation or information you require to meet your obligations under the Bond.

Your truly,

[Full corporate title]

By: ..............................................................................................................................

[Name]
[Title]
[Phone]
[Email address]

CC: [Contractor]
Appendix A

The following checked documents and information are enclosed with this Notice:

☐ Copy of full, executed Contract (with letter of award), including approved changes and pending changes relevant to this Notice (along with a copy of the Change Order log)

☐ Copy of original schedule and latest approved schedule for the Contract including actual progress and the order to commence work

☐ Specifications and drawings, including tender and post tender addenda, if any, applicable to the Contractor’s scope of work

☐ Copies of and summary reconciliation of all invoices received under the Contract

☐ Copies of and summary reconciliation of all payments made and holdback of any kind retained under the Contract

☐ Copy of the most recent approved or certified payment application including the applicable Schedule of Values and copies of all unpaid payment applications

☐ A detailed list of all outstanding work in the Contractor’s scope of work (including any deficiencies identified to date)

☐ Any issued or pending backcharges from the Owner to the Contractor

☐ Copy of any notice or correspondence to and from the Contractor related to the Contract and relevant to this Notice

☐ Copy of any claim for lien, legal proceeding or other documents received on the Contract

☐ Copy of any correspondence from subcontractors, suppliers or others indicating claims for unpaid amounts related to the Contract

☐ Copy of the executed and delivered Performance Bond

☐ [Additional documents or information]
SCHEDULE B
Surety’s Acknowledgement of a Notice

[date]

[Name/corporate title of the Owner]
[Address]
[Address]
[E-mail address (if provided in the Notice of Claim)]

Attention:

Re: __________________________________________________________________________

Bond No: ________________________________________________________________________

Contractor: _____________________________________________________________________

Owner: _________________________________________________________________________

Contract: _______________________________________________________________________

Dear Sir/Madam,

On behalf of the Surety defined in the captioned Bond we acknowledge receipt on ________________ of your Notice
(date of receipt)
of your Notice under the captioned Performance Bond.

Please advise as soon as possible which of the following proposed dates and times and logistics are convenient to conduct the Post-Notice Conference:

<table>
<thead>
<tr>
<th>Proposed Date</th>
<th>Proposed Time</th>
<th>Meeting or conference/video conference logistics</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
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</tbody>
</table>

To enable our Investigation of the Notice please provide us promptly with the information and/or documentation identified in Appendix A to this Acknowledgement (and as necessary with access for our staff or appointed representatives to attend the place where the Contract is being performed to inspect the condition and progress of the work), hereinafter the Information.

We will provide you with the Surety’s Position to the Notice no later than thirty (30) business days of our receipt of the Notice based on the information, documentation and access you have provided.

We continue to reserve all of our rights pursuant to the Bond and at law.

Yours truly;

[Corporate name of the Surety]

By: __________________________________________________________________________

[Name]
[Title]
[Phone]
[Email address]

CC: [Contractor]
Appendix A to Surety’s Acknowledgement
Surety’s Request for Information

Please identify and provide contact information for a person who is knowledgeable about the circumstances of the Notice and any Protective Work and Mitigation Work, and who can speak for the Owner.

Please identify and provide contact information for a person with whom arrangements can be made for access to the site where the work under the Contract is being performed.

Please provide copies of the following documentation in digital or hard format:

☐ Copy of full, executed Contract (with letter of award), including approved changes and pending changes relevant to this Notice (along with a copy of the Change Order log)

☐ Copy of original schedule and latest approved schedule for the Contract including actual progress and the order to commence work

☐ Specifications and drawings, including tender and post tender addenda, if any, applicable to the Contractor’s scope of work

☐ Copies of and summary reconciliation of all invoices received under the Contract

☐ Copies of and summary reconciliation of all payments made and holdback of any kind retained under the Contract

☐ Copy of the most recent approved or certified payment application including the applicable Schedule of Values and copies of all unpaid payment applications

☐ A detailed list of all outstanding work in the Contractor’s scope of work (including any deficiencies identified to date)

☐ Any issued or pending backcharges from the Owner to the Contractor

☐ Copy of any notice or correspondence to and from the Contractor related to the Contract and relevant to this Notice

☐ Copy of any Notice of Non-payment issued under the Act

☐ Copy of any Notice of Adjudication issues under the Act

☐ Copy of any claim for lien, legal proceeding or other documents received on the Contract

☐ Copy of any correspondence from subcontractors, suppliers or others indicating claims for unpaid amounts related to the Contract

☐ Copy of the executed and delivered Performance Bond

☐ [Additional documents or information]
SCHEDULE C
Surety's Position

[date]

[Name/corporate title of the Owner]
[Address]
[Address]
[E-mail address (if provided in the Notice of Claim)]
Attention:

Re: __________________________________________________________
Bond No: ______________________________________________________
Contractor: ____________________________________________________
Owner: _________________________________________________________
Contract: _______________________________________________________

Dear Sir/Madam,

Based on the Information you have provided and given the current status of our Investigation, we can advise that [use only one of these Options]:

**OPTION A**

The Surety accepts liability under the Bond. To satisfy our Obligation we propose, under Section 6.1 of the Bond, to:
[Select 1 and delete the others]

a) Promptly remedy the Contractor Default. [Describe proposal and timelines.]
   or
b) Complete the Contract in accordance with its terms but only on the condition that the Owner undertakes to pay or to make available to the Surety the Balance of the Contract Price. [Describe proposal and timelines.]
   or
c) Obtain a bid or bids for submission to the Owner for completing the Contract in accordance with its terms and conditions and, upon determination by the Owner and the Surety of the lowest responsible bidder:
   i. arrange for a contract between such bidder and the Owner; and
   ii. make available as work progresses (even if there should be a default, or a succession of defaults, under the contract or contracts of completion, arranged under this paragraph) sufficient funds to complete the Contractor’s obligations in accordance with the terms and conditions of the Contract including any applicable value-added taxes for which the Surety may be liable, less the Balance of Contract Price. [Describe proposal and timelines.]
   or
d) pay the Owner the lesser of : (1) the Bond Amount, or (2) without duplication, the Owner’s Direct Expenses plus the Owner’s proposed cost of completion of the Contract and any applicable value-added taxes for which the Surety may be liable; less the Balance of Contract Price. [Describe proposal and timelines.]

**OPTION B**

The Surety disputes the Notice. The reasons are as follows:
OPTION C

Based on the Information you have provided and the time available for our Investigation [if applicable] and taking into account genuine disputed issues as between the Owner and the Contractor that have not been resolved according to the terms of the Contract as outlined generally below,

the Surety is unable to determine whether or not one or more of the Conditions Precedent has been satisfied and, therefore, is not able to accept liability under the Bond. In particular we have been unable to determine that

[delete those that do not apply]

a) the Contractor is, in fact, in default of its obligations under the Contract. [Provide further explanation as appropriate.]

   and/or

b) the Owner has performed its obligations under the Contract. [Provide further explanation as appropriate.]

   and/or

c) the Owner has given the notice to the Contractor of a Contractor Default as required under the terms of the Contract. [Provide further explanation as appropriate.]

   and/or

d) the Owner has agreed to apply the Balance of Contract Price as necessary to enable the Surety to exercise the Surety Option under the Bond. [Provide further explanation as appropriate.]

With your agreement and assistance we are willing to extend our Investigation in an effort to resolve outstanding issues. Should this extended Investigation allow us to provide you with an alternative Surety’s Position we will do so promptly.

[If applicable] Under a full reservation of all of our rights under the Bond and the applicable law, and without prejudice to the rights and obligations of the Owner, the Contractor or the Surety under the Bond we propose to proceed as follows:

We continue to reserve all of our rights pursuant to the Bond and at law.

If you have any questions or concerns, please do not hesitate to contact us.

Yours truly;

[Corporate name of the Surety]

By:

[Name]
[Title]
[Phone]
[Email address]

CC: [Contractor]
Appendix B

LABOUR AND MATERIAL PAYMENT BOND UNDER SECTION 85.1 OF THE ACT

Construction Act

No. ________________________________ (the “Bond”) Bond Amount $ ________________________________

______________________________ (name of the contractor*)

as a principal, hereinafter [collectively] called the “Contractor”, and

______________________________ (name of the surety company**)

a corporation created and existing under the laws of ________________________________,
as a surety, and duly authorized to transact the business of Suretyship in the Province of Ontario and hereinafter called
the “Surety”, are held and firmly bound unto ________________________________,
as obligee, hereinafter called the “Owner”, in the amount of $ ________________________________ hereinafter called the “Bond Amount”,

for the payment of which sum the Contractor and the Surety bind themselves, their heirs, executors, administrators, successors and assigns, jointly and severally in accordance with the provisions of this Bond (the “Obligation”).

WHEREAS the Contractor has entered into a written contract with the Owner dated the _________ day of _______________,
in the year _______________ for ________________________________,

(the “Original Contract”) and, for the purpose of specifying the conditions of the Obligation, this contract together with
amendments made in accordance with its terms are by reference made part hereof and are hereinafter referred to
collectively as the “Contract”;

NOW THEREFORE the condition of this Obligation is such that if the Contractor shall make payment to all Claimants as
hereinafter defined in accordance with the terms of their respective subcontracts or sub-subcontracts for all labour and
material used or reasonably required for use in the performance of the Contract then this Obligation shall be null and void,
otherwise it shall remain in full force and effect subject to the following conditions:

1. Every corporate or natural person having a direct contract with the Contractor (hereinafter called a “Subcontractor”) or
with any Subcontractor (hereinafter called a “Sub-subcontractor”) for labour, material or both used or reasonably
required for use in the performance of the Contract is a “Claimant” under this Bond. The entitlement under this Bond of
any Sub-subcontractor, however, is limited to such amounts as the Contractor would have been obligated to pay to the
Sub-subcontractor under the Construction Act (the “Act”). The terms “labour” and “material” include that part of water,
gas, power, light, heat, oil, gasoline, telephone or digital service or rental equipment directly applicable to the Contract
provided that a Claimant who rents equipment to the Contractor or a Subcontractor to be used in the performance of
the Contract under a contract which provides that all or any part of the rent is to be applied towards the purchase price
thereof shall only be a Claimant to the extent of the prevailing industrial rental value of such equipment for the period
during which the equipment was used in the performance of the Contract. The prevailing industrial rental value of
equipment shall be determined, insofar as it is practical to do so, by the prevailing rates in the equipment marketplace
in which the work is taking place.

2. Any Claimant may use the name of the Owner to sue on and enforce this Bond. If a Claimant takes any action or
proceeding under this Bond in the name of the Owner or by joining the Owner as a party to such proceeding then
that Claimant shall indemnify and save harmless the Owner against all costs, charges and expenses or liabilities
incurred thereon and any loss or damage resulting to the Owner by reason thereof.
Every Claimant who has not been paid for labour, material or both used or reasonably required for use in the performance of the Contract, after the date on which payment was due and payable under the terms of its subcontract or sub-subcontract may demand payment under this Bond by giving the Surety, with a copy to the Contractor and the Owner, a written Notice of Claim, substantially in the form prescribed in Schedule A for a Subcontractor or Schedule B for a Sub-subcontractor, hereinafter called the “Notice of Claim”.  

Where the Surety includes two or more companies a Notice of Claim may be delivered to the first listed Surety on behalf of all Sureties. The first listed Surety is hereby authorized to respond to a Notice of Claim on behalf of the Surety, and a Claimant is not required to make separate Notices of Claim to each Surety and is entitled to correspond with the first listed Surety on behalf of all Sureties.

It is a condition precedent to the liability of the Surety under this Bond that a Claimant shall have submitted a Notice of Claim

a) in respect of any amount required to be held back from the Claimant by the Contractor, or by a Subcontractor to the Contractor, under either the terms of the Claimant’s contract with the Contractor or Subcontractor to the Contractor or under the Act, whichever is the greater, hereinafter and for the purposes of this Bond called the “Holdback”, within one hundred and twenty (120) calendar days after the Claimant should have been paid in full under its contract with the Contractor or with a Subcontractor of the Contractor; and

b) in respect of any amount other than for Holdback within one hundred and twenty (120) calendar days after the date on which the Claimant last performed labour or provided materials for which the Notice of Claim was given.

For each Notice of Claim provided by a Subcontractor:

a) No later than five (5) business days after receipt by the Surety of a Notice of Claim the Surety shall acknowledge receipt of the Notice of Claim, substantially in the form prescribed at Schedule C, and request from the Claimant any information and documentation the Surety requires to determine the Claimant’s entitlement under this Bond (hereinafter called the “Information”); and

b) No later than the earlier of: (a) ten (10) business days after receipt by the Surety of the Information, (b) twenty-five (25) business days after receipt by the Surety of a Notice of Claim, or (c) such longer time as agreed by the Surety and the Subcontractor, the Surety shall provide a position in response to the Notice of Claim, substantially in the form prescribed at Schedule D, hereinafter called the “Surety’s Position”.

For each Notice of Claim provided by a Sub-subcontractor:

a) No later than five (5) business days after receipt by the Surety of a Notice of Claim the Surety shall acknowledge receipt of the Notice of Claim, substantially in the form prescribed at Schedule C, and request from the Claimant any information and documentation the Surety requires to determine the Claimant’s entitlement under this Bond (hereinafter called the “Information”); and

b) No later than the earlier of: (a) twenty (20) business days after receipt by the Surety of the Information, (b) forty-five (45) business days after receipt by the Surety of a Notice of Claim, or (c) such longer time as agreed by the Surety and the Sub-subcontractor, the Surety shall provide a position on the Notice of Claim, substantially in the form prescribed at Schedule D, hereinafter called the “Surety’s Position”.

No later than ten (10) business days after the Surety’s Position being provided to any Claimant the Surety shall pay such amounts included in the Notice of Claim that are undisputed by the Surety, except to the extent that the Surety makes an application to the Court with respect to such amounts in accordance with Section 11 below. This payment of undisputed amounts shall be without prejudice to the Surety’s position regarding any disputed portions of a Notice of Claim.

If the subject matter of a notice of adjudication which is delivered in accordance with the Act by the Contractor or a Claimant (the “Notice of Adjudication”) is substantially the same as that contained in a Notice of Claim, the obligations of the Surety under this Bond shall be stayed until the Surety receives a copy of the adjudicator’s determination.

The Surety shall not in any circumstances be liable for a greater sum than the Bond Amount.

The Bond Amount shall be reduced by and to the extent of any payment or payments made under this Bond. If the aggregate of all Notices of Claim exceed, or the aggregate of amounts for which Notices of Claim might be given are believed by the Surety to exceed, the Bond Amount then the Surety may apply to the Court for direction in the interest of all Claimants.

Upon payment to a Claimant under this Bond in respect of any indebtedness of the Contractor or Subcontractor to the Claimant, the Surety shall be subrogated to all of the rights of the Claimant in respect of any and all claims, causes of action and rights to recovery which the Claimant may have against any person, firm or corporation because of or in connection with or arising out of such indebtedness, and the Claimant undertakes to extend to the Surety or the Surety’s designee any warranties and/or guarantees under the Contract in respect of all labour and materials for which the Claimant has been paid.
13. As a condition precedent, any suit or action under this Bond must be commenced within one (1) year after the date on which the Contractor last performed work on the Contract, including work performed under any warranty or guarantees provided in the Contract.

14. The parties to this Bond and a Claimant by providing a Notice of Claim agree that any suit or action is to be made to a court of competent jurisdiction in Ontario and agree to submit to the jurisdiction of such court notwithstanding any terms to the contrary in the Contract.

15. The rights and obligations of the Owner, the Contractor, and the Surety under this Bond are in addition to their respective rights and obligations at common law and in equity.

16. All notices (“Notices”) under this Bond shall be delivered by registered mail, facsimile, or electronic mail at the addresses set out below, subject to any change of address in accordance with this Section. Any Notice given by facsimile or electronic mail shall be deemed to have been received on the next business day or, if later, on the date actually received if the person to whom the Notice was given establishes that he or she did not, acting in good faith, receive the Notice until that later date. Any Notice given by registered mail shall be deemed to have been received five (5) days after the date on which it was mailed, exclusive of Saturdays and holidays or, if later, on the date actually received if the person to whom the Notice was mailed establishes that he or she did not, acting in good faith, receive the Notice until that later date. A change of address for the Surety shall be publicly available on the Financial Services Commission of Ontario website (see: https://www5.fsco.gov.on.ca/Licensing/LicClass/eng/lic_companies_class.aspx). The address for the Owner or the contractor may be changed by giving Notice to the other parties setting out the new address in accordance with this Section.

---

**The Surety:**
[Surety corporate name]
[address]
[fax]
[email]

**The Owner:**
[Owner proper name]
[address]
[fax]
[email]

**The Contractor:**
[Contractor corporate name]
[address]
[fax]
[email]

---

---

Signature

Name of person signing

---

Surety

Signature

Name of person signing

---

* IF THERE ARE TWO OR MORE COMPANIES IN PARTNERSHIP OR JOINT VENTURE, JOINTLY AND SEVERALLY BOUND, INSERT THE NAME OF EACH PARTNER OR JOINT VENTURE PARTY, AND INSERT THE WORD “COLLECTIVELY” AFTER THE WORD “HEREINAFTER” IN THE FIRST LINE.

** IF THERE ARE TWO OR MORE SURETY COMPANIES, JOINTLY AND SEVERALLY BOUND, INSERT THE “[Name of the surety company], a corporation created and existing under the laws of [Place of incorporation],” FOR EACH SURETY, FOLLOWED BY “each as a surety and each duly authorized to transact the business of Suretyship in the Province of Ontario and hereinafter collectively called the “Surety”.”

*** INSERT THE CROWN, A MUNICIPALITY OR A BROADER PUBLIC SECTOR ORGANIZATION, AS APPLICABLE, OR SUCH OTHER PARTY DEEMED TO BE THE OWNER UNDER THE ACT, AND ENTERING INTO THE PUBLIC CONTRACT WITH THE CONTRACTOR.
[Contractor proper name]

By: ____________________________________________

Name: ____________________________________________

Title: _____________________________________________

I have authority to bind the corporation.

[Surety corporate name]

By: ____________________________________________

Name: ____________________________________________

Attorney-in-fact: __________________________________

* IF THERE ARE TWO OR MORE COMPANIES IN PARTNERSHIP OR JOINT VENTURE, JOINTLY AND SEVERALLY BOUND, INSERT THE NAME OF EACH PARTNER OR JOINT VENTURE PARTY, AND INSERT THE WORD “COLLECTIVELY” AFTER THE WORD “HEREINAFTER” IN THE FIRST LINE.

** IF THERE ARE TWO OR MORE SURETY COMPANIES, JOINTLY AND SEVERALLY BOUND, INSERT THE “[Name of the surety company], a corporation created and existing under the laws of [Place of incorporation],” FOR EACH SURETY, FOLLOWED BY “each as a surety and each duly authorized to transact the business of Suretyship in the Province of Ontario and hereinafter collectively called the “Surety”.”

*** INSERT THE CROWN, A MUNICIPALITY OR A BROADER PUBLIC SECTOR ORGANIZATION, AS APPLICABLE, OR SUCH OTHER PARTY DEEMED TO BE THE OWNER UNDER THE ACT, AND ENTERING INTO THE PUBLIC CONTRACT WITH THE CONTRACTOR.
SCHEDULE A
Notice of Claim
[Subcontractor]

[date]

[Surety name]
[Surety address]
[Surety address]
[Surety’s electronic/email address]

Attention:

Re: ..............................................................................................................................
Bond No: ....................................................................................................................
Contractor: ................................................................................................................
Owner: ....................................................................................................................... 
Contract: ....................................................................................................................

Dear Sir/Madam,

We have a subcontract with the Contractor for ........................................................................ (title or description of the Contract)
(our “Subcontract”) related to the Contract between the Owner and the Contractor for
........................................................................................................................................ in ................................................................. (town/city, province).

We have given notice to the Contractor as required under our Subcontract that an amount is due and payable under the
Subcontract and remains unpaid contrary to the terms of the Subcontract.

For Holdback amounts we hereby demand payment of $ __________________ under the captioned Bond.

For amounts other than Holdback we hereby demand payment of $ __________________ under the captioned Bond for all labour
and material used or reasonably required for use in the performance of the Contract.

To assist in your evaluation of this Notice of Claim we invite you to contact our representative as follows:

[Name]
[Title]
[Company address]
[Phone (mobile)]
[Email address]

We also enclose the following documents supporting our Notice of Claim:

[The following is a suggested list of documents to be considered for delivery to the Surety. Please check off the
documents (if any) that you are providing with this Notice of Claim.]

☐ Copy of full, executed Subcontract [or Purchase Order or Collective Bargaining Agreement], including approved
changes and pending changes relevant to this Notice of Claim

☐ Copy of the prime contract between the Contractor and the Owner

☐ Copy of original schedule and latest approved schedule for the Subcontract

☐ Copies of all invoices submitted to the Contractor
Copies of all payments from the Contractor to the Claimant

Summary reconciliation of all invoices issued under the Subcontract

Summary reconciliation of all payments received under the Subcontract

Confirmation from the Owner or Contractor that the Claimant has completed all of its work including rectification of all identified deficiencies and the delivery of all required close-out documents

Copy of any notice or correspondence to and from the Contractor relevant to this Notice of Claim

Confirmation of the last day the Claimant performed work pursuant to the Subcontract including proof thereof

Copy of any claim for lien, legal proceeding or other documents to enforce your entitlement to payment

Copy of the executed Labour and Material Payment Bond under which this Notice of Claim is being made

[additional documents]

We look forward to receiving your acknowledgment of this Notice of Claim within five (5) business days of receipt and your request for any additional documentation or information you require to meet your obligations under the Bond.

Yours truly;

[Full corporate title]

By: ________________________________________________________________

[Name]
[Title]
[Phone]
[Email address]

CC: [Contractor]
SCHEDULE B
Notice of Claim
[Sub-subcontractor]

[date]

[Surety name]
[Surety address]
[Surety address]
[Surety’s electronic/email address]
Attention:

Re: ________________________________________________________________
Bond No: __________________________________________________________________________
Contractor: __________________________________________________________________________
Subcontractor: __________________________________________________________________________
Owner: ________________________________________________________________________________
Contract: _________________________________________________________________________________

Dear Sir/Madam,

We have a written subcontract with ______________________ (the “Subcontractor”) for ______________________ (name of the subcontractor) ______________________ (our “Subcontract”) related to ______________________ (title or description of the Sub-subcontract) between the Owner and the Contractor for ______________________ (title or description of the Contract) in ______________________ (town/city, province).

We have given notice under our Sub-subcontract to the Subcontractor that an amount is due and payable under the Sub-subcontract and remains unpaid contrary to the terms of the Sub-subcontract. A copy of that notice has also been provided to the Contractor.

We hereby demand payment of $ __________________ under the captioned Bond.

To assist in your evaluation of this Notice of Claim we invite you to contact our representative as follows:

[Name]
[Title]
[Company address]
[Phone (mobile)]
[Email address]

We also enclose the following documents supporting our Notice of Claim:

[The following is a suggested list of documents to be considered for delivery to the Surety. Please check off the documents (if any) that you are providing with this Notice of Claim.]

☐ Copy of full, executed Sub-subcontract [or Purchase Order or Collective Bargaining Agreement], including approved changes and pending changes relevant to this Notice of Claim
☐ Copy of the prime contract between the Subcontractor and the Contractor
☐ Copy of original schedule and latest approved schedule for the Sub-subcontract
☐ Copies of all invoices submitted to the Subcontractor
Copies of all payments from the Subcontractor to the Claimant

☐ Summary reconciliation of all invoices issued under the Sub-subcontract

☐ Summary reconciliation of all payments received under the Sub-subcontract

☐ Confirmation from the [Owner, Contractor or Subcontractor] that the Claimant has completed all of its work including rectification of all identified deficiencies and the delivery of all required close-out documents

☐ Copy of any notice or correspondence to and from the Subcontractor or Contractor relevant to this Notice of Claim

☐ Confirmation of the last day the Claimant performed work pursuant to the Sub-subcontract including proof thereof

☐ Copy of any claim for lien, legal proceeding or other documents to enforce your entitlement to payment

☐ Copy of the executed Labour and Material Payment Bond under which this Notice of Claim is being made

☐ [additional documents]

We look forward to receiving your acknowledgment of this Notice of Claim under the Bond and your request for any additional documentation or information you require to meet your obligations under the Bond.

Yours truly;

[Full corporate title]

By: _____________________________________________________________

[Name]
[Title]
[Phone]
[Email address]

CC: [Contractor and Subcontractor]
Acknowledgement of Notice of Claim

[date]

[Name/corporate title of the Subcontractor or Sub-subcontractor]
[Address]
[Address]
[E-mail address (if provided in the Notice of Claim)]

Attention:

Re: 

Bond No: 

Contractor: 

Owner: 

Contract: 

Dear Sir/Madam,

We acknowledge receipt on [date of receipt] of your Notice of Claim dated [date of receipt].

Subject to a full reservation of all of our rights pursuant to the Bond and at law and to assist us in evaluating your Notice of Claim we ask that you provide the following information and/or documentation promptly:

This request for information is not an acknowledgement of the validity of your claim. We look forward to hearing from you.

Yours truly;

[Corporate name of the Surety]

By: 

[Name]
[Title]
[Phone]
[Email address]

CC: [Contractor]
Dear Sir/Madam,

Having reviewed the information and documentation provided to us in support of your Claim, we can advise as follows:

A – Disputed Amount(s)

The following amounts in your Claim are disputed at the present time for the reasons indicated:

With respect to any disputed amounts we invite you to contact us promptly with further information or documentation in support of your Claim.

B – Undisputed Amount(s)

The following amounts in your Claim are not disputed at the present time, however we reserve the right to dispute any amount should an ultimate determination find that amounts included in your Claim were not payable by the Contractor:

We continue to reserve all of our rights pursuant to the Bond and at law.

If you have any questions or concerns, please do not hesitate to contact us.

Yours truly;

[Corporate name of the Surety]

By: ________________________________

[Name]
[Title]
[Phone]
[Email address]

CC: [Contractor]
Appendix C

The Economic Value of Surety Bonding in Canada

A networked agent-based economic assessment

August 2017
About the Canadian Centre for Economic Analysis

The Canadian Centre for Economic Analysis (CANCEA) is a socio-economic research and data firm. CANCEA provides objective, independent and strictly evidence-based analysis dedicated to a comprehensive, collaborative, and quantitative understanding of the short- and long-term risks and returns behind market changes, policy decisions and economic outcomes.

At the centre of CANCEA’s analysis is its Prosperity at Risk® simulation platform which is a networked agent-based, socio-economic computer platform. Using a combination of “big data” technology advancements with data sets that are linked back to the objects that generated them, Prosperity at Risk® simulates the interactions of many millions of virtual agents (individuals, corporations, governments, and non-profit organizations) to provide a deep and realistic understanding of the consequences of market and policy developments for our clients.

About the Report

CANCEA does not accept any research funding or client engagements that require a pre-determined result or policy stance, or otherwise inhibits its independence.

In keeping with CANCEA’s guidelines for funded research, the design and method of research, as well as the content of this study, were determined solely by CANCEA.

This information is not intended as specific investment, accounting, legal or tax advice.
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This research has been prepared by the Canadian Centre for Economic Analysis (CANCEA) and would not have been possible without data received under non-disclosure agreements from Aviva Canada Inc., The Guarantee Company of North America, Intact Insurance, Travelers Insurance Company of Canada, Trisura Guarantee Insurance Company, and Zurich Insurance Company Ltd (Canadian Branch). Collectively, these companies underwrite the majority of surety bonds for the construction market in Canada.

CANCEA is grateful to those executives and experts who shared their expertise and insights via interviews that were conducted as part of the research process for this project. The profile of those organizations interviewed included several of the largest general contractors and subcontractors operating in Canada.
EXECUTIVE SUMMARY

Surety bonds protect against non-performance and non-payment risks associated with the operation and financial standing of construction enterprises and their relationships. In a highly integrated economy, understanding the economic value of surety bonds is no simple task and requires:

- The ability to model the contractual and commercial connections (network structure) that permeate through industries – particularly in the construction sector – to understand the “domino” impacts of financial and operational distress on the broader economy;
- A significant amount of data on the interaction of the surety industry with stakeholders in the construction sector and the broader economy, how stakeholders purchase surety products, construction projects on which surety bonds are used, and the performance of projects with and without surety bonds; and
- Analytical tools designed to quantify the economic impacts that extend beyond aggregate economic activity and include impact on jobs and taxes, and quantify where risks and rewards (intended or otherwise) arise for different stakeholders.

Canada’s construction industry plays a significant role in the its economy, currently contributing approximately 7.6% of its GDP and employment. Nationally, insolvency rates in the construction industry are at a 35 year low, averaging around 3.4 insolvencies per 1,000 firms over the last 10 years. This is almost 6 times lower than in the early 1990s when insolvency rates were averaging 17.7 per 1,000 firms.

The objective of this research project was to conduct a network-based quantitative analysis of the economic value of surety (e.g., performance bonds, payment bonds) for different construction activity (with varying capital types), and industries (i.e., public and private capital projects). The aim is to illuminate surety’s value proposition for policy-makers, the general public, and other key stakeholders.

A performance bond is a special class of contract signed by a contractor (the ‘principal’) and a surety in which the contractor and surety guarantee to a third party (an ‘obligee’, often a project owner) that the contractor will perform a specific construction contract. If the contractor fails to perform, then the project owner may look to the surety under the bond for the costs of completing the contract and additional related costs.

Labour and material payment bonds (or simply, payment bonds), a related class of bonds, are signed by a contractor and its surety and guarantee that the contractor will pay its subcontractors, suppliers and labourers on a specific contract. If the contractor fails to honour its payment obligations then subcontractors, suppliers and labourers may look to the surety for payment under the bond.
Findings at a glance

A majority of public construction work in Canada is carried out under bonded contracts. Using surety industry datasets of over 150,000 surety records and Prosperity at Risk® network modeling of the Canadian economy, we found that:

<table>
<thead>
<tr>
<th>Area</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Reduced risk of insolvency</td>
<td>Non-bonded construction firms are ten-times more likely than bonded companies to suffer insolvency at any given point in time. As a result, firms whose projects are bonded see a general reduction in project delays through a combination of reduced insolvencies and delays associated with insolvencies. The process of underwriting bonds on construction projects appears to contribute to capital and operational adequacy in bonded businesses.</td>
</tr>
<tr>
<td>Protection of economic activity (GDP)</td>
<td>In the current low interest rate economy, insolvencies in the construction industry are at a 35 year low. At these current insolvency rates, surety bonds protect 3.5 times more Canadian economic activity than their premium cost (over $3.5M of GDP protected per $1M premiums paid), which amounts to the equivalent of around 25 full time jobs (or about $6M in wages) protected per $1M of premiums paid.</td>
</tr>
<tr>
<td>Economic risk management benefits</td>
<td>In the 1990s, insolvencies had reached 6 times current levels. At these insolvency rates, surety bonds could protect 25 times more Canadian economic activity than their premium cost (about $25M of GDP per $1M in premiums paid), which amounts to the equivalent of 200 full-time jobs (or about $28M in wages) protected per $1M of premiums paid.</td>
</tr>
<tr>
<td>Fiscally responsible</td>
<td>In the current economic environment, governments could recover $0.4M per $1M of premiums paid on public infrastructure projects. In a higher insolvency environment, such as the early 1990s, this could increase to $3.0M per $1M of premiums paid indicating that governments (in total) become a net beneficiary of surety bonding.</td>
</tr>
<tr>
<td>Extent of industry coverage is important</td>
<td>The size and significance of the surety bond benefits vary depending upon the level of risk in the economy (e.g., increasing interest rates, debt levels, recession, and global shocks). The highest economic and fiscal benefits versus the premium costs required comes from a policy that requires a combination of performance and payment bonds – with 100% of public infrastructure projects bonded.</td>
</tr>
</tbody>
</table>
Canada’s construction industry and surety bonds

A majority of public sector construction work in Canada is carried out under bonded contracts. Based on the surety bond data, it is estimated that companies involved in non-bonded projects have an insolvency rate ten times greater than companies with bonded projects. While insolvency tends to occur more frequently in smaller companies, the insolvency of larger companies appears to be much more disruptive to the economy. Further, an examination of the surety bond data shows significant project delivery overruns associated with companies in financial stress (negative net worth, operating losses).

As highlighted in previous work by CANCEA (2016)\(^1\), there are significant economic consequences to project delays, as infrastructure delivery is about “right size, right place, and right time”. If something stands in the way of delivering or enabling a vital public service at that time, then the economy suffers. As a result, any delays could have a much greater impact than simply the direct financial cost of the delay, and there is potentially significant economic value to preventing construction delays.

Many additional impacts of surety bonding may not be directly observable in the public records of insolvencies or project delays. This includes changes to a firm’s financial planning or intervention of the surety companies. In particular, these additional impacts could include:

- Capital and operational adequacy: The process of underwriting bonds on construction projects involves pre-qualification of bidders by surety companies, which is observed to accompany an improvement in the capitalization and financial management within the construction industry. This benefit reduces the potential and the severity of construction insolvencies;

- Project completion and subcontractor payment: Costs of restructuring, financing and completing failed projects can be significant and can be transferred to a surety under a bond. For example, during the five-year period ending in 2016, the surety industry paid out more than $200 million under bonds in Ontario to fund completion of projects and pay subcontractors, suppliers and labourers\(^2\); and

- Prevention of financial distress: While insolvencies are distinct legal and financial events, operational and financial distress (such as cash flow issues, inability to access needed credit or materials) often occurs prior to the recording of an insolvency. Given their role as guarantors to a process, surety providers will at times support firms through a project or program of work when needed, thereby reducing the incidence of solvency and enabling contractors to complete projects and pay subcontractors, suppliers and labourers.

---

\(^1\) An analysis of 200 P3 infrastructure projects in Canada found that delays in construction could have significant long-term economic impact particularly as the size of the portfolio of delayed projects increases.

\(^2\) Source: MSA Research Inc.
Industry network structure

The construction sector is part of a complex economic system, with a vast array of networked interactions between many diverse “agents”. How things are connected within such a system impacts how actions reverberate through it. Without a good understanding of the key linkages between economic agents (e.g., firms), the measurement of the risks that could occur when an adverse event hits is significantly limited. Metaphorically, a car accident on the highway may only do severe damage to the few cars directly involved, but many more cars get affected due to traffic delays.

In order to capture the full effect of interruptions in the network, it must be modelled for over 3 million companies in 20 industry sectors across Canada. The figure below shows the connections between the largest 1000 companies in Canada. A typical construction company, could have a dozen linkages (e.g., suppliers, subcontractors or customers), each of which may have a dozen of its own, and so on. If such a company were to become insolvent, its suppliers would have an increased chance of insolvency depending upon how dependent it is on the insolvent company. In addition, if a supplier or subcontractor became insolvent, it could introduce delays in other projects of its customers. Surety bonds can help protect against such interruptions in the network.

The types of bonds considered in this analysis are performance bonds (which protect ‘upstream’ so the project is completed) and payment bonds (which protect ‘downstream’ so that suppliers and subcontractors are more likely to remain solvent). Section 2.2 presents more details on the industry network structure.
Given the complexity of modeling the range of networked interactions and impacts required for this research – a networked agent-based model was required. CANCEA’s Prosperity at Risk® (PaR) computer simulation platform is used by several Ontario Ministries and municipalities to perform socio-economic impact analysis, and was used for this project. This had allowed for the detailed simulation of dependencies between:

- 1.2 million Canadian firms across 17 industries, 3 levels of government, 30 commodity types, 25 capital types;
- More than 150,000 surety records (see Appendix A for details);
- Other PaR (Prosperity at Risk®) datasets (e.g., many down to detailed geographic areas) on demographics, income statements and balance sheets, consumption patterns, labour force statistics, and commuting choices, among many others; and
- Public data on insolvency from the Office of the Superintendent of Bankruptcy Canada (OSBC) provide a good sense of the rates of insolvency by province and industry. These data allowed for a detailed comparison between the experience of bonded firms and those in the construction sector overall.

One benefit of using PaR is that multiple scenarios can be run and compared against a baseline. This shows, across thousands of randomized trials, the likely outcomes (plus the not-so-likely ones), and their broad impacts across the entire economy. It also allows for in-depth sensitivity analysis (employed here) to help decision-makers determine “optimal” policies. To investigate this topic in detail, we define eight broad scenarios (two risk scenarios times four bonding scenarios), and investigate over the next 20 years (2018-2037).
Results

Surety bonds can significantly reduce the insolvency rates within the construction sector. In the following figure the two risk scenarios are shown:

- The blue line shows the historical national number of construction firm insolvencies since 1980;
- The dashed green line shows a typical modelled rate of insolvency in the status-quo risk baseline with no surety bonds; and
- The dashed red line shows a typical modelled rate of insolvency in the high-rate risk baseline with no surety bonds.

Companies that exhibit financial distress (negative net worth and operating losses) or become insolvent can lead to project delays:

- Directly if company is the general contractor; or
- Indirectly if a supplier becomes insolvent (possibly through the previous insolvency of a different customer).

By introducing the performance and payment bonds, we see a significant reduction in delays for bonded projects through reduced insolvencies. As a result, many more projects are completed closer to the scheduled time with a large decrease in projects with significant overruns, particularly in the high risk case.
The Economic Value of Surety Bonding in Canada

Status Quo Scenario

With performance and payment bonds, insolvency rates are reduced considerably resulting in significant economic benefits. The figure below shows that in the status quo scenario, if 100% of public infrastructure projects have performance and payment bonds, over $3.5 of GDP is protected per dollar of surety bond premium. Of this benefit, 32% is attributed to the reduction in insolvencies of companies, while the remaining 68% are systemic benefits which arise from having the infrastructure built on time.

Attribution of GDP protected to insolvencies (green) and delays and compounding effects (blue) in the status-quo scenario

High Risk Scenario

In the high risk scenario, as illustrated in the figure below, if 100% of public infrastructure projects have performance and payment bonds, over $25 of GDP is protected per dollar of surety bond premium. Of this benefit, 25% is attributed to the reduction in insolvencies of companies, while 75% are systemic benefits which arise from having the infrastructure built on time, given a larger aggregate portfolio of projects delayed at higher insolvency rates. Similar differences exist for the other outcome metrics such as tax revenue and jobs.
The following table highlights some of the key economic metrics from the analysis. A greater proportion of the benefits in the status quo risk case are driven by direct insolvencies, while the high-risk case benefits result more from the network effects.

<table>
<thead>
<tr>
<th>Risk level</th>
<th>Economic activity, per $1 of premium</th>
<th>% of benefits arising directly from reduced insolvencies</th>
<th>Associated tax revenue, per $1 of premium</th>
</tr>
</thead>
<tbody>
<tr>
<td>Status Quo</td>
<td>$3.5</td>
<td>32%</td>
<td>$0.4</td>
</tr>
<tr>
<td>High Risk</td>
<td>$25</td>
<td>25%</td>
<td>$3.0</td>
</tr>
</tbody>
</table>

These results reflect status quo and high risk scenarios in which 100% of projects are bonded with both performance and payment bonds, and reflect the best economic outcomes. When only a portion of projects are bonded, or when performance bonds are used without payment bonds, the economic outcomes are less than optimal.
The Economic Value of Surety Bonding in Canada

Surface plots of economic activity were generated for every combination of:

- Minimum project size for bonding (x-axis); and
- Percentage of public infrastructure projects bonded (y-axis).

The illustrations below show the expected GDP results of each combination (z-axis using percent of maximum GDP seen in the analysis). As can be seen, the most optimal outcome for the economy as a whole occurs when 100% of public infrastructure projects are bonded.

![Surface plots of economic activity](image)

Bonding of Public Projects: Sensitivity of economic impacts, percentage of high risk scenario maximum

The “% of maximum GDP Impact” is the percent of the maximum GDP results we saw in any scenario. When payment bonds are used together with performance bonds the GDP outcomes increase. In addition, the combination of performance bonds with payment bonds shows significant economic outcomes at the 100% project coverage level without negative marginal returns.
The Economic Value of Surety Bonding in Canada

Conclusion

Credit and operational risk in the construction industry can vary significantly due to the movement of interest rates, recession, supply shocks, debt levels, credit squeezes, and so on. Currently, Canada enjoys historically low rates of construction insolvencies, which has been aided in part by the fact that many public infrastructure projects are surety bonded.

By understanding, quantifying and simulating the way in which the construction industry is connected between suppliers and subcontractors of materials and services and to the broader economy, the value of providing surety guarantees for projects to the socio-economic network of Canada could be measured. We found that the impact of surety – and the additional due diligence its use ensures – is generally positive, regardless of scenario run (assuming some coverage). But a combination of performance and payment bonds – with a focus on infrastructure investments – yields the highest benefits (measured in terms of GDP growth) relative to the costs required.

Further, the process of underwriting bonds on construction projects appears to contribute to capital and operational adequacy in bonded businesses and reduces financial stress and insolvencies.

The benefits in the high insolvency rate scenario (e.g., 1990s levels) were particularly significant and about 7 times greater than in the status quo scenario despite the insolvency rates being only 5 times higher, which is a demonstration of how important network analysis is to such impact analysis. The analysis of the high risk scenario indicated that the benefits include:

- $25 of economic activity protected per $1 of premium paid;
- $3.0 of tax revenue (across all levels of government) protected per $1 of premium paid by all levels of government3; and
- 200 job-years protected per $1M of premiums.

Future research

Further, we have assumed zero administrative cost to construction companies in undertaking the due diligence required by the surety. (This is somewhat similar to capital adequacy requirements in the banking sector, where there are imposed costs to being a bank to ensure that the entire system isn’t “infected” by poor performance.) Such research might suggest that there is a minimum project threshold that should be imposed, to avoid an undue burden on smaller construction companies.

3 This analysis did not investigate any asymmetry in the government sector with respect to the level of governments which may pay the premium and those that receive the benefits. However, see CANCEA’s report, “Ontario Infrastructure Investment: Federal and Provincial Risks and Rewards (Canadian Centre for Economic Analysis, 2016).
1. INTRODUCTION

Understanding the true economic value of surety is no simple task. It requires the ability to model the full network structure of industry – particularly in the construction sector – to understand the broad impacts of an adverse event. It also requires a significant amount of data on surety, such as who purchases it, what projects they work on, and what happens with those projects. Finally, it requires appreciating that economic impacts go beyond GDP; that they also include the likes of jobs and taxes, to understand where risks and rewards (intended or otherwise) may land. As such, as part of its industry advocacy work, the Surety Association of Canada (SAC) approached CANCEA to undertake network modeling, with major members confidentially providing significant amounts of data.

The objective of this independent report is therefore to provide the essential quantitative analysis of the economic value of surety (e.g., performance bonds, labour & material bonds) for different:

- Construction activity (with varying capital types); and
- Industries (i.e., public and private capital projects).

Using the framework established in previous and related work, CANCEA’s unique modeling platform is utilized to demonstrate the value proposition for policy-makers, the general public, and other key stakeholders.

1.1 What is surety?

The enterprise of suretyship, where one person guarantees and answers for the performance of another person’s obligations to a third party, is a form of performance security that has been effective and has persisted through time. Religious and civic laws have regulated the use of surety instruments in commerce and society since ancient times. By 1840, the first successful corporate Surety – Guaranty Society of London – was founded, and in 1935, the US federal Miller Act was established to require use of performance bonds for public works contracts in excess of $100,000 and payment bonds for contracts in excess of $25,000 (Surety Bonds Timeline, 2017). In 1992, The Surety Association of Canada (SAC) was formed by companies seeking advocacy independent of the insurance industry. SAC currently has close to 80 members.\(^4\)

The diagram below illustrates the 3-party relationship that is at the heart of a surety bond. While the surety engages in a process of due diligence in evaluating the credit and performance capacity of a construction enterprise and often forms a business relationship with a contractor, the surety’s primary obligation under a bond is to the obligee (often a project owner).

Among the various types of surety bonds underwritten by the surety industry in Canada, this study focuses on performance bonds and payment bonds used in the construction industry. In the Canadian market, performance bonds typically have a value of 50% of the value of the bonded contract, and are normally issued in tandem with a payment bond also having a value of 50% of the bonded contract.

The proceeds of a payment bond are restricted and can be used only to pay qualifying subcontractors, suppliers and labourers on the bonded contract. Payment of these subcontractors and suppliers can preserve warranty on products, equipment and work, and can ensure continuity of a project team to avoid delay in completion of a defaulted project. A payment bond can also ensure payment of subcontractors and others who would otherwise seek recovery of unpaid accounts by registering a lien on the project or taking other legal action that could disrupt the completion of a project.

The proceeds of a performance bond are available to offset additional costs of completing a bonded contract in the event of the default of the principal contractor and financial protection is provided to a project owner against the risk of contractor default.

1.1.1 ASSURANCE RATHER THAN INSURANCE

While surety has commonalities with insurance and banking, it should not be confused with either. An insurance company typically gathers premiums from a large group of customers at risk of some adverse event occurring (e.g., a car accident). This creates a substantial pool of money that can be used to pay out the costs of adverse events to the small subset of customers to whom they occur, spreading the costs of such risk across all customers. Details gathered on potential customers are generally only used to
The Economic Value of Surety Bonding in Canada

determine the premiums paid, without much regard for the individual characteristics that could determine actual “riskiness” (e.g., while people of a certain subgroup, like teenagers, may be more at risk in general of car accidents, individuals in that group may be excellent drivers).

But the fundamental idea of surety bonds is to avoid adverse events, because a surety company is putting up its own resources to ensure projects get completed. This makes surety bonds more like an extension of credit with the assumption that there will be no losses, such as co-signing a loan. This means that surety is more about assurance than insurance. A surety company assesses a contractor’s experience and track record (e.g., in financial and project management), capacity (both financial and performance), character, and other factors before deciding whether or not to issue a bond. If a particular contractor is deemed too risky, the surety will simply decline to issue bond. Premiums are collected to cover the costs of underwriting expenses, not to pay losses. Taking on an overly risky contractor can be a costly decision.
2. CANADA’S CONSTRUCTION INDUSTRY

Canada’s construction industry\(^5\) plays a significant role in its economy, contributing approximately 7.7% of provincial GDP and employment – a share that has risen over the last 15 years. Over that period, the construction sector in Canada has built up a significant net worth, having grown their aggregate assets (net of liabilities) by nearly 500%.

That said, this growth has come more from a return on capital investment than on operating profit margins.

\(^5\) For the purposes of this analysis construction includes building construction (non-residential – industrial, commercial, and institutional, plus residential); and engineering construction (e.g., transportation, water & wastewater, communications, and other engineering construction). Each has a public and private component.
Further, construction employs a significant fraction of the population geographically distributed across the country.

![Distribution of construction employees across Canada](image)

This distribution stems from the fact that the construction sector is dominated by a large number of small companies, both in terms of the number of companies (over 2/3) and number of employees (over 1/4) and the construction is location dependent.

![Canada's construction industry breakdown by size of firm](image)

### 2.1 Risk in the construction industry

As discussed in previous CANCEA work, it has become fairly common to read a news headline about a major infrastructure project having blown through its budget or construction timelines. Research suggests that
such cost overruns and construction delays “are a global epidemic. They affect projects conducted by national, provincial, and local government, and by private sector organizations; they are a feature of a wide diversity of infrastructure project types; and they have been stubbornly persistent throughout history” (Siemiatycki, 2015). Cost overruns and timing delays are often borne of multiple issues, including poor schedule management, trade strikes, unknown site conditions, harsh environmental conditions, design errors, delivery delays of core elements, scope changes, or inspections by other authorities having jurisdiction (Hanscomb, 2015).

Another driver is contractor insolvency. Currently, as shown in Figure 8, the insolvency rate in the construction industry is at a 35 year low, having fallen consistently over the last twenty years.

Figure 8 Insolvency rates in the Canadian construction sector

![Insolvency rates graph]

Part of that is likely due to the significantly low interest rate environment and the significantly increased amount of liquidity held by Canadian construction companies, who have seen the share of their (aggregate) assets held in cash nearly double from 7% in 2002 to 13% in 2016. However, underlying these trends are risks, for instance, in Ontario, the average collection period in construction has increased by nearly a quarter from 2002 to 2013, from 57.3 to 71.1 days (Reynolds & Vogel, 2016), and thus a larger “pot” of receivables has developed on corporate balance sheets (accounts receivable have grown as a share of total assets over that period by 36% to 19%). There are no readily available data to know whether these financial trends are simply dominated by the larger players\(^6\) in the industry, though a review of the financial statements for a few of the bigger companies would suggest this to be the case.

\(^6\) In the Canadian construction industry, the top 3 companies represent roughly 5% of the revenue generation and the next 10 companies another 5% (Sources: On-site Magazine and Statistics Canada table 187-0001)
Nonetheless, as shown in Figure 9, over the last 5 years the construction sector in Canada has had:

- The highest absolute number of industry insolvencies;
- The 5th largest industry rate per 1,000 companies; and
- An insolvency rate significantly higher for smaller companies.

![Figure 9 Number and rate of insolvencies by industry](image)

The construction industry has been making efforts to reduce their exposure to risk. Part of this has come from the introduction of modern risk management practices that understand the role of the external environment (Baloi & Price, 2003; Fan, Lin, & Sheu, 2008), and that appreciate that different stages of a project face different risks and so should be managed differently (Nielsen, 2006).

### 2.2 Industry network structure

The construction sector is part of an incredibly complex economic system with a vast array of networked interactions between many diverse “agents”. If analysis only relies on averages to estimate causes and effects, then it only looks at the economy from the top down. But we are not averages. We behave differently. We offer different things to different people. And we all face different constraints.

In other words, how things are connected within a system impacts how actions reverberate through it. Without properly understanding the linkages between economic agents (e.g., firms), a full understanding of what happens when an adverse event hits is impossible. Metaphorically, a car accident on the highway may only do severe damage to the few cars directly involved, but many more cars get affected.

As an example, Figure 10 illustrates the ease with which networked companies can indirectly impact other organizations within a network. Trying to model such a network top down would entirely lose these linkages, and hide knock-on effects from an interruption (e.g., from a financial hardship).
Taking this to the fullest, in order to capture the effect of interruptions in the network, it must be modelled for over the 3 million companies in 20 industry sectors across Canada. While difficult to represent graphically, Figure 11 presents a subsection of such a set of networked companies, by showing the linkages (inputs and outputs) between the largest 1,000 companies by industry (the size of marker here represents the number of employees). Figure 12 then shows an individual construction company (brown square), which has (say) a dozen linkages (e.g., suppliers or subcontractors), each of which has (say) a dozen of its own, and so on.

Therefore, if such a company were to become insolvent, suppliers would have an increased chance of insolvency, based on both their own underlying industry rates and a fraction of revenue from the insolvent customer. (Payment bonds remove the impact of fraction of revenue from insolvent customers but do not affect underlying industry rates.) On the flip side, if a supplier or subcontractor became insolvent, it could introduce delays in other projects depending on the fraction of inputs it supplies.

For Canada, the full network includes 1.2 million companies across: 17 industries and 3 levels of government, 30 commodity types, 25 capital types. Most companies have dozens of suppliers and customers.
As such, surety bonds can help protect against interruptions in the network. The types of bonds considered here are performance bonds (which protect ‘upstream’) and payment bonds (which protect ‘downstream’).

Figure 11 Network of 1,000 largest employers by industry

Figure 12 Suppliers or subcontractors of one construction company (left) have their own connections (right)
3. MODELING THE NETWORK

Given the complexity of modeling the range of networked interactions and impacts required for this project, a different approach is required. Improvements in computing power and data have given rise to a new method of socio-economic inquiry.

Agent-based modeling provides a framework for investigating dynamic, networked systems, such as an economy (with specific land-uses), by means of individual agents (e.g., households, businesses, governments), their mutual interaction with each other and their environment. Prosperity at Risk® (PaR) is CANCEA’s “big data” computer simulation platform that incorporates social, health, economic, financial, and infrastructure factors in a networked system. This platform models agents as:

- Individuals, with individual budget constraints (e.g., income, expenses, assets, and liabilities) and production/consumption activities (dependent upon economic input/output tables), thereby recognizing the independence of their motivations and decisions; and as
- Part of a spatial and economic network, thereby recognizing the dependence of their economic decisions upon other agents (via, for example, policy, investment decisions, and land use).

As such, PaR simulates the interactions of more than 40 million agents (people, households, dwellings, companies, government) across Canada that are each encoded with financial, behavioural/motivational rules to guide their decisions, act based on those rules, and be influenced by the actions of others. This is enabled by an enormous “linked-path” database that links hundreds of disparate (and typically cross-sectional) data sources back to the very objects that created them (e.g., individual companies)\(^8\). This allows for the introduction of varied constraints and behaviours over time. The goal of such analysis is to identify the risks and rewards (intended or not) across various stakeholders.

Because PaR features the entirety of the Canadian economy and adopts a micro-simulation approach, all scenarios can be evaluated with precision regarding their impacts on various types of agents or sectors of the economy. This also allows for unforeseen spillover effects (or ‘externalities’) to be accounted for, tracked, and assigned to the correct cause, as agents dynamically adapt to their environments. Small changes in behaviour, spending, or infrastructure lead to local adaptations by agents, which then spread to others, such that all the relevant aspects of the economy reflect all the ‘ripples in the pond’.

In this way, the breadth of effects can be tracked as they unfold geographically and temporally, and an intervention or scenario can be assessed holistically, such that all impacts are taken into consideration. The model is therefore realistically sensitive to the particular type of investment, intervention, or behavioural change with as few \(a \text{ priori}\) assumptions as possible.

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\(^8\) For example, PaR imbues in agents hundreds of data sources (e.g., Statistics Canada tables, many down to detailed geographic areas) on demographics, income statements and balance sheets, consumption patterns, labour force statistics, and commuting choices, among many others.
3.1 Methodology

In addition to the hundreds of data sources that have already been triangulated into agents in PaR, the larger members of the Surety Association of Canada (SAC) provided detailed (proprietary) claims data (collectively called the SAC data for simplicity) that included:

- Surety industry datasets of over 10,000 construction firms
- Over 150,000 bonded construction projects
- Over 3,000 surety claims

Additional details on the SAC data are provided in Appendix A.

Further, public data on insolvency from the Office of the Superintendent of Bankruptcy Canada (OSBC) provide a good sense of the rates of insolvency by province and industry.

These data allowed for a detailed comparison between the experience of bonded firms and those in the general construction sector. Given that the number of companies involved with surety bonds is small relative to the number of construction-related companies overall, these average rates of insolvency provide a good estimate for the rate of insolvency for companies with non-bonded projects.

Given the number and distribution of firms in the construction industry, its dependence on other sectors, and the inherent (and often unforeseen) risks associated with construction, the industry writ large is affected by insolvency at a relatively high rate. Recall from Figure 9 that the industry has the highest absolute number of insolvencies across Canada on an annual basis, and has the 5th highest rate (per 1,000 companies), behind the likes of accommodation and food services, and retail trade.

However, identified by companies with large losses or expenses (greater than 50% of project value), and operating losses, and negative tangible net worth, Figure 13 shows that insolvencies are quite rare within the SAC data.
This suggests that the due diligence that surety enforces, along with the surety itself (in cases requiring it), help to reduce strain in the economic network, although this does not apply to all companies evenly.

Individually, smaller companies are not eligible for larger projects since they do not have the resources available. As the project values requiring surety bonds decreased, a greater number of smaller companies would require their projects to be bonded. It is assumed for this project that any policy which may require surety bonds for small projects will not impose an undue burden on either the smaller companies or the surety. (This assumes no attrition of small companies due to the surety requirement.) As a result, they experience a reduction in insolvency (though stay at a higher rate than larger companies).

3.1.1 SCENARIOS

One benefit of using PaR is that multiple scenarios can be run and compared against a baseline. This shows, across thousands of randomized trials, the likely outcomes (plus the not-so-likely ones), and their broad impacts across the entire economy. It also allows for in-depth sensitivity analysis (employed here) to help decision-makers determine “optimal” policies. For this project, there are some key steps:

- **Define a ‘baseline’ capital investment profile**: construction (public and private) under the status quo
- **Assign companies to build projects**: Under the status quo, companies are randomly assigned to build the projects (accounting for insolvencies)
- **Quantify impacts of Surety bonds**: Vary the number of bonded projects to study the impact through changes in insolvency and project delays
To investigate this topic in detail, we define four sets of projects and the related bonds issued. For varying project sizes, we consider – over the next 20 years (2018-2037) – the fraction of:

1. Public sector infrastructure (e.g., transportation and transit, health, education, water & wastewater) projects with only performance bonds;
2. Public sector infrastructure projects with only performance and payment bonds;
3. All construction (i.e., public plus residential/commercial/industrial construction and private engineering construction) projects with performance bonds; and
4. All construction projects with performance and payment bonds.

For each set, the analysis is performed:

1. Maintaining the current status quo insolvency rates – that is, maintain the average insolvency rate over the last 10 years (see Figure 14); and
2. Using ‘high-risk’ insolvency rates from the late-1980s to mid-1990s.

![Figure 14 Insolvency rates in the Canadian construction sector](image-url)
This leads to a total of eight broad scenarios, and a few key hypotheses:

- Insolvency rates for companies with non-bonded projects differ from those with bonded projects (could be tied to different capital levels as a correlating factor for insolvencies); and
- Projects that experience profit losses or have claims tend to have greater time overruns than those that don’t after accounting for project size (difficult to attribute cause of overruns).

3.1.2 IMPACTS OF BONDS

To summarize some of the data used to help undertake the network modeling done in PaR, there is a noticeable variety in what happens to companies with bonded vs. non-bonded projects across Canada\textsuperscript{9}.

First, as shown in Figure 15, the estimated difference in insolvency rates between bonded and non-bonded companies is almost a factor of ten. That is, non-bonded companies are ten-times more likely to go insolvent at any given point in time. Further, insolvency tends to hit smaller companies far more frequently than their larger counterparts (by orders of magnitude).

Further, as highlighted in previous work by CANCEA (2016)\textsuperscript{10}, there are significant economic consequences to project delays, as infrastructure delivery is about “right size, right place, and right time”. If something

\textsuperscript{9} Limited data due to the relative infrequency of surety claims require that the impact of surety bond be evaluated on a national scale but the results can be applied regionally.

\textsuperscript{10} An analysis of 200 P3 infrastructure projects in Canada found that delays in construction could have significant long-term economic impact particularly as the size of the portfolio of delayed projects increases
stands in the way of delivering or enabling a vital public service at that time, then the economy suffers. Specifically:

Since infrastructure plays a critical role in the efficient operation of the economy, the effect of delays today compound over decades. As a result, the effective present-day value of an infrastructure project is reduced significantly for larger projects and greater delay in implementation.... That is, for smaller projects, the impact of delays even up to a few years has a relatively small effect, but as the projects grow in size, the cost of delays to the Canadian economy quickly become more significant.

The Economic Impact of Canadian P3 Projects (Canadian Centre for Economic Analysis, 2016)

Examining the data, as shown in Figure 17, we see there is a distribution of delays given financial stress (where claims were used as a proxy for financial stress) with different bond types. Non-bonded companies experiencing financial stress would conservatively have projects facing the largest delay distribution. Similarly, the percentage of projects with claims have more delays than those without. This provides:

- A lower estimate of the delays that might be experienced without bonds; and
- The delays that might be avoided for projects that become bonded.

What this shows is that:
• Most projects are completed around the expected timeframe, though less so for those being undertaken by companies with under financial stress (i.e., with claims); and

• While roughly 90% of projects not under financial stress (i.e., without claims) are completed within a 40% delay, a similar proportion of those under financial stress (i.e., with claims) are only completed within a 200% delay.

Note that we are not assigning any specific reason for the change in total time from expectation. Projects may extend beyond their initial target date for a variety of reasons – such as scope changes or unforeseen issues – in addition to financial issues, hence overruns for projects without claims as well.

3.1.3 DISTRIBUTION OF PROJECTS AND BOND PROPERTIES

Project values range from tens of thousands to multi-million dollars with the majority in the $100,000 to $1,000,000 range. Note that project values are “annualized” by dividing total value by expected duration of construction (in years), as this is more reflective of the rate that money enters the economy. The model picks bond properties based on the distributions from the SAC dataset, and premiums may vary depending on bond type (performance vs performance and payment). This gives us a way of randomly selecting realistic bond characteristics in the simulations.
4. RESULTS

Beginning with the baseline, or reference scenario, against which the impacts of surety bonds will be measured.

In Figure 18:

- The dashed green line shows a typical modelled rate of insolvency in the status-quo scenario with no surety bonds; and
- The dashed red line shows a typical modelled rate of insolvency in the high-rate scenario with no surety bonds.

Now, consider a specific example in which all public infrastructure capital projects are eligible for bonds and are bonded, no minimum project threshold is applied, and all bonds can have characteristics randomly drawn from the characteristics seen in the SAC data. For example:

- The percentage of project value covered is randomly drawn from the “Bond Coverage” distribution (usually 50% or 100%); and
- The premium paid relative to the original bond is randomly drawn from the “Premiums” distribution.
As shown in Figure 19, with performance and payment bonds, insolvency rates are reduced considerably (shown is the case when 100% of infrastructure projects have bonds). In the high-insolvency scenario, there is significantly more room for improvement, and as such, we see a significant decline in insolvencies. This results in much larger economic benefits overall.

Further, companies that become insolvent lead to project delays – directly if the company is the general contractor or indirectly if a supplier becomes insolvent, such as through the insolvency of a different customer. (These are modeled based on the distribution of project delays with claims.) By introducing the performance and payment bonds, however, we see a significant reduction in delays – as shown in Figure 20. As a result, many more projects are completed closer to the scheduled time with a large decrease in the number of projects with large overruns, particularly in the high risk case.
The economic contribution due to project delays and compounding effects are significantly greater in the high-insolvency scenario. This is largely driven by the bigger aggregate portfolio of projects delayed at higher insolvency rates. Similar differences exist for the other outcome metrics such as tax revenue and jobs.

Figure 21 GDP impact of all public infrastructure having performance and payment bonds

Table 1 highlights that the high insolvency risk case is disproportionately large. That is, the status quo risk case is driven more by direct insolvencies while the high-risk case more by the network effects.

Table 1 Summary economic impacts of surety (public infrastructure)

<table>
<thead>
<tr>
<th>Risk level</th>
<th>Economic activity, per $1 of premium</th>
<th>% of benefits arising directly from reduced insolvencies</th>
<th>Associated tax revenue, per $1 of premium</th>
</tr>
</thead>
<tbody>
<tr>
<td>Status Quo</td>
<td>$3.5</td>
<td>32%</td>
<td>$0.4</td>
</tr>
<tr>
<td>High risk</td>
<td>$25</td>
<td>25%</td>
<td>$3.0</td>
</tr>
</tbody>
</table>

As a demonstration of the importance of both bond types, Figure 22 and Figure 23 highlight the economic impacts as a percentage of the scenario maximum for public infrastructure only (Figure 22) and for all capital projects (Figure 23) in the high-risk scenario. That is, inclusion of both bond types (performance and payment) for projects leads to better economic outcomes than performance bonds only.
Figure 22 GDP impacts as % of high risk-scenario, public infrastructure only

Figure 23 GDP impacts as % of high risk-scenario, all infrastructure
5. CONCLUSION

Credit and operational risk in the construction industry can vary significantly due to the movement of interest rates, recession, supply shocks, debt levels, credit squeezes, and so on. Currently, Canada enjoys historically low rates of construction insolvencies, which has been aided in part by the fact that a majority of public infrastructure projects are surety bonded.

By understanding, quantifying and simulating the way in which the construction industry is connected between suppliers and subcontractors of materials and services and to the broader economy, the value of providing surety guarantees for projects to the socio-economic network of Canada could be measured. We found that the impact of surety – and the additional due diligence its use ensures – is generally positive, regardless of scenario run (assuming some coverage). But a combination of performance and payment bonds – with a focus on infrastructure investments – yields the highest benefits (measured in terms of GDP growth) relative to the costs required.

The benefits in the high insolvency rate scenario (e.g. 1990’s levels) were particularly significant and about 7 times greater than in the status-quo scenario despite the insolvency rates being only 5 times higher. The analysis indicated that the benefits in the high risk scenario include

- $25 of economic activity recovered per $1 of premium paid;
- $3.0 of tax revenue (for all levels of governments) recovered per $1 of premium paid (by all levels of governments); and
- 200 job-years recovered per $1M of premiums.
A. DATA SET CHARACTERISTICS

The following table outlines the characteristics of the surety dataset used in the analysis.

<table>
<thead>
<tr>
<th>Characteristics</th>
<th>Value</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number of Surety Firms</td>
<td>6</td>
</tr>
<tr>
<td>Year of Earliest Record</td>
<td>1997 (not all firms provided data back to this date)</td>
</tr>
<tr>
<td>Total Number of Project</td>
<td>150,000+</td>
</tr>
<tr>
<td>Total Number of Construction Firm Records</td>
<td>10,000+</td>
</tr>
<tr>
<td>Total Number of Surety Claims</td>
<td>3,000+</td>
</tr>
</tbody>
</table>

Various firms provided different levels of details for construction firms, projects, and claims.
B. DEFINITIONS

Agent: An autonomous individual, firm or organization that responds to cues from other agents and their environment using a set of evidence-based behavioural rules in response to those cues.

Agent-based modeling: A framework for modeling a dynamic system, such as an economy, by means of individual agents, their mutual interaction with each other, and their mutual interaction with their environment(s).

Beneficiary: A person who is entitled, by law or bond language, to claim against a bond even though they may not be specifically named as an obligee.

Bid bond: An instrument which guarantees that a bidder, if awarded the project, will execute a contract for the amount bid and will provide the appropriate performance and payment bonds.

Collateral: Assets (e.g., cash) which is placed with the surety company and reduces the risk that the surety assumes when issuing a bond for high risk principals or unusual obligations.

Commercial surety bonds: Bonds that guarantee the performance of all obligations that do not arise from contracts.

Contract surety bonds: A classification of bond that guarantees the principal’s obligations under a construction contract.

Obligee: The party to whom a service will be provided, and to whom a surety bond guarantees the service provider will perform as expected.

Payment bonds: Also known as “labour and materials bonds”, a classification of bond that guarantees payment by a contractor to subcontractors, labourers, and suppliers involved in contracted project.

Performance bonds: A classification of bond that guarantees performance of the contract. The obligee will be protected from financial loss resulting from the principal’s failure to perform the work according to the contract, plan, and specifications at the agreed price. Most of these contracts are for construction, and the contractor must meet pre-qualification standards before being approved for the bond.

Principal: The bonded party (e.g., contractor) who bears primary responsibility on a surety bond and who has the duty to perform for the obligee’s benefit.

Prosperity at Risk®: An event-driven, agent-based, microsimulation platform that tracks over 50 million agents for all of Canada. It simulates the economy’s processes, including consumption, production, labour force dynamics, as well as evolving financial statements of agents. It conserves the flows of people, money and goods.

Surety (company): The party to a surety bond who answers to the obligee for the principal’s failure to perform as required by the underlying contract, permit, or law.
Surety bond: A written contract in which one party guarantees another party’s performance to a third party. Protects the obligee against losses, up to the limit of the bond, that result from the principal’s failure to perform its obligations or undertaking. Unlike insurance, a loss paid under a surety bond is fully recoverable from the principal.

System effects: Impacts that transcend direct, indirect and induced effects, which are not traditionally measured by economics. These impacts arise from the relationship between every economic agent and the environment in which they operate, as they influence one another’s states and behaviours.

Systemic risk: In the context of this report, “systemic risk” refers to risks that are inherent to an entire market segment as well as the wider macroeconomic framework.
REFERENCES


The Economic Value of Surety Bonding in Canada


TAB 12
April 11, 2018

Singleton Reynolds
150 King St. West
Suite 2512 PO Box 24
Toronto, ON M5H 1J9

Attention: R. Bruce Reynolds/Sharon Vogel

Dear Sir/Madam:

Re: Winnipeg Construction Association Response to your Expert Review of Prompt Payment and Adjudication on Federal Construction Contracts

Further to our meeting on March 8, 2018, this will confirm that we act for the Winnipeg Construction Association ("WCA") and your letter of February 21, 2018 has been referred to us for our response.

We have also reviewed the Canadian Construction Association's ("CCA") March 23, 2018 proposed response to your letter. Generally, we agree with the position being advocated by the CCA.

By way of an opening general comment with respect to payment within the construction industry, we agree that contractual payment and related terms should be fair and reflect the industry consensus expressed in CCDC and CCA standard documents. To this end many, if not most, of the "protections" the proposed new legislation may afford are already available to contractors through provisions found either in the standard form contracts commonly in use or the existing legislation.

It goes without saying that we share the view that all parties in the payment chain should comply with all legal requirements and should honour their contractual obligations on time. With respect to the comments regarding the "spirit of the general principles", it is trite law that contracting parties are responsible for understanding all agreed contractual terms affecting payment. This is a common problem in many construction payment disputes, and it is worth pointing out that new legislation will not, in and of itself, afford a remedy for situations where one or more parties does not understand or has not read the contract documents prior to their execution. While the
imposition of certain statutory payment terms may help to establish a new industry standard, it would be naïve to think that there won't be situations that will be somehow exempt from the new legislation and the freedom to contract will still exist such that all parties involved in the construction industry would be well advised to thoroughly read the contracts they are being asked to sign – and in most if not all cases, this should be done prior to tender/quote submission. That said, we do agree that effective regulation and legislation aligned with industry consensus can correct certain imbalances and preserve an efficient and productive economic and commercial environment for the benefit of the whole construction industry. We also agree that it would make sense to align federal and provincial construction laws, as this may reduce risk for industry, reduce costs associated with training and compliance, and enables competition across Canada on a level playing field.

With respect to your request for our comments and input on your report, we offer the following:

What kinds of contracts should the Federal Payment Legislation apply to?

- Contracts with a Government of Canada department, agency, crown corporation or special agency for "improvements" or "supply of services" related to any land owned or controlled by the Government of Canada, including an improvement to the interest of the Government of Canada in any land (i.e. tenant improvement and/or repair);
- Projects on First Nations lands;
- All levels of contract should be subject to the Payment legislation (i.e., owners, prime contractors, subcontractors, and suppliers);
- As with the current Manitoba Builders' Liens Act, parties should not be able to contract out of payment legislation;
- Industry must be able to easily identify whether their contract or subcontract is subject to provincial payment/lien legislation or federal payment legislation.

Should Payment Legislation exclude certain types of projects or treat them differently (e.g. P3 projects)?

- No, there should be no exclusions, however we agree that all existing projects should be grandfathered. RP 1 & 2 contracts should be grandfathered but only until expiry of the current term – i.e. exercising an option to extend would bring those contracts under the new legislation. We have some difficulty accepting that subcontracts entered into after the new legislation takes effect should be subject to the new legislation, even though the greater project/prime contract may not be. We expect that this would be cumbersome and would not sit well with general contractors responsible for administration of those contracts. In short, we are of the view that if a project is grandfathered then every entity in the payment period for that project should be grandfathered.
What should be the trigger for starting the clock running on a payment period?

- The prime contractor's "proper invoice" should be the trigger.

What is a reasonable payment period? Should these periods differ for parties at different levels of the construction pyramid?

- We accept the payment timelines endorsed by the CCA (i.e. owner should have 14 days to give notice of non-payment/28 days to pay undisputed amounts; Prime contractor should have 7 days from receipt of payment to pay subcontractors and suppliers included in the proper invoice; Subcontractors should have 7 days from receipt of payment to pay their own subcontractors and suppliers).

What, if any, limitations should be placed on the parties to a construction contract in respect of their freedom to contract in relation to invoicing terms?

- Parties should not be restricted in agreeing on invoicing terms, provided notice of said terms was given during the bid/quote phase. Where no payment terms are stated in the contract, a default monthly basis of payment per the legislation would apply.

On what basis can payment be withheld and when? Should there be any limits on a set off (e.g. in relation to other projects)?

- Only disputed amounts should be withheld. Undisputed amounts should be paid in normal timelines;
- If the Government of Canada withholds payment to a contractor, that contractor can withhold payment to its subs and suppliers, subject to notice being given to the effected parties, and the commencement of adjudication with the Government of Canada within 14 days;
- Set-off by the Government of Canada should be restricted to amounts arising under the Contract, and not to other projects between the same parties.

Should payment information be posted? If so, where?

- We agree that the Government of Canada should post public notices on its existing websites of the date on which it received a proper invoice from the general contractor and the date on which payment was made to the general;
- WCA has indicated that they, among other Construction Associations across the Country, would be prepared to offer to communicate payment information to its members at no cost.
What should the consequences be of a failure to pay?

- The unpaid party should have the right to suspend work (without breach) if it has not been paid within 10 days of an adjudicator's determination and should only be required to resume work after payment of the awarded amount, including interest and reasonable costs incurred as a result of the suspension of work.

Who can adjudicate a dispute?

- We agree that, where possible, it would be preferable for adjudicators to have experience in the **local** construction industry, including but not limited to lawyers, engineers, architects, experienced construction and project managers and construction executives.

What is the role of an authorized nominating authority?

- We support the idea of an authorized nominating authority (ANA), administered by a Ministry of the Government of Canada. That said, we agree that the Government ought to defer to a Provincial ANA where it exists.

What types of disputes should be adjudicated? Should there be limits to the quantum of the disputes that are subject to adjudication?

- Adjudication ought to focus on issues around payment, including disputes related to obligations under the contract where allegations of non-performance give rise to set-off or non-payment;

- The opposing views on whether adjudication should be mandatory are difficult to reconcile. The models using a dollar value as a threshold may be arbitrary as the complexity of a dispute is not always proportionate to its monetary value;

- Concerns with respect to security for payment of an adjudicator's determination and security for recovery should a court overturn an adjudicator's decision are legitimate and this merits consideration of having the adjudication undertaken through the JADR process (or perhaps a variant of that) which would utilize judges or other court officials (perhaps retired judges).

What should an adjudication process look like?

- We agree that designing a process proportional to the dispute is a strength of the adjudication compared to the courts, but along with that comes uncertainty. Again, it is very difficult to balance these two competing priorities;

- Timelines to file for an adjudication should be limited and the process should include the right for the respondent to make an initial submission to the adjudicator, which timelines could be set by the adjudicator.

How should the costs of an adjudication process be addressed?

- Costs should be fixed by the adjudicator and should be proportionate to the parties "success" in the adjudication.
How should adjudication decisions be enforced?

- Adjudication decisions should be enforced as an order of the court upon filing of the determination with the court.

Would some combination of federal legislation and amendments to standard form contracts be appropriate?

- The Government of Canada should revise standard form contracts to incorporate the federal legislation to enhance clarity/certainty.

Are there any operational concerns that federal legislation could be different than provincial/territorial legislation (i.e. would there be different rules applicable to a federal construction site as opposed to a provincial/territorial construction site)?

- The Government of Canada should align federal legislation with provincial legislation.

From an operational perspective, should the federal government defer to provincial/territorial prompt payment legislation where it exists?

- Yes.

We agree that the Government of Canada should discontinue its practice of keeping a blanket holdback, with a recommendation that no holdback be retained down the payment chain. In our view, this practice is outdated and draconian. If the Government desires performance security, it should (and does) obtain performance bonds in the ordinary course.

We further agree that, in the absence of a lien remedy, a trust regime should be introduced, applying to funds received by any party who will be required to make payment further down the payment chain, excepting the Government of Canada. This would serve to enhance accountability within the payment chain and increase the overall effectiveness of legislation.

We trust the foregoing is of assistance. Should you have any questions or wish to discuss this matter further, please do not hesitate to contact the writer at your convenience.

Yours truly,

BOOTH DENNEHY LLP

Per

BREN T C.A. KANESKI

BCK/ jb
Appendix 4
Summaries of Written Submissions of Stakeholders
1. **Applicability**

(a) What kinds of projects would federal legislation implementing prompt payment and adjudication apply to?

<table>
<thead>
<tr>
<th>Stakeholder</th>
<th>Comment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Public Services and Procurement Canada (PSPC)</td>
<td>This (and the related questions) is something that PSPC is currently considering. Ideally, the rules on a federal construction site would match the rules of a construction site that may be on private land across the street. Clarity and consistency of rules is critical in the construction industry. Consistency is also advantageous as firms at lower tiers, may not realize that the work they are doing is related to a federal construction contract and thus with different rules than all the other work being done. Although firms in the National Capital Region are used to different rules, most contractors elsewhere in Canada do not see enough federal construction work to make a distinction. This can get more complex as PSPC continues to outsource its property management and project delivery services to the private sector. In these cases, a private sector firm is issuing its own contracts under its own authority to meet its contractual obligations with PSPC. Some of this work will result in construction work on federal property BUT the work is not federal work and the contracts issued are not federal construction contracts. This work should likely follow provincial/territorial legislation.¹</td>
</tr>
</tbody>
</table>
| National Trade Contractors Coalition of Canada (NTCCC) | The principle should be that federal prompt payment legislation and policy should apply to any project constructed with federal monies or constructed for the benefit of the federal government or any of its agencies. Specifically, prompt payment legislation and policy should apply to:  

   a) The federal government and its departments when they contract for construction,  
   b) Agencies of the federal government established by statute or regulation when they contract for construction,  
   c) Entities that receive capital grants from the federal government for the purpose of construction,  
   d) Entities that receive transfer payments from the federal government for the purpose of construction,  
   e) P3 projects, and  
   f) Facility management contractors operating as agents of the federal government or its agencies.² |
| BGIS Global Integrated Solutions Canada LP (BGIS) | BGIS understands that the breadth of the legislation has been questioned in respect of application to Crown corporations, projects receiving federal funding, and private-sector businesses in federally-regulated industries. |

¹ PSPC Submission at p. 18.  
² NTCCC Submission at p. 21.
<table>
<thead>
<tr>
<th>Stakeholder</th>
<th>Comment</th>
</tr>
</thead>
<tbody>
<tr>
<td>In BGIS’ view, these organizations carry out their construction projects subject to, and in accordance with, provincial lien legislation. Their projects have existing legislative protections in respect of the contracting chain and will be subject to forthcoming provincial initiatives to implement prompt payment. The need for federal legislative protection is less, and may infringe on provincial jurisdiction in respect of property and civil rights. BGIS submits that it favors a version of federal prompt payment that is narrowly drafted so as to avoid unnecessary risks of being considered unconstitutional.</td>
<td></td>
</tr>
<tr>
<td>Canadian Bar Association (CBA)</td>
<td>The CBA Section recommends that the scope of jurisdictional operation be modest.</td>
</tr>
<tr>
<td>As a general comment, we are supportive of the concept developed in question #25 whereby federal legislation would defer to provincial prompt payment legislation in jurisdictions where it exists and federal legislation would apply only in jurisdictions where no such legislation is in force. Legislation should apply to all work which forms an improvement to real property. Legislation should not attempt to limit its application based on contract type (e.g. lump sum, milestone, design-build, P3, etc.). So long as the type of work falls within the scope of the prompt payment legislation (i.e. an improvement to real property), there is no need to define or require a particular contract type in that legislation. That being said, any legislation should apply to P3 projects with appropriate modifications to accommodate the structure of P3 projects. Legislation should apply to work where the Owner as defined under the contract is a federal government ministry, special agency or Crown corporation. It should not apply to projects where the Federal Government is only providing funding to the project, but is not otherwise the “owner” of the project. Federal legislation should apply where the government is the beneficiary of the project notwithstanding that the government has delegated administration of the project to a third-party such as under an RP1 or RP2 format. Legislation should not apply to maintenance work which does not extend the life of a project. The government should consider how prompt payment legislation might affect projects on Indigenous lands. From a “construction industry” perspective there is no reason that prompt payment legislation could not</td>
<td></td>
</tr>
</tbody>
</table>

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3 BGIS Submission at pp. 2-3.
4 CBA Submission at p. 12.
What kinds of projects would federal legislation implementing prompt payment and adjudication apply to?

<table>
<thead>
<tr>
<th>Stakeholder</th>
<th>Comment</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>apply, but we suggest that the government consult with Indigenous communities before enacting legislation that might affect projects involving Indigenous peoples or lands. We would be happy to participate in any such consultations in whatever capacity the government may request.⁵</td>
</tr>
<tr>
<td>Canadian Institute of Quantity Surveyors (CIQS)</td>
<td>Projects on federal properties or tied to federal entities.⁶</td>
</tr>
</tbody>
</table>
| Surety Association of Canada (SAC) | SAC reiterates its support for a recommendation that the prompt payment and adjudication provisions of the new legislation should apply to any and all construction contracts where the Crown has a proprietary or controlling interest in that land or premises that is the subject of the improvement. For greater clarity, this should include:  
  - Any contract undertaken by a Federal Ministry, Crown agency, or Crown Corporation or by an independent management firm (e.g. Brookfield) on behalf of same.  
  - Any such contract, be it domestic or foreign (e.g. foreign embassies).  
  - Contracts for First Nations bands on Reserve.  
  - Any contract located on land under federal control that may be administered by other authorities such as airports.  
  SAC would not recommend extending the scope to those contracts that may fall within other provincial or territorial jurisdictions where the Crown has provided some of all of the funding. We suggest that this could result in jurisdictional ambiguity, leading to unnecessary disputes. More to the point, the objective should be to ensure that the Crown has paramountcy and that any ambiguity around jurisdiction or potential for conflict with provincial/territorial legislation is eliminated.⁷ |
| Coalition Contres Les Retards de Paiement dan la Construction | With regard to this section of the consultation, the members of the Coalition would first like to make clear that they do not have enough expertise in constitutional law to provide the consultation group with any concrete answers. We therefore leave it entirely up to the experts in the field.  
However, the Coalition would like to point out that in Quebec, for a number of years now, the construction industry has been working to harmonize the acts and regulations governing municipalities and public bodies. A number of actions have also been taken to develop and implement a standardization of contracts for public bodies. Harmonization of legislation and consistency of documentation promotes a better understanding of the applicable rules by all stakeholders.⁸ |

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⁵ GCAC Submission at p. 3.  
⁶ CIQS Submission at p. 4.  
⁷ SAC Submission at p. 10.  
⁸ Alliance Contres Les Retards de Paiement dans la Construction Submission at p. 5.
### What kinds of projects would federal legislation implementing prompt payment and adjudication apply to?

<table>
<thead>
<tr>
<th>Stakeholder</th>
<th>Comment</th>
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</thead>
<tbody>
<tr>
<td>Industry stakeholders, from the client to the material supplier.</td>
<td>Better understanding means better enforcement of and greater compliance with applicable rules. That is why the Coalition believes it is essential that there be harmonization between federal and provincial legislation. Moreover, the parameters that the Coalition is proposing were developed with a public policy statute in mind so that the new provisions may be binding for all. With this in mind, the Coalition is of the opinion that all new federal measures governing payment delays should be contained in a law. These provisions would thus apply to all federal projects (agencies and departments, including BGIS and companies operating under federal jurisdiction such as Bell Canada). The Coalition hopes that these few points will help the consultation group in their work.</td>
</tr>
<tr>
<td>Winnipeg Construction Association (WCA)</td>
<td>Contracts with a Government of Canada department, agency, Crown corporation or special agency for &quot;improvements&quot; or &quot;supply of services&quot; related to any land owned or controlled by the Government of Canada, including an improvement to the interest of the Government of Canada in any land (i.e. tenant improvement and/or repair); Projects on First Nations lands; All levels of contract should be subject to the Payment legislation (i.e., owners, prime contractors, subcontractors, and suppliers); As with the current Manitoba Builders’ Liens Act, parties should not be able to contract out of payment legislation; Industry must be able to easily identify whether their contract or subcontract is subject to provincial payment/lien legislation or federal payment legislation.</td>
</tr>
</tbody>
</table>

**Stakeholder**

**Comment**

- industry stakeholders, from the client to the material supplier. Better understanding means better enforcement of and greater compliance with applicable rules. That is why the Coalition believes it is essential that there be harmonization between federal and provincial legislation.

Moreover, the parameters that the Coalition is proposing were developed with a public policy statute in mind so that the new provisions may be binding for all. With this in mind, the Coalition is of the opinion that all new federal measures governing payment delays should be contained in a law.

These provisions would thus apply to all federal projects (agencies and departments, including BGIS and companies operating under federal jurisdiction such as Bell Canada).

The Coalition hopes that these few points will help the consultation group in their work.  

### Are there potential conflicts between such federal legislation and provincial legislation?

<table>
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<tr>
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</table>
| Public Services and Procurement Canada | Federal legislation will in some way apply to federal construction work being done across the country. There will therefore be consistency on the Federal construction sites; however, this could mean that there are inconsistencies

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8 Quebec Coalition Submission.
9 WCA Submission at p. 2.
## Are there potential conflicts between such federal legislation and provincial legislation?

<table>
<thead>
<tr>
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<tbody>
<tr>
<td>(PSPC)</td>
<td>with the way things are done in the provinces/territories. Other than Ontario through its recently enacted Bill 142, other provinces/territories do not currently have legislation dealing with prompt payment. There is a high risk that the various legislations that will likely follow will have elements that are unique to a given province/territory meaning that there will be a conflict with Federal legislation somewhere. For example, Bill 142 suggests the subs should be paid no later than seven days after payment being made at the next tier up – Alberta on the other hand, is suggesting 10 days in its contractual structure. Ideally, if each province and territory had a prompt payment legislated requirement, the federal government could contractually require firms working on the federal site to follow the provincial/territorial requirements – thus eliminating any confusion or contradictions with work being done on non-federal land right next door.</td>
</tr>
<tr>
<td>Canadian Construction Association (CCA)</td>
<td>For the transparent and efficient functioning of the construction market in Canada, it is important that industry (general contractors, subcontractors, suppliers) must be able to easily identify whether their contract or subcontract is subject to provincial payment/lien legislation or federal payment legislation. Potential conflicts between other federal legislation (other than payment legislation – i.e. federal insolvency legislation and its impact on deemed trusts under provincial lien legislation) we believe are beyond the scope of this Review.</td>
</tr>
<tr>
<td>National Trade Contractors Coalition of Canada (NTCCC)</td>
<td>To the extent federal legislation differs from provincial legislation, there is the potential for conflict. In this case, NTCCC believes that any construction project initiated by the federal government or its agencies for their own benefit should be indisputably subject to federal legislation. While this is fundamentally a legal question, NTCCC believes that there is no constitutional impediment to the enactment of prompt payment legislation governing federal works. In the case of projects that are funded by the federal government, but where the federal government is not a party to the construction contract, the obligations in federal prompt payment legislation should be contractual terms in the grant or transfer agreement such that the entity receiving the funds is bound to the same prompt payment obligations that are in federal legislation. If provincial or territorial prompt payment legislation establishes higher standards, those higher standards would take precedence over the contractual terms. However, if provincial or territorial prompt payment legislation establishes lower standards, the higher contractual standards would apply.</td>
</tr>
</tbody>
</table>

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10 PSPC Submission at p. 18.
11 CCA Submission pp. 8-9.
12 NTCCC Submission at p. 21.
### Are there potential conflicts between such federal legislation and provincial legislation?

<table>
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<tr>
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</tr>
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<tr>
<td>BGIS Global Integrated Solutions Canada LP (BGIS)</td>
<td>Section 91(1A) of the <em>Constitution Act, 1867</em> gives the federal Crown exclusive legislative authority over the “The Public Debt and Property.” Provincial laws affecting the use of land are inapplicable to land owned by the federal Crown, even where such land is leased and is not being used for a public purpose.1 The Court of Appeal for Ontario has held that any regime that seeks to regulate the use and development of federal property invades Parliament’s exclusive jurisdiction.2 Whether the law is targeted at a lessee or has general application, “this distinction makes no constitutional difference. In both cases, the provincial law would affect and thus cannot apply to federal property. An application of federal prompt payment that focuses on only federal land appears to be well supported by these principles.13</td>
</tr>
<tr>
<td>General Contractors Alliance of Canada (GCAC)</td>
<td>No comment.14</td>
</tr>
<tr>
<td>Canadian Institute of Quantity Surveyors (CIQS)</td>
<td>Yes, there is such potential.15</td>
</tr>
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</table>

(c) If so, in view of the doctrine of paramountcy, is there any constraint on the federal legislation?

### If so, in view of the doctrine of paramountcy, is there any constraint on the federal legislation?

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<tbody>
<tr>
<td>Public Services and Procurement Canada (PSPC)</td>
<td>When there are differences between legislations, issues arise (especially at the lower tiers). For example, let’s assume a supplier is providing stainless steel sinks. The supplier is providing the sinks to a plumbing contractor that will install these sinks into two different construction projects (one a federal construction project and the other with a private owner). The payment (and related) terms come under which legislation (federal or provincial) as the supplier only had a single supply contract with the plumber?16</td>
</tr>
<tr>
<td>Canadian Construction Association (CCA)</td>
<td>No comments.17</td>
</tr>
<tr>
<td>National Trade</td>
<td>NTCCC does not believe that federal legislation would be constrained as a</td>
</tr>
</tbody>
</table>

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13 BGIS Submission at p. 2.
14 GCAC Submission at p. 8.
15 CIQS Submission at p. 4.
16 PSPC Submission at p. 18.
17 CCA Submission at p. 9.
If so, in view of the doctrine of paramountcy, is there any constraint on the federal legislation?

<table>
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<tbody>
<tr>
<td>Contractors Coalition of Canada (NTCCC)</td>
<td>result of any conflict between it and provincial legislation. Ideally, federal legislation should work in harmony with provincial law, but to the extent there may be conflict between the two, federal legislation should prevail. See above comments. 18</td>
</tr>
<tr>
<td>General Contractors Alliance of Canada (GCAC)</td>
<td>No comment. 19</td>
</tr>
<tr>
<td>Canadian Institute of Quantity Surveyors (CIQS)</td>
<td>No comment. 20</td>
</tr>
</tbody>
</table>

(d) Would some combination of federal legislation and amendments to standard form contracts be appropriate?

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<tbody>
<tr>
<td>Public Services and Procurement Canada (PSPC)</td>
<td>A possible federal legislation could be to require construction contracts issued by the Government of Canada to consider prompt payment. If legislation exists in the province/territory of work, the federal legislation could require the federal construction contract incorporate the provincial/territorial processes/timelines. This would mean that federal legislation has been created but puts the implementation down at the contract level which allows for the greatest flexibility to address provincial/territorial differences. Industry may see this as legislation with no real teeth and may not see this as a leadership piece of legislation being requested. 21</td>
</tr>
<tr>
<td>Canadian Construction Association (CCA)</td>
<td>While we would expect legislation to deem contracts amended to comply, revisions to standard contracts should be made by industry and GoC following enactment of federal legislation to promote clear understanding and avoid uncertainty and unnecessary disputes. A federal scheme for prompt payment and adjudication should be contained within the legislation. There is no consensus that an effective outcome would be achieved by placing some elements in legislation and other elements in contracts. 22</td>
</tr>
</tbody>
</table>

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18 NTCCC Submission at p. 22.  
19 GCAC Submission at p. 8.  
20 CIQS Submission at p. 4.  
21 PSPC Submission at p. 18.  
22 CCA Submission at p. 9.
### Would some combination of federal legislation and amendments to standard form contracts be appropriate?

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<tr>
<td>National Trade Contractors Coalition of Canada (NTCCC)</td>
<td>While some amendment to the standard contract forms used by the federal government would likely be necessary, these changes should be in response to the requirements of the legislation proposed. The objectives of prompt payment and adjudication should, in any event, be achieved by legislation on all projects that are within federal jurisdiction. Equivalent contractual solutions should be used only where federal legislative jurisdiction does not apply. 23</td>
</tr>
<tr>
<td>General Contractors Alliance of Canada (GCAC)</td>
<td>Any legislation contemplated would likely only affect contracts where the Federal Government is the Owner and therefore regardless of whether or not legislation is implemented, the Federal Government is in a position to mandate the terms of prime contracts, or to mandate specific policies that would govern prime contracts generally. Accordingly, we feel there is merit in considering implementing prompt payment principles primarily through the terms of the prime contract or government policies. 24</td>
</tr>
<tr>
<td>Canadian Institute of Quantity Surveyors (CIQS)</td>
<td>No comments. 25</td>
</tr>
<tr>
<td>Winnipeg Construction Association (WCA)</td>
<td>The Government of Canada should revise standard form contracts to incorporate the federal legislation to enhance clarity/certainty. 26</td>
</tr>
</tbody>
</table>

(e) Are there any operational concerns that federal legislation could be different than provincial/territorial legislation (i.e. would there be different rules applicable to a federal construction site as opposed to a provincial/territorial construction site)?

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<tbody>
<tr>
<td>Public Services and Procurement Canada (PSPC)</td>
<td>This is in fact the concern of PSPC that federal legislation will not be consistent with provincial/territorial legislation. Added to this, legislation tends to be complex and time consuming to enact and tends to be inflexible once enacted. Once federal legislation is enacted, it will likely be years before it is considered for amendment. It is also worth pointing out that when Federal legislation and Provincial legislation exist on the same issues, confusion does commonly exist. Environmental legislation is a clear example – contractors not used to working on federal sites often carefully meet provincial regulations only to find out that there are different federal requirements. This</td>
</tr>
</tbody>
</table>

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23 NTCCC Submission at p. 22.
24 GCAC Submission at pp. 8-9.
25 CIQS Submission at p. 4.
26 WCA Submission at p. 5.
Are there any operational concerns that federal legislation could be different than provincial/territorial legislation (i.e. would there be different rules applicable to a federal construction site as opposed to a provincial/territorial construction site)?

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<td></td>
<td>confusion often adds costs for the contractor and can negatively impact the overall schedule.(^{27})</td>
</tr>
<tr>
<td>Canadian Construction Association (CCA)</td>
<td>CCA would support efforts by the federal government to align federal legislation with provincial legislation, primarily with the Construction Act in Ontario as the only example at present. We believe alignment on issues like triggers and payment timelines, adjudication process and administration of a roster of adjudicators, and enforcement of determinations, will allow industry to better manage internal processes, training risk management, cash flow and capital planning, and enable competition across Canada on a level playing field. Where there are competing and different schemes across provincial, territorial and federal jurisdictions, contractors doing business in more than one jurisdiction, and small and medium sized enterprises looking to expand their businesses incur additional cost in designing business processes, training, risk management.(^{28})</td>
</tr>
</tbody>
</table>
| National Trade Contractors Coalition of Canada (NTCCC) | Contractors already operate under different standards for:  
- labour relations (Canada Labour Code: Part I)  
- employment standards (e.g., statutory holidays) (Canada Labour Code: Part III),  
- fair wage schedules (former Federal Fair Wages and Hours of Labour Act),  
- occupational health and safety (Canada Labour Code: Part II)  
- employment equity (Federal Contractors Program), and  
- environmental protection (Canada Environmental Protection Act).  
Current federal procurement practices do not defer to the practices of other jurisdictions. Nor do federal security clearance requirements, where they apply, defer to the practices of other jurisdictions.  
All contractors are aware that the rules on federal projects often differ from the rules on other projects. If contractors can adapt to different rules on labour relations, employment standards, fair wage schedules, occupational health and safety, employment equity and environmental protection, they also can adapt, if necessary, to different rules on prompt payment.\(^{29}\) |
| General Contractors Alliance of Canada | Yes, we feel that there is potential for operational conflict between provincial and federal jurisdictions. Examples would include:  
\(^{27}\) PSPC Submission at p. 19.  
\(^{28}\) CCA Submission at p. 9.  
\(^{29}\) NTCCC Submission at pp. 22-23. |
Are there any operational concerns that federal legislation could be different than provincial/territorial legislation (i.e. would there be different rules applicable to a federal construction site as opposed to a provincial/territorial construction site)?

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<tr>
<td>(GCAC)</td>
<td>- Offsite fabrication where a supplier or subcontractor is not tied to the prime contract which references a federal owner.</td>
</tr>
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<td></td>
<td>- Work outside the property line</td>
</tr>
<tr>
<td></td>
<td>- Tenant work within a federal project that is privately owned.</td>
</tr>
<tr>
<td></td>
<td>- Work for private owners situated on federal property such as work for a contractor on a military base</td>
</tr>
<tr>
<td></td>
<td>- Work in federally regulated industries for non-government owners.</td>
</tr>
<tr>
<td>Canadian Institute of Quantity Surveyors (CIQS)</td>
<td>No comments.</td>
</tr>
</tbody>
</table>

From an operational perspective, should the federal government defer to provincial/territorial prompt payment legislation where it exists?

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<tbody>
<tr>
<td>Public Services and Procurement Canada (PSPC)</td>
<td>Not sure if this can be done. Ideal situation would be to have all provincial/territorial/federal legislation be consistent. Perhaps there would be a way to have the federal legislation apply only if there is no provincial/territorial legislation in place?</td>
</tr>
<tr>
<td>Canadian Construction Association (CCA)</td>
<td>CCA would support separate federal payment legislation, even where provincial legislation exists. We believe this would help avoid uncertainty in the market.</td>
</tr>
<tr>
<td>National Trade Contractors Coalition of Canada (NTCCC)</td>
<td>On projects that are covered by federal prompt payment legislation, there should, in general, be no deference to the legislation of any province or territory. On projects which are federally funded, but not federally undertaken, federal prompt payment obligations should be implemented through equivalent contractual requirements. We would propose to use the provincial or territorial adjudication procedures where those apply. In all other respects, on such projects, provincial or territorial legislation would only apply</td>
</tr>
</tbody>
</table>

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30 GCAC Submission at p. 9.
31 CIQS Submission at p. 4.
32 WCA Submission at p. 5.
33 PSPC Submission at p. 19.
34 CCA Submission at p. 10.
From an operational perspective, should the federal government defer to provincial/territorial prompt payment legislation where it exists?

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<tr>
<td>General Contractors Alliance of Canada (GCAC)</td>
<td>Yes. Many of the issues identified above would be addressed if federal prompt payment legislation were to defer to provincial prompt payment legislation. This would also create efficiencies and simplify administration as participants in the construction industry in a province will likely be accustomed to working with the local prompt payment legislation.</td>
</tr>
<tr>
<td>Winnipeg Construction Association (WCA)</td>
<td>Yes.</td>
</tr>
</tbody>
</table>

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35 NTCCC Submission at p. 23.
36 GCAC Submission at p. 9.
37 WCA Submission at p. 5.
2. Promptness of Payment

   (i) Extent of Operability

   A. What kinds of contracts and what level?

<table>
<thead>
<tr>
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</tr>
</thead>
<tbody>
<tr>
<td>Public Services and Procurement Canada (PSPC)</td>
<td>Everyone in the construction pyramid should be entitled to prompt payment.(^{38})</td>
</tr>
<tr>
<td>Defence Construction Canada (DCC)</td>
<td>Prompt payment is not an issue for DCC's payments to the prime contractor. DCC does certification in house and the average time to certify is 11 days. In observing the requirements of the FAA, DCC is required to pay in 30 days, and it nearly always pays on time.(^{39})</td>
</tr>
<tr>
<td>Canadian Bar Association (CBA)</td>
<td>The CBA was unable to provide a unified response to this question. Some members recommended that it apply all the way down the construction pyramids, others questioned the practicality of applying it down the chain since &quot;a GC may subcontract portions of their work under different payment structure[s] such as unit rates or milestones.&quot; The CBA therefore recommended that the proposed legislation balance freedom of contract with statutory intervention and allow parties some flexibility.(^{40})</td>
</tr>
<tr>
<td>Canadian Construction Association (CCA)</td>
<td>The CCA submitted that prompt payment legislation should apply to: contracts with any Government of Canada department, agency, Crown corporation or special agency for any improvement or supply of services (as defined in Ontario's \textit{Construction Act}) but also including RP1 and RP2. In addition, the CCA proposed that legislation should include projects on First Nation lands and that improvements include IT/energy improvement/retrofit work. Contracts should be deemed to apply (i.e. no contracting out).(^{41})</td>
</tr>
<tr>
<td>National Trade Contractors Coalition of Canada (NTCCC)</td>
<td>NTCCC submitted that prompt payment should apply at all levels of the construction pyramid as an interruption to flow of funds at any level forces payment delays on subordinate levels resulting in serious issues.(^{42}) It should apply to all types of contractors at every tier.(^{43})</td>
</tr>
</tbody>
</table>

\(^{38}\) PSPC Submission at p. 12.
\(^{39}\) DCC Meeting Summary.
\(^{40}\) CBA Submission at p. 5.
\(^{41}\) CCA Submission at p. 3.
\(^{42}\) NTCCC Submission at p. 15.
\(^{43}\) NTCCC Submission at p. 13.
### What kinds of contracts and what level?

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</thead>
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<tr>
<td>General Contractors Alliance of Canada (GCAC)</td>
<td>Legislation should apply to all work which forms an improvement to real property. Legislation should not attempt to limit its application based on type of contract, but some types of work need to be considered with modifications.(^\text{44}) It should otherwise apply to all levels of the supply chain.(^\text{45})</td>
</tr>
<tr>
<td>Canadian Institute of Quantity Surveyors (CIQS)</td>
<td>Prompt payment should apply to all forms (bespoke and industry standard) of construction contract used by the Federal Government and all levels of the construction pyramid as in Ontario.(^\text{46})</td>
</tr>
<tr>
<td>Surety Association of Canada (SAC)</td>
<td>SAC would support a recommendation that the new prompt payment protocol apply universally to any and all construction work taking place on any federally owned or controlled facilities; either domestic or foreign.(^\text{47})</td>
</tr>
<tr>
<td>Coalition Contres Les Retards de Paiement dans la Construction</td>
<td>The Coalition’s parameters, which were initially conceived for a provincial legislative framework, require that all contracts, public and private, be subject to the new payment terms. Transposing this rationale to the federal level, the Coalition believes that all federal contracts at all levels should be covered, with exceptions for certain types of work.(^\text{48})</td>
</tr>
<tr>
<td>Winnipeg Construction Association (WCA)</td>
<td>The WCA generally agreed with the CCA position. Added that parties should easily be able to identify whether their contract or subcontract is subject to provincial payment/lien legislation or federal payment legislation.(^\text{49})</td>
</tr>
</tbody>
</table>

(i) What kinds of work? What exclusions should there be?

### What kinds of work? What exclusions should there be?

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</tr>
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<tbody>
<tr>
<td>Public Services and Procurement Canada (PSPC)</td>
<td>Work of all types should be paid promptly as per the agreed terms and conditions of the relevant contract. Prompt payment legislation should only apply to work for federal government departments that typically do construction contracts under their own contracting authority. Consider Schedule 1 departments under the FAA with the inclusion of DCC. Other Crown corporations should be excluded as they tend to follow provincial laws and regulations when doing construction work.(^\text{50}) Certain exceptions should apply including:</td>
</tr>
<tr>
<td></td>
<td>• Fit-up work for leased buildings (where the other floors are</td>
</tr>
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</table>

\(^{44}\) GCAC Submission at p. 3.  
\(^{45}\) GCAC Submission at p. 4.  
\(^{46}\) CIQS Submission at p. 2.  
\(^{47}\) SAC Submission at p. 3.  
\(^{48}\) Quebec Coalition Submission at p. 8.  
\(^{49}\) WCA Submission at p. 2.  
\(^{50}\) PSPC Submission at p. 11.
### What kinds of work? What exclusions should there be?

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</table>
| BGIS Global Integrated Solutions Canada LP (BGIS) | Subject to provincial laws for example);  
  - Work done on PSPC custodian property through a property manager (i.e. RP1 – although new large-scale contracts with a construction component executed after the effective date of new legislation would not be excluded);  

Consideration should be given to the complexity of the contract agreement (i.e. P3) in relation to prompt payment mechanisms, although payment should still be made promptly.\(^{51}\) |

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\(^{51}\) PSPC Submission at pp. 11-12.
<table>
<thead>
<tr>
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<th>Comment</th>
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</thead>
</table>
| **Canadian Bar Association (CBA)** | The CBA submits that federal prompt payment legislation should apply to projects where the federal government is both the owner of the project and the lands on which construction is taking place.\(^{52}\)Further, it should apply to any contract with a Government of Canada department, agency or Crown corporation, for improvements or supply of services, and in relation to any land owned or directly controlled by the Government of Canada, and any improvements to the interest of the Government of Canada in any land.\(^{53}\)

The CBA submitted that federal legislation not apply where the federal government has a limited role or interest in a project, such as where the project is not entirely federally funded, on lands not owned by the federal government. We also recommend that projects should not be under the application of federal legislation solely by virtue of being a federal undertaking (e.g. a pipeline or airport).

In relation to P3s, the CBA sees no reason to exclude them from the proposed legislation.\(^{54}\)

The CBA recommends we exclude international projects.

As an alternative, the CBA suggests that we consider prescribing an express list of the types of projects the legislation applies to (e.g. the Canadian Environmental Assessment Act, 2012 uses a list).\(^{55}\) |

| **Canadian Construction Association (CCA)** | There should be no exclusions or different treatments for certain types of construction work except for as follows:

In relation to the RP1 and RP2 contracts, they should be grandfathered but only until the expiry of the current term. Legislation should apply immediately to all “subcontracts” under the RP 1 and RP 2 contracts.

The accommodation in the Ontario Construction Act for AFP / P3 procurements to the effect that the SPV is deemed to be the contractor, the project agreement is deemed to be the contract, the design-build contractor is deemed to be a subcontractor, and the design-build agreement is deemed to be a subcontract, should be followed.\(^{56}\) |

| **National Trade Contractors Coalition of Canada (NTCCC)** | In considering what types of contract prompt payment should apply to, the NTCCC suggested that prompt payment protection should apply to:

• The federal government and its departments when they contract |
### What kinds of work? What exclusions should there be?

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<tr>
<td><strong>General Contractors Alliance of Canada (GCAC)</strong></td>
<td>GCAC largely supports the Ontario <em>Construction Act</em> model. Legislation should apply to work where the Owner as defined under the contract is a federal government ministry, special agency or Crown corporation. It should not apply to projects where the Federal Government is only providing funding to the project, but is not otherwise the “owner” of the project. The legislation should apply where the government is the beneficiary of the Project notwithstanding it has delegated administration to a third party (i.e. RP1/RP2).</td>
</tr>
</tbody>
</table>

The NTCCC refers to the definition of construction contract under the FAA and specifically *Government Contract Regulations* (SOR87-402) under the FAA. The only proposed difference is that the NTCCC believes there should be no exclusion for “vessels” as under the regulations, as trade contractors located in Canada’s shipbuilding centres frequently engage in this type of work including remodelling or repair.58

There should be no exclusions. When federal funds are used to pay for construction or when the federal government is the beneficiary of a construction project, prompt payment obligations should be automatic.59

- There should be no exclusion for P3 projects. Although certain modifications were allowed for payment tied to milestones in Ontario.60

- The construction / contracting activity of facilities managers should be subject to prompt payment obligations (i.e. RP1/RP2).61

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57 NTCCC Submission at p. 14.  
58 NTCCC Submission at p. 13.  
59 NTCCC Submission at p. 14.  
60 NTCCC Submission at p. 14.  
61 NTCCC Submission at p. 14.
### What kinds of work? What exclusions should there be?

<table>
<thead>
<tr>
<th>Stakeholder</th>
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<tbody>
<tr>
<td></td>
<td>Legislation should not apply to maintenance work which does not extend the life of the project.</td>
</tr>
<tr>
<td></td>
<td>GCAC suggests that further consultation is required in relation to whether legislation applies to projects on Indigenous lands.</td>
</tr>
<tr>
<td></td>
<td>In relation to P3 projects, as in Ontario, the legislation should apply with appropriate modifications to accommodate the structure of P3s. The legislation should permit certification of draws as a precondition to payment to recognize the role of an independent certifier under lending arrangements. Facility maintenance and operations should be excluded.</td>
</tr>
<tr>
<td>Canadian Institute of Quantity Surveyors (CIQS)</td>
<td>No exclusions.</td>
</tr>
<tr>
<td>Coalition Contres Les Retards de Paiement dans la Construction</td>
<td>The legislation should not apply to contracts less than $25,000, contracts for residential dwellings and contracts for maintenance, repair, renovation or modification of a residential dwelling.</td>
</tr>
<tr>
<td>Winnipeg Construction Association (WCA)</td>
<td>There should be no exclusions, but all existing projects should be grandfathered (with RP1/RP2 grandfathered only until the expiry of the current term).</td>
</tr>
</tbody>
</table>

### Trigger for Payment

<table>
<thead>
<tr>
<th>Stakeholder</th>
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<tbody>
<tr>
<td></td>
<td>The trigger must be a combination of two things:</td>
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<tr>
<td></td>
<td>1) The submission of a valid invoice; and</td>
</tr>
<tr>
<td></td>
<td>2) The acceptance of the work (goods/services) identified in the invoice.</td>
</tr>
<tr>
<td></td>
<td>It cannot be the invoice alone as that would allow for false invoices and an expectation of payment. There must be some validation of what is being requested and confirmation that it meets what is specified. PSPC agreed that</td>
</tr>
</tbody>
</table>

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62 GCAC Submission at p. 3.
63 GCAC Submission at p. 3.
64 CIQS Submission at p. 2.
65 Quebec Coalition Submission at p. 8.
66 WCA Submission at p. 2.
### Trigger for Payment

<table>
<thead>
<tr>
<th>Stakeholder</th>
<th>Comment</th>
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<tbody>
<tr>
<td>BGIS Global Integrated Solutions Canada LP (BGIS)</td>
<td>BGIS recommends that a payment obligation, from the top down, arise only after a contractor submits to a federal authority's both a payment certificate and a proper invoice. An owner’s receipt of only one, without the other, may jeopardize standard checks and balances required for good accounting practices and maintaining integrity.(^{68})</td>
</tr>
<tr>
<td>Canadian Bar Association (CBA)</td>
<td>The trigger should be the “proper invoice” however defined. The parties should be left to negotiate invoicing best terms, as is the case in Ontario. In the context of milestone payments, some members encourage requirements for written/email/posted notice of milestone payments by a GC before entering into a construction contract.(^{69})</td>
</tr>
<tr>
<td>Canadian Construction Association (CCA)</td>
<td>The “proper invoice” in accordance with the <em>Construction Act</em> model in Ontario.(^{70})</td>
</tr>
<tr>
<td>National Trade Contractors Coalition of Canada (NTCCC)</td>
<td>The “proper invoice” should be the trigger. The federal government should define a “proper invoice” as the trigger as was done in Ontario. Alternatively, the federal legislation could use the definition in the Government of Canada’s “General Conditions of a Service Contract”, being the TP3 Invoice Submission as the definition for a “proper invoice.”(^{71})</td>
</tr>
<tr>
<td>General Contractors Alliance of Canada (GCAC)</td>
<td>The submission of the “proper invoice” as per the Ontario model. As part of the proper invoice, the legislation should include a provision that permits revision of an invoice with agreement of the parties and maintenance of the original invoice date as it will encourage negotiation of monthly invoicing amounts rather than imposing a formal process on what already is working well.(^{72})</td>
</tr>
<tr>
<td>Canadian Institute of Quantity Surveyors (CIQS)</td>
<td>Where an independent payment certifier is used, a certificate from the payment certifier or in other instances a proper invoice. To avoid challenges around what a “proper” invoice constitutes, the term “proper” should be defined and an industry developed template encouraged.(^{73})</td>
</tr>
<tr>
<td>Surety Association of Canada (SAC)</td>
<td>SAC would support a recommendation that the payment period be initiated by the receipt of a proper invoice.(^{74})</td>
</tr>
</tbody>
</table>

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\(^{67}\) PSPC Submission at p. 12.
\(^{68}\) BGIS Submission at p. 3.
\(^{69}\) CBA Submission at p. 6.
\(^{70}\) CCA Submission at p. 4.
\(^{71}\) NTCCC Submission at p. 15.
\(^{72}\) GCAC Submission at p. 4.
\(^{73}\) CIQS Submission at p. 2.
\(^{74}\) SAC Submission at p. 3.
<table>
<thead>
<tr>
<th>Trigger for Payment</th>
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<tbody>
<tr>
<td><strong>Stakeholder</strong></td>
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<tr>
<td>Canada (SAC)</td>
</tr>
<tr>
<td>Coalition Contres Les Retards de Paiement dan la Construction</td>
</tr>
<tr>
<td>Winnipeg Construction Association (WCA)</td>
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</table>

(c) Reasonable Payment Period

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<tr>
<th>Reasonable Payment Period</th>
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<tbody>
<tr>
<td><strong>Stakeholder</strong></td>
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<tr>
<td>Public Services and Procurement Canada (PSPC)</td>
</tr>
<tr>
<td>Canadian Bar Association (CBA)</td>
</tr>
<tr>
<td>Canadian Construction Association (CCA)</td>
</tr>
<tr>
<td>National Trade Contractors Coalition of Canada (NTCCC)</td>
</tr>
<tr>
<td>General Contractors Alliance of Canada (GCAC)</td>
</tr>
<tr>
<td>Canadian Institute of Quantity Surveyors</td>
</tr>
</tbody>
</table>

75 Quebec Coalition Submission at p. 9.  
76 WCA Submission at p. 3.  
77 CCA Submission at p. 4.  
78 NTCCC Submission at p. 16.  
79 GCAC Submission at p. 4.  
80
### Reasonable Payment Period

<table>
<thead>
<tr>
<th>Stakeholder</th>
<th>Comment</th>
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<tbody>
<tr>
<td>(CIQS)</td>
<td></td>
</tr>
<tr>
<td>Coalition Contres Les Retards de Paiement dan la Construction</td>
<td>The payment cycle in the Quebec Coalition’s submission is based on a monthly schedule.</td>
</tr>
<tr>
<td>Winnipeg Construction Association (WCA)</td>
<td>The Ontario <em>Construction Act</em> scheme as submitted by the CCA.</td>
</tr>
</tbody>
</table>

### Preconditions to Payment

<table>
<thead>
<tr>
<th>Stakeholder</th>
<th>Comment</th>
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</thead>
<tbody>
<tr>
<td>Public Services and Procurement Canada (PSPC)</td>
<td>Freedom of contract permits unique situations and conditions to be considered. However, it needs to be considered in view of elements of the industry that may abuse it. Freedom of contract also allows for flexibility to do milestone payments where applicable.</td>
</tr>
<tr>
<td>National Trade Contractors Coalition of Canada (NTCCC)</td>
<td>As per Ontario’s <em>Construction Act</em>, the parties to a construction contract should be entitled to negotiate the frequency of invoice submissions, including invoicing on a milestone basis. The frequency of invoices should be set out in the tender documents, failing which the default should be that invoices may be submitted once per month.</td>
</tr>
<tr>
<td>Canadian Construction Association (CCA)</td>
<td>There should be no limitations placed on the parties in agreeing on invoicing terms. Where invoicing terms are not agreed in a contract then follow the Ontario Construction Act model and default to a monthly basis. Require a general contractor to notify subcontractors and suppliers during the bidding process if (but only if) the invoicing terms on the prime contract are other than monthly.</td>
</tr>
<tr>
<td>General Contractors Alliance of Canada (GCAC)</td>
<td>Parties should be permitted full freedom of contract in respect of establishing invoicing terms.</td>
</tr>
<tr>
<td>Canadian Institute of</td>
<td>Invoicing terms should be left to the parties, as commercial entities,</td>
</tr>
</tbody>
</table>

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80 CIQS Submission at p. 2.
81 Quebec Coalition Submission at p. 10.
82 WCA Submission at p. 3.
83 PSPC Submission at p. 13.
84 NTCCC Submission at p. 16.
85 CCA Submission at p. 4.
86 CCA Submission at p. 5.
87 GCAC Submission at p. 4.
### Preconditions to Payment

<table>
<thead>
<tr>
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<tbody>
<tr>
<td>Quantity Surveyors (CIQS)</td>
<td>recognizing the reasonable periods stated above.</td>
</tr>
<tr>
<td>Coalition Contres Les Retards de Paiement dan la Construction</td>
<td>The Coalition believes that the federal government’s new measures respecting payment terms should be public policy and, consequently, that all provisions contrary to these measures should be declared null and void and replaced by provisions that comply with these measures.</td>
</tr>
<tr>
<td>Surety Association of Canada (SAC)</td>
<td>SAC would support recommendations involving a modest abridgment of freedom to contract that lead directly to a significant improvement in prompt cash flow throughout the construction payment chain, and that do not unduly preclude parties from agreeing and enforcing meaningful commercial terms.</td>
</tr>
<tr>
<td>Winnipeg Construction Association (WCA)</td>
<td>Parties should not be restricted in agreeing on invoicing terms, provided notice of said terms was given during the bid/quote phase. Where no payment terms are stated in the contract, a default monthly basis of payment per the legislation should apply.</td>
</tr>
</tbody>
</table>

### Certification

<table>
<thead>
<tr>
<th>Stakeholder</th>
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<tbody>
<tr>
<td>Public Services and Procurement Canada (PSPC)</td>
<td>If payment is based on the submission of a valid invoice and some time to certify the goods/services are as per the drawings/specifications there should be no need for a pre-condition to the submission of an invoice.</td>
</tr>
<tr>
<td>Defence Construction Canada (DCC)</td>
<td>Certification is done in house within 11 days typically and would fit within prompt payment timelines.</td>
</tr>
</tbody>
</table>
| National Trade Contractors Coalition of Canada (NTCCC) | Certification should not be permitted as a precondition to the delivery of a proper invoice. Certification can be built into the timeline for prompt payment (i.e. the 28 days).  
  NTCCC recognizes certification may be appropriate in the context of P3 projects and may require modification to the general provisions. |
| Canadian Bar Association                             | The CBA supports the Ontario approach of prohibiting certification as a                                                                 |

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88 CIQS Submission at p. 2.  
89 Quebec Coalition Submission at p. 11.  
90 SAC Submission at p. 3.  
91 WCA Submission at p. 3.  
92 PSPC Submission at p. 13.  
93 DCC Meeting Summary.  
94 NTCCC Submission at p. 16.
### Certification

<table>
<thead>
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<tbody>
<tr>
<td>(CBA)</td>
<td>precondition to a proper invoice because it would remove an impediment to payment flowing down the chain.(^95) The exception being P3 projects, where the certification is necessary due to the financing model.</td>
</tr>
<tr>
<td>Canadian Construction Association (CCA)</td>
<td>The solution in the Ontario <em>Construction Act</em> permitting certification as a pre-condition to delivery of a proper invoice on public-private partnership projects is a reasonable exception. Otherwise, this should not be permitted.(^96)</td>
</tr>
<tr>
<td>General Contractors Alliance of Canada (GCAC)</td>
<td>Certification as a pre-condition should not be permitted except in the case of P3 projects as the process is subject to abuse and is used as a means to delay payments. The GCAC would be similarly concerned with the introduction of other preconditions on the same grounds.(^97)</td>
</tr>
<tr>
<td>Canadian Institute of Quantity Surveyors (CIQS)</td>
<td>Certification should be permitted as a pre-condition where the payment certifier is independent. In all other instances, the term “proper” invoice as a pre-condition requires definition (terminology) and clarity (template).(^98)</td>
</tr>
<tr>
<td>Surety Association of Canada (SAC)</td>
<td>SAC recommended that certification of the work not be a pre-condition to the delivery of a proper invoice.</td>
</tr>
<tr>
<td>Coalition Contres Les Retards de Paiement dan la Construction</td>
<td>The Coalition believes that no certification should be required before an invoice is issued. Any stipulation to that effect in any contract should be considered null and void.(^99)</td>
</tr>
</tbody>
</table>

(f) Basis for Withholding Payment

### Basis for Withholding Payment

<table>
<thead>
<tr>
<th>Stakeholder</th>
<th>Comment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Public Services and Procurement Canada (PSPC)</td>
<td>Payment must be withheld if the goods/services do not meet the requirements of the drawings and/or specifications.(^100)</td>
</tr>
</tbody>
</table>

\(^{95}\) CBA Submission at p. 6.  
\(^{96}\) CCA Submission at p. 5.  
\(^{97}\) GCAC Submission at p. 4.  
\(^{98}\) CIQS Submission at p. 3.  
\(^{99}\) Quebec Coalition Submission at p. 11.  
\(^{100}\) PSPC Submission at p. 13.
## Basis for Withholding Payment

<table>
<thead>
<tr>
<th>Stakeholder</th>
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</tr>
</thead>
<tbody>
<tr>
<td>Canadian Construction Association (CCA)</td>
<td>Follow the Ontario <em>Construction Act</em> scheme:</td>
</tr>
<tr>
<td></td>
<td>• Undisputed amounts should be paid in normal timelines;</td>
</tr>
<tr>
<td></td>
<td>• The Government of Canada can withhold a disputed amount if it disputes entitlement of an amount from a contractor’s invoice;</td>
</tr>
<tr>
<td></td>
<td>• The general contractor can withhold payment to a subcontractor or supplier in circumstances where the Government of Canada has not paid all or part of the contractors invoice – subject to proper notice of non-payment to the subcontractor/supplier and an undertaking to commence adjudication; and</td>
</tr>
<tr>
<td></td>
<td>• Contractor can only withhold payment to a subcontractor or supplier of disputed amounts (regardless of whether the contractor has been paid) if the contractor disputes the subcontractor’s or supplier’s entitlement. Undisputed amounts must be paid.(^\text{101})</td>
</tr>
</tbody>
</table>

CCA would support a recommendation that the Government of Canada discontinue its practice of keeping a blanket holdback of 10% (or 5% with bonds), with a recommendation therefore that no holdback be retained down the payment chain. Where holdback to manage performance risk (e.g. warranty, manuals, as-builds, commissioning, etc.) is negotiated by the Government of Canada in a prime contract (or by a general contractor on a subcontract or supply contract) these amounts should be clearly itemized and dealt with in the normal course of the invoicing and payment process.\(^\text{102}\)

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\(^{101}\) CCA Submission at p. 5.  
\(^{102}\) CCA Submission at p. 10.
## Basis for Withholding Payment

<table>
<thead>
<tr>
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<tbody>
<tr>
<td>National Trade Contractors Coalition of Canada (NTCCC)</td>
<td>In relation to when monies are withheld, the NTC identified three relevant circumstances including withholding payment due to: a) invoice deficiencies; b) performance deficiencies; and c) payment interruption. The NTCCC viewed circumstances of an invoice deficiency as a legitimate reason to withhold payment and submitted that the payer should be required to advise the contractor immediately that the proper invoice is deficient and indicate additional information required to rectify the deficiency. In relation to performance deficiencies, the NTCCC viewed this as a legitimate basis for withholding payment if the contractor has not met the basis for payment in the contract. As a caveat, the NTCCC submitted that contractors need to be protected from gratuitous assertions of deficient performance as a pretext for delayed payment. The NTCCC endorsed the Ontario Construction Act process for disputing payment (i.e. written notice of intention to withhold that identifies deficiencies and limits the amount of payment withheld to an amount that is proportionate to the magnitude of the deficiency). This notice should be given within 14 days of the proper invoice. In cases of a payment interruption, when a payee receives a notice of intention to withhold payment, it is legitimate for that payee to withhold payment further down the supply chain until payment has been received so long as it gives a notice of intent to withhold to its payees. This payee must also take the issue of non-payment from its payer to immediate adjudication and interest should be payable on the withheld amount. Where holdbacks are mandated contractually, federal prompt payment legislation should provide: a) that the percentage of the total contract amount which an owner may holdback for warranty purposes should be reasonable in relation to the risk of deficiencies; b) for each segment of the construction project undertaken by a particular trade, the holdback period should not exceed 12 months from the completion of that segment of the work; c) a prime contractor should be allowed to holdback for warranty purposes an amount that does not exceed in percentage terms the holdback that is allowed in the contract between the owner and the prime contractor; d) monies held back for warranty purposes by a prime contractor should be released within 15 days of the prime contractor receiving from the owner the holdback monies applicable to the work completed by that sub-contractor. The same principle should apply to holdback between a sub-contractor and a sub-sub-contractor. e) contractors should have the right to substitute a surety bond for any such holdback.</td>
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### Basis for Withholding Payment

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| General Contractors Alliance of Canada (GCAC) | All payers should be permitted to withhold payment by providing a notice of non-payment that identifies the amount withheld and the reason for the withholding, and subject to the right of the payee to prompt dispute resolution (e.g. adjudication).<sup>106</sup> Where a federal contract includes a retention (or contractual holdback), all payers down the supply chain should have the same right to withhold from the retention (and those rights should be the same as for any other payment on the project). The legislation should be simple, but robust in terms of procedures for how any payer withholds payments regardless of the reasons for withholding. The GCAC recommends a single form of notice (for all payers of all tiers) that includes the required information (amount and reasons for withholding) and that must be provided on or before the payment deadline.<sup>107</sup> The GCAC is opposed to the elimination of the mandatory contractual holdback employed by the Federal Government for two reasons:  
- The current broad form labour & material payment bonds employed by the government permit 2<sup>nd</sup> tier and lower subcontractors/suppliers to claim with a cap against the value of the holdback. Eliminating the holdback would eliminate the protection for these claimants or expose general contractors to an unacceptable risk.  
- The holdback funds serve as a security holdback which is often used to address issues and deficiencies that manifest after the completion of a general or trade contractors work.<sup>108</sup> |
| Canadian Institute of Quantity Surveyors (CIQS) | Payment can be withheld for set-off that satisfies the notice and assessment (quantification/evaluation) provisions in relation to a specific project and contract.<sup>109</sup> |
| Alberta Construction Association (ACA) | Federal holdbacks should be eliminated given that there is no corresponding lien fund.<sup>110</sup> |

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<sup>103</sup> NTCCC Submission at p. 17.  
<sup>104</sup> NTCCC Submission at p. 17.  
<sup>105</sup> NTCCC Submission at pp. 10-11 and pp 24-25.  
<sup>106</sup> GCAC Submission at p. 4.  
<sup>107</sup> GCAC Submission at pp. 4-5.  
<sup>108</sup> GCAC Submission at pp. 10-11.  
<sup>109</sup> CIQS Submission at p. 3.  
<sup>110</sup> ACA Submission.
### Basis for Withholding Payment

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</table>
| Coalition Contres Les Retards de Paiement dans la Construction              | With respect to the contractual withholding, the Quebec Coalition refers to Quebec’s proposed prompt payment regime which sets a maximum value of a contractual withholding and the circumstances justifying such a withholding.  

(g) The Right of Set-off

<table>
<thead>
<tr>
<th>Stakeholder</th>
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</table>
| Public Services and Procurement Canada (PSPC)                               | The Federal Government does use right of set-off (as required by federal legislation) when someone has not paid their federal taxes. Thus, the concept of right of set-off is a given.  

PSPC has in fact used right of set-off when costs were incurred on one project and the contractor abandoned the site but was able to recover the costs on another project done by that same contractor. Although recognizing that this could have an impact down the chain, there must be the ability to collect rightfully owed funds.  

| Defence Construction Canada (DCC)                                          | The right to set-off for federal Owners should be protected. It is often the most efficient means of dealing with situations where payment deductions are warranted for costs that are incurred by the Owner as a result of the contractor’s actions or lack thereof.  

| Canadian Bar Association                                                   | The CBA cautions against interfering with set-off rights as the implications could be severe, particularly in the case of insolvency.                                                                                   |

111 Quebec Coalition Submission at pp. 11-12.  
112 WCA Submission at p. 3.  
113 WCA Submission at p. 5.  
114 PSPC Submission at p. 13.  
115 DCC Submission at p. 2.
### The Right of Set-off

<table>
<thead>
<tr>
<th>Stakeholder</th>
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<tbody>
<tr>
<td>(CBA)</td>
<td>The CBA states that if a GC becomes bankrupt, without the right of set-off, the government may be forced to make payment to a receiver instead of using contract funds to complete defective work. The CBA also noted the ability for owners to abuse set-off rights toward the end of a project. ^116</td>
</tr>
<tr>
<td>Canadian Construction Association (CCA)</td>
<td>Set-off by the Government of Canada should be restricted to amounts arising under the Contract. ^117</td>
</tr>
<tr>
<td>National Trade Contractors Coalition of Canada (NTCCC)</td>
<td>All construction projects should be treated as stand-alone projects. Set-off should not be allowed cross-projects. NTCCC accepts that the one exception to this principle is set out in Ontario’s Construction Act, in the situation where the payer is insolvent. ^118</td>
</tr>
<tr>
<td>General Contractors Alliance of Canada (GCAC)</td>
<td>Payors must be permitted to set-off in relation to other improvements under the same contract, and in respect of other contracts/subcontracts. The GCAC states that there is a risk that payers in the middle of the pyramid (i.e. general contractors and upper tier subcontractors) will be placed in a situation where payees can fail to perform work, yet the only recourse for the payer is to go to court or arbitration (e.g. if the defect is discovered near the end of a project after the subcontract is complete). Adjudication would likely no longer be available in that circumstance. ^119</td>
</tr>
<tr>
<td>Canadian Institute of Quantity Surveyors (CIQS)</td>
<td>Set-off from one project to another project that are both subject to separate contracts (recognising public funds) should be allowable subject to strict and established criteria. ^120</td>
</tr>
<tr>
<td>Coalition Contres Les Retards de Paiement dans la Construction</td>
<td>It is the Coalition’s view that that compensation should never be effected between different projects. Compensation may be effected, but only within the framework of a single contract.</td>
</tr>
<tr>
<td>Winnipeg Construction Association (WCA)</td>
<td>Set-off by the Government of Canada should be restricted to amounts arising under the Contract, and not to other projects between the same parties. ^121</td>
</tr>
</tbody>
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^116 CBA Submission at p. 9.  
^117 CCA Submission at p. 5.  
^118 NTCCC Submission at p. 17.  
^119 GCAC Submission at p. 5.  
^120 CIQS Submission at p. 3.  
^121 WCA Submission at p. 3.
## Posting Payment Information

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</table>
This website provides the Procurement Identification Number, Project Number, name of Prime Contractor in receipt of payment and the payment date. The website takes a great deal of resources on the part of PSPC. Despite this effort, the use of this site by the industry has been marginal to date.  
As an alternative, PSPC proposed that the Prime Contractor post a notice at the construction site when it receives payment from PSPC (as L&M bonds must already be posted at the site). This could be applied downwards, although it would be complicated.  

122 PSPC Submission at pp. 13-14.                                                                 |
| Defence Construction Canada (DCC)                     | DCC posts payment information on its website currently in accordance with agreements made as part of the Working Group.                                                                                                                                                                                                                   |
| BGIS Global Integrated Solutions Canada LP (BGIS)     | BGIS recommended a process permitting the publication of a payor’s payment to the next level in the contracting chain, which could reduce unnecessarily over-inclusion of innocent parties in payment disputes.                                                                                                                                             |
|                                                       | BGIS views this as also increasing transparency and confidence in prompt payment mechanisms.                                                                                                                                                                                                                                               |
| Canadian Bar Association (CBA)                        | The CBA submits that it would be beneficial for basic payment information to be easily accessible, and recommends either requiring it to be publicly posted (where possible), or mandating that it be made available upon request, with five to seven days’ notice.  
The information should be limited in scope, the CBA recommends we review the existing lien legislation in Ontario and B.C.                                                                                                                                         |
| Canadian Construction Association (CCA)               | The Government of Canada should utilize its existing websites to post public notices of: the date on which a proper invoice is submitted; and, the date on which payment is made to the general contractor. The CCA would also support a “by request” disclosure system similar to what is required under Section 39 of the *Construction Act* (particularly 39(1) and (2)).  

124 CCA Submission at p. 5.                                                                                           |
<p>| National Trade Contractors Coalition of                | The federal government should establish a website that lists every federally-funded construction project and includes information on when a progress                                                                                                                                  |
|                                                       |                                                                                                                                                                                                                                                                                                                                                                                                            |</p>
<table>
<thead>
<tr>
<th>Stakeholder</th>
<th>Comment</th>
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<tbody>
<tr>
<td>Canada (NTCCC)</td>
<td>payment has been made to the prime contractor and what the amount of that payment was. Disclosure should be made in a timely manner. 125</td>
</tr>
</tbody>
</table>
| General Contractors Alliance of Canada (GCAC) | The GCAC supports the continued practice of posting the date of payment between the Federal Government and the General Contractor to the PSPC/DCC or other federal government websites.  

The GCAC would also support posting of the date of receipt of the proper invoice.  

The GCAC does not support the posting of payments below the level of the general contractor, or any other details about the proper invoice or the payment. 126 |
| Canadian Institute of Quantity Surveyors (CIQS) | Yes, suitable publications to be determined. 127 |
| Coalition Contres Les Retards de Paiement dans la Construction | The Coalition believes that the information does not need to be posted. If the federal government were to enact legislation similar to what is proposed in Quebec, more specifically provisions relating to the exact chronology of the claims for payment, contractors and subcontractors would easily be able to determine exactly when they will be paid based on the payment schedule. Therefore, the Quebec Coalition is of the view that there is no need to post further information. 128 |
| Winnipeg Construction Association (WCA) | In agreeing with the CCA, the WCA states that the Government of Canada should post public notices on its existing websites of the date on which it received a proper invoice from the general contractor and the date on which payment was made to the general.  

The WCA adds that they, among other Canadian construction associations, would be prepared to offer to communicate payment information to their members at no cost. 129 |

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125 NTCCC Submission at p. 17.  
126 GCAC Submission at p. 5.  
127 CIQS Submission at p. 3.  
128 Quebec Coalition Submission at p. 12.  
129 WCA Submission at p. 3.
### The Consequences of Failure to Pay

<table>
<thead>
<tr>
<th>Stakeholder</th>
<th>Comment</th>
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</thead>
<tbody>
<tr>
<td>Public Services and Procurement Canada (PSPC)</td>
<td>In order for prompt payment legislation to be effective, there must be consequences for failure to follow it however, the consequences should not negatively impact other innocent parties. No unqualified right to suspend should be allowed.(^{130})</td>
</tr>
<tr>
<td>Defence Construction Canada (DCC)</td>
<td>The ability for subcontractors to suspend work could have significant operational impact to departments and in some cases on defence projects, may impact national security. When a contract contains security requirements, the process for another subcontractor to obtain security clearance before being granted access to the site is quite lengthy. We would suggest that the legislation permit the Owner to make discretionary payments of amounts directly to a subcontractor following the decision of the Adjudicator, to avoid interruptions in the work and impact to Owner operations. However, such payments must be at the Owner’s discretion and the legislation or contractual terms must not create a duty of any kind from the Owner to the subcontractors. In light of this, there should be a requirement for the general contractor and the subcontractors to advise the Owner of any matter submitted for Adjudication and prior to suspension of the work.(^{131}) DCC would like the ability to pay subcontractors directly to avoid issues of non-payment if they arise.(^{132})</td>
</tr>
<tr>
<td>BGIS Global Integrated Solutions Canada LP (BGIS)</td>
<td>BGIS recommended that we consider the potential effects of expressly permitting a subcontractor’s right to suspend work upon a payment dispute. BGIS noted that there are significant policy implications to such a suspension given the nature of such projects as compared to private interests. Such a suspension may effect the safety and security of Canadians or detract from economic benefits to Canada. BGIS views it as reasonable for requiring subcontract work to continue despite any payment dispute, with no right of suspension until an independent person is persuaded of the legitimaticy of the dispute and then, only if the payor fails to pay after a reasonable time. This recommendation largely reflects the Ontario model.(^{133})</td>
</tr>
<tr>
<td>Canadian Bar Association (CBA)</td>
<td>Some CBA members recommended a notice of non-payment model, but the CBA was not uniform in this recommendation. The CBA also suggested that there could be a payment dispute by way of</td>
</tr>
</tbody>
</table>

\(^{130}\) PSPC Submission at p. 14.  
\(^{131}\) DCC Submission at p. 2.  
\(^{132}\) DCC Meeting Summary.  
\(^{133}\) BGIS Submission at p. 7.
The Consequences of Failure to Pay

<table>
<thead>
<tr>
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</table>
| **Canadian Construction Association (CCA)** | separate adjudication scheme or contractual dispute resolution.\(^{134}\)  
In relation to suspension, some CBA members recommend the Ontario model.  
The CCA endorses the approach in Ontario’s *Construction Act*:  
• The right to commence an adjudication;  
• Mandatory statutory interest;  
• The right to suspend work (without breach) if an adjudicator’s determination is not paid in 10 days;  
• Resumption of work after suspension would be conditional on payment of a determined amount, interest, reasonable costs incurred by the payee as a result of the suspension.\(^{135}\) |
| **National Trade Contractors Coalition of Canada (NTCCC)** | Depending on the nature of the failure to pay, the NTCCC recommended varied consequences including the ability to refer to adjudication, interest and suspension.\(^{136}\)  
In the event of a default in the payment obligation to a payee following upon a decision by an adjudicator, the payee should have the right to suspend work, and this suspension of work should not constitute any breach of contract.  
In the event that a payee resumes work on a project following a suspension, the payee should be entitled to reasonable remobilization costs.\(^{137}\) |
| **General Contractors Alliance of Canada (GCAC)** | In the absence of a notice of non-payment, and largely in accordance with the Ontario model, the GCAC submits that:  
• Interest should apply at the prescribed rate;  
• The payee should have the right to commence adjudication or other form of short and efficient dispute resolution;  
• In the case of a failure to pay an adjudication determination, the payee should have the right to suspend work and should be entitled to delay, demobilization and remobilization costs;  
• Other than in the case of a failure to pay an adjudication determination, parties should not be allowed to suspend work;  
In addition, the GCAC submits that if a subcontractor fails to abide by an adjudication determination with respect to any amount owing to the contractor or any work that should be performed, the contractor should be |
## The Consequences of Failure to Pay

<table>
<thead>
<tr>
<th>Stakeholder</th>
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<tbody>
<tr>
<td></td>
<td>allowed to suspend the subcontractor and/or terminate the subcontract for cause.(^{138})</td>
</tr>
<tr>
<td>Canadian Institute of Quantity Surveyors (CIQS)</td>
<td>Pre-determined damages, similar to Liquidated Damages.(^{139})</td>
</tr>
<tr>
<td>Coalition Contres Les Retards de Paiement dan la Construction</td>
<td>The Coalition proposes the resiliation or suspension of construction work in the case of a failure to pay a payment claim.(^{140})</td>
</tr>
<tr>
<td></td>
<td>The Quebec Coalition also proposes the imposition of interest following non-payment.(^{141})</td>
</tr>
<tr>
<td></td>
<td>The final consequence is the referral to adjudication.(^{142})</td>
</tr>
<tr>
<td>Winnipeg Construction Association (WCA)</td>
<td>In line with the CCA Submission and the Ontario model, the WCA submitted that the unpaid party should have the right to suspend work (without breach) if it has not been paid within 10 days of an adjudicator's determination and should only be required to resume work after payment of the awarded amount, including interest and reasonable costs incurred as a result of the suspension of work.(^{143})</td>
</tr>
</tbody>
</table>

### 3. Adjudication

(a) **Who Can Require Adjudication and When**

<table>
<thead>
<tr>
<th>Stakeholder</th>
<th>Comment</th>
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<tbody>
<tr>
<td>Public Services and Procurement Canada (PSPC)</td>
<td>It seems appropriate that adjudication should be available to anyone that believes payment is being improperly withheld. The adjudication would become an option as soon as the individual/firm that is certifying the invoice is as per drawings and specifications determines that a lower amount than invoiced is to be paid AND this cannot be resolved in an amicable way within a short period (perhaps two working days). The challenge becomes what happens if there is an adjudication at a higher or lower level – does the decision have influence on others not part of the adjudication? For example, if a cabinet maker is not paid a portion of the</td>
</tr>
</tbody>
</table>

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\(^{138}\) GCAC Submission at pp. 5-6.  
\(^{139}\) CIQS Submission at p. 3.  
\(^{140}\) Quebec Coalition Submission at p. 12.  
\(^{141}\) Quebec Coalition Submission at p. 13.  
\(^{142}\) Quebec Coalition Submission at p. 14.  
\(^{143}\) WCA Submission at p. 4.
### Who Can Require Adjudication and When?

<table>
<thead>
<tr>
<th>Stakeholder</th>
<th>Comment</th>
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<tbody>
<tr>
<td>invoice by the carpenter because the Prime is withholding some</td>
<td>because the Federal Government’s professional determined that the installed cabinets are not fully in compliance with the drawings and specs, where is the adjudication held? What happens if the manufacturing drawings done by the cabinet maker and approved by the carpenter exactly match what was contracted for between those two organizations but somehow mistakenly does not match what is specified in the original drawings and specifications? (In other words the withholding by Government of Canada and the Prime may be appropriate, but inappropriate for the carpenter to withhold funds from the cabinet maker).</td>
</tr>
<tr>
<td>defence Construction Canada (DCC)</td>
<td>Adjudication seems the right form of dispute resolution when dealing with issues around disagreements around payment BUT there is a limit. Complex delay claims should never be resolved through adjudication but instead the normal contract specified dispute resolution process used (adjudication timelines are too aggressive for such a complex dispute).</td>
</tr>
<tr>
<td>DCC supports the principle that contractors throughout all tiers</td>
<td>of a construction contract should be paid promptly when they are entitled to payment. Our primary concern with a legislated solution relates to how disputes are characterized and dealt with in the adjudication process and any process must be fair and reasonable to all parties, including the Owner.</td>
</tr>
<tr>
<td>All parties should be subject to, and be able to, initiate</td>
<td>adjudication when there is agreement.</td>
</tr>
<tr>
<td>CBA</td>
<td>CCA would support the approach in the Ontario Construction Act.</td>
</tr>
<tr>
<td>Canadian Construction Association (CCA)</td>
<td>Any payee whose payment has been withheld should have the right to commence an adjudication.</td>
</tr>
<tr>
<td>National Trade Contractors Coalition of Canada (NTCC)</td>
<td>An adjudicator’s affirmation that payment has not been made should be required before a contractor exercises the right to suspend work.</td>
</tr>
<tr>
<td>General Contractors Alliance of Canada (GCAC)</td>
<td>Any party in the construction pyramid should be permitted to initiate an adjudication subject to the issue conforming to a prescribed list of matters appropriate for adjudication. Parties should be permitted to include an insurer under an insurance policy that relates to the improvement in an adjudication. Parties should be permitted to include sureties in adjudication under both labour and material payment bonds and performance bonds. This should apply for bonds issued at all level and not just in the instance where the</td>
</tr>
</tbody>
</table>

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144 PSPC Submission at p. 15.  
145 DCC Submission at p. 1.  
146 CBA Submission at p. 12.  
147 CCA Submission at p. 8.  
148 NTCCC Submission at p. 19.
## Who Can Require Adjudication and When?

<table>
<thead>
<tr>
<th>Stakeholder</th>
<th>Comment</th>
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<tbody>
<tr>
<td><strong>principal</strong> is the contractor.</td>
<td>A party should be permitted to commence adjudication at any time before the Prime Contract is complete (regardless of whether or not a subcontract has been completed).</td>
</tr>
<tr>
<td>The Canadian Council for Public-Private Partnerships (CCPPP)</td>
<td>Where it is required for P3 projects, adjudication should have the ability to be heard concurrently. If there are overlapping issues, disputes should be rolled into one adjudication process. That is important in P3s as a ruling in favour of a subcontractor against a contractor could lead to a dispute by the contractor and the financier, which could lead to a dispute with government. Instead of multiple adjudications, they should be heard as one where appropriate, particularly to avoid a stranded asset problem. Government should be brought into adjudication. In P3s, this is again critical as government can sometimes be a part of the problem. This too will avoid a stranded asset situation.</td>
</tr>
<tr>
<td>Canadian Institute of Quantity Surveyors (CIQS)</td>
<td>Any contracting party, at any time from the award of a contract up to Substantial Performance.</td>
</tr>
<tr>
<td>Surety Association of Canada (SAC)</td>
<td>The adjudication option should be available to any party to a contract or subcontract at all levels of the construction pyramid. The adjudication period should expire when the contract or subcontract is deemed completed.</td>
</tr>
<tr>
<td>Coalition Contre Les Retards de Paiement dans la Construction</td>
<td>Any of the parties to the dispute (including the entire chain of subcontractors) can call upon an adjudicator. The parties can submit the dispute at any time during execution of the contract, in other words, between the time it is signed and the time it ends. The general contract or subcontract ends when all of the parties have fulfilled their obligations. See section 22.1 of the proposed parameters.</td>
</tr>
</tbody>
</table>

[Translation]

22. The right to submit a dispute to adjudication

22.1 Any party to a contract governed by this Act may, at any time, submit to adjudication any dispute relating to the application, interpretation, execution or resiliation of the contract.

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149 GCAC Submission at p. 6.
150 CCPPP Submission at pp. 2-3.
151 CIQS Submission at p. 3.
152 SAC Submission at p. 9.
153 Coalition Contre Les Retards de Paiement dans la Construction Submission at p. 8.
## Who Can Adjudicate a Dispute?

<table>
<thead>
<tr>
<th>Stakeholder</th>
<th>Comment</th>
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</table>
| **Public Services and Procurement Canada (PSPC)** | For adjudication to be quick and efficient, an adjudicator needs to be knowledgeable in the subject matter of the dispute. This would suggest that different adjudicators may be required on a single project if there are multiple disputes on different topics. Unlike mediation/arbitration where the mediator/arbitrator is trying to help the two parties come to an agreement (and thus little if any knowledge of the construction issue itself required), an adjudicator is making an informed decision that both parties have to live with until either there is agreement or a decision through a different dispute resolution process. Using the UK model, it seems appropriate that adjudicators come from different professional associations (e.g. architects, engineers, etc...). It may be possible that the dispute is related to wording in the contract and thus a lawyer/retired judge may be an appropriate adjudicator in those cases.  

154 PSPC Submission at p. 15.                                                                                                                                                                                         |
| **Canadian Bar Association (CBA)**               | The CBA recommends following the Ontario model for who can adjudicate a dispute, but recommends a time limitation on initiating adjudication to avoid the risk of “adjudication by ambush” where one party amasses an enormous claim and drops it on the other side with little or no time to respond.  

155 CBA Submission at p. 12.                                                                                                                                                                                         |
| **Canadian Construction Association (CCA)**      | Adjudicators should have significant (i.e. at least 7 years) relevant and Canadian experience in the construction industry, and may include but should not be limited to those in the legal, engineering or architectural professions, experienced construction and project managers and construction executives.  

156 CCA Submission at p. 6.                                                                                                                                                                                         |
| **National Trade Contractors Coalition of Canada (NTCCC)** | Akin to the process being implemented in Ontario, the federal government should establish an Authorized Nominating Authority (ANA) governing the appointment, training and other ancillary aspects governing a roster of adjudicators. Adjudicators would be assigned by the ANA to a dispute on the basis of their availability, proficiency in the official language(s) of the parties, and regional access.  

In addition, the federal government should consider allowing the use of adjudicators who are already roster members of a provincial ANA, as, for example, will be the case in Ontario.  

157 NTCCC Submission at p. 19.                                                                                                                                                                                         |
| **General Contractors Alliance of Canada (GCAC)** | Adjudicators should be individuals with a minimum of seven years work experience, 5 years of which should be Canadian experience. Adjudicators who are members of relevant regulated professions should be members in good standing. Adjudicators should have successfully completed a training program administered by the nominating authority prescribed in the legislation.  

158 GCAC Submission at p. 10.  
159 CAC Submission at p. 2.  
160 CAANF Submission at p. 4. |
## Who Can Adjudicate a Dispute?

<table>
<thead>
<tr>
<th>Stakeholder</th>
<th>Comment</th>
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<tbody>
<tr>
<td>Considerations should be given to recognizing individuals accredited as</td>
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<tr>
<td>adjudicators under the Construction Act in Ontario, to serve as adjudicators</td>
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<tr>
<td>under similar federal legislation.</td>
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<tr>
<td>The Canadian Council for Public-Private Partnerships (CCPPP)</td>
<td>Some adjudicators should be trained on P3 arrangements as it will be</td>
</tr>
<tr>
<td></td>
<td>important to ensure the nuance of these deals is not lost.</td>
</tr>
<tr>
<td>Canadian Institute of Quantity Surveyors (CIQS)</td>
<td>A professional that is qualified as a subject matter expert academically,</td>
</tr>
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<td>professionally and by experience in the matter that is the subject of a</td>
</tr>
<tr>
<td></td>
<td>dispute. Such a professional having basic legal/dispute resolution training</td>
</tr>
<tr>
<td></td>
<td>and being registered as a Construction Adjudicator.</td>
</tr>
<tr>
<td>Coalition Contre Les Retards de Paiement dans la Construction</td>
<td>The Coalition believes that adjudicators must be chartered by a certified</td>
</tr>
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<td>organization. In Quebec, that means the Ministère de la Justice or the</td>
</tr>
<tr>
<td></td>
<td>Institut de médiation et d’arbitrage au Québec (IMAQ). See sections 23.1</td>
</tr>
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<td>and 23.2 of the proposed parameters.</td>
</tr>
<tr>
<td>[Translation]</td>
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<tr>
<td>23. Qualifications of the adjudicator</td>
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<tr>
<td>23.1 Only persons certified by the Minister of Justice may act as</td>
<td></td>
</tr>
<tr>
<td>adjudicators. The conditions for the certification of adjudicators will be</td>
<td></td>
</tr>
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<td>defined in regulations adopted under this Act.</td>
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<tr>
<td>23.2 An adjudicator who has an interest in one or the other of the parties</td>
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<tr>
<td>shall declare this interest and, if applicable, may not act if one or the</td>
<td></td>
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<tr>
<td>other of the parties opposes his or her involvement.</td>
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</tr>
<tr>
<td>Winnipeg Construction Association (WCA)</td>
<td>We agree that, where possible, it would be preferable for adjudicators to</td>
</tr>
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<td></td>
<td>have experience in the local construction industry, including but not</td>
</tr>
<tr>
<td></td>
<td>limited to lawyers, engineers, architects, experienced construction and</td>
</tr>
<tr>
<td></td>
<td>project managers and construction executives.</td>
</tr>
</tbody>
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158 GCAC Submission at p. 6.
159 CCPPP Submission at p. 3.
160 CIQS Submission at p. 3
161 Coalition Contre Les Retards de Paiement dans la Construction Submission at pp. 8-9.
162 WCA Submission at p. 4.
### How Should an Adjudicator Be Nominated?

<table>
<thead>
<tr>
<th>Stakeholder</th>
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</table>
| **Public Services and Procurement Canada (PSPC)** | Although it may be possible to have the two parties that are in disagreement come up with an adjudicator that both are satisfied with, it is unlikely that this will be an easy process as the two parties are already in dispute. The concept of coming up with an adjudicator before the dispute happens (i.e. while the two parties are still in the “honeymoon state”) does not recognize the fact that adjudicators need to be knowledgeable in the specific field of the dispute - it would seem a lot of effort to identify adjudicator A for these kinds of issues and adjudicator B for these other kinds of issues and adjudicator C etc....

It therefore seems appropriate that there be one or more adjudication bodies that could be approached to provide an adjudicator when the need arises. These bodies would ensure that the adjudicators are licensed/certified and trained. The adjudication body would then assign an adjudicator appropriate to the issue in dispute.

There would likely be a cost to having an adjudication authority provide a name but this cost could be shared by the two parties.

Perhaps the bigger issue is how is an adjudicator licensed/certified? It would seem appropriate that large financial decisions that can have a significant impact on one or more parties should be qualified to do the job. It is then important for those seeking an adjudicator to know that the individual is qualified to do the role.\(^{163}\) |
| **Canadian Construction Association (CCA)** | Follow the Ontario model.\(^ {164}\) |
| **National Trade Contractors Coalition of Canada (NTCCC)** | An adjudicator should be nominated by the party seeking the adjudication, or alternatively appointed by the ANA.\(^ {165}\) |
| **General Contractors Alliance of Canada (GCAC)** | An adjudicator should be proposed by the party initiating an adjudication and should require the agreement of the other party to the adjudication.

Should the parties fail to agree on an adjudicator, one should be appointed by a nominating authority.\(^ {166}\) |
| **Canadian Institute of Quantity Surveyors (CIQS)** | Nomination is agreement between the parties once a dispute arises or by a nominating body subject to a request by the parties that are in dispute.\(^ {167}\) |

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\(^{163}\) PSPC Submission at pp. 15-16.
\(^{164}\) CCA Submission at p. 6.
\(^{165}\) NTCCC Submission at p. 19.
\(^{166}\) GCAC Submission at p. 6.
\(^{167}\) CIQS Submission at p. 3.
# How Should an Adjudicator Be Nominated?

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<th>Stakeholder</th>
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</table>
| Coalition Contre Les Retards de Paiement dans la Construction                | The parties shall appoint an adjudicator at the time they enter into the contract or, if they have not done so, at the time the notice of intention to submit a dispute to adjudication is sent. For more information, see sections 25 and following of the proposed parameters.\(^{168}\)  

[Translation]  
25. Appointment of an adjudicator  
25.1 The parties to a contract subject to this Act shall agree, at the time they enter into the contract, on an adjudicator who shall be called upon to settle any dispute among them under this part.  
25.2 If they do not appoint an adjudicator under section 25.1, the party sending the notice of intention provided for in section 24 shall propose a list of three (3) potential candidates after verifying their availability.  
25.3 The party receiving the notice of intention shall then have five (5) days to indicate, in a written response addressed to the first party, that it accepts one of the candidates proposed, or to send a list of three (3) other potential candidates after verifying their availability.  
25.4 If the parties cannot reach an agreement concerning the choice of an adjudicator within two (2) days following the second party’s response, each of the parties may ask the representative appointed by the Minister of Justice to appoint an adjudicator, within five (5) days of the request, to settle the dispute.  
25.5 If the party receiving the notice of intention fails to respond within the time frame provided for in section 25.3, the party who sent the notice may, at its discretion, choose an adjudicator from among the three candidates it proposed.  
25.6 The party who chooses an adjudicator under section 25.5 shall send notice of this choice to the other party by bailiff.  
25.7 Once the adjudicator has been appointed, any communication between any party and the adjudicator and any communication between the adjudicator and any party shall also be sent to the other party.  

| Winnipeg Construction Association (WCA)                                    | We support the idea of an authorized nominating authority (ANA), administered by a Ministry of the Government of Canada. That said, we agree that the Government ought to defer to a Provincial ANA where it exists.\(^{169}\) |

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\(^{168}\) Coalition Contre Les Retards de Paiement dans la Construction Submission at p. 9-10.  
\(^{169}\) WCA Submission at p. 4.
(e) The Role of An Authorized Nominating Authority

<table>
<thead>
<tr>
<th>Stakeholder</th>
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<tbody>
<tr>
<td>Public Services and Procurement Canada (PSPC)</td>
<td>As stated above, the authorized naming authority would do the following:</td>
</tr>
<tr>
<td></td>
<td>• provide training to its adjudicators</td>
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<tr>
<td></td>
<td>• ensure they are licensed/certified to do the adjudication service</td>
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<tr>
<td></td>
<td>• provide a name of an adjudicator that is knowledgeable on the issue in dispute</td>
</tr>
<tr>
<td></td>
<td>• if there is more than one possible adjudicator, then the authorized nominating authority could oversee a process to have the parties select their preferred adjudicators in order of preference and then assemble the results from an independent third party perspective and choose the best ranked from the submissions of the two sides.</td>
</tr>
<tr>
<td>Canadian Bar Association (CBA)</td>
<td>If an adjudication process is implemented through federal legislation, the CBA Section supports the establishment of an Authorized Nominating Authority (ANA), similar to the UK approach for nominating adjudicators. The CBA Section views an ANA as an essential element of a successful prompt payment adjudication system. It would be too time consuming to have a court appoint an adjudicator.</td>
</tr>
<tr>
<td></td>
<td>Furthermore, the CBA is concerned with who will run an ANA and who will fund it. Federal adjudication will require more adjudicators than Ontario. Knowledge and expertise in relation to federal projects may be in short supply. The CBA recommends that the federal government recognize adjudicators already certified under the provincial or territorial regimes to manage resource challenges and to be sensitive to regional and local differences.</td>
</tr>
<tr>
<td>Canadian Construction Association (CCA)</td>
<td>• To the extent that some agency would be required to administer the roster of adjudicators, CCA would support the idea of an authorized nominating authority (ANA).</td>
</tr>
<tr>
<td></td>
<td>• CCA would also support placing this authority in the first instance with a GoC Minister to ensure it can be executed and delegated.</td>
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<tr>
<td></td>
<td>• Some considerations, however, include:</td>
</tr>
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<td></td>
<td>• CCA generally would support GoC delegating this to the private sector through a procurement process.</td>
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<tr>
<td></td>
<td>• Careful consideration should be given to adequate funding for an ANA to ensure that its resources and effectiveness are not dependent on its volume of work, especially during the start-up phase and accommodate any surges in demand. In other words, a</td>
</tr>
</tbody>
</table>

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170 PSPC Submission at p. 16.
171 CBA Submission at p. 10.
172 CBA Submission at p. 11.
### What Is the Role of an Authorized Nominating Authority?

<table>
<thead>
<tr>
<th>Stakeholder</th>
<th>Comment</th>
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</thead>
<tbody>
<tr>
<td>National Trade Contractors Coalition of Canada (NTCCC)</td>
<td>The role of the ANA should be modelled on the Ontario’s <em>Construction Act</em>.</td>
</tr>
<tr>
<td>General Contractors Alliance of Canada (GCAC)</td>
<td>The role of a nominating authority should include:</td>
</tr>
<tr>
<td></td>
<td>• Certifying and regulating adjudicators and maintaining a role of certified adjudicators</td>
</tr>
<tr>
<td></td>
<td>• Decertifying adjudicators</td>
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<td></td>
<td>• Providing training for adjudicators</td>
</tr>
<tr>
<td></td>
<td>• Nominating adjudicators in the event that parties to an adjudication do not agree on an adjudicator</td>
</tr>
<tr>
<td>Canadian Institute of Quantity Surveyors (CIQS)</td>
<td>The role of the authorized nominating authority is to keep a list of adjudicators, nominate suitable candidates as adjudicators, hear complaints around adjudicators, establish a code of conduct for adjudicators and enforce discipline.</td>
</tr>
<tr>
<td>Coalition Contre Les Retards de Paiement dans la Construction</td>
<td>The competent authority shall make sure of the adjudicator’s competence and appoint an adjudicator should the parties fail to reach an agreement. See sections 23.1 and 25.4 of the proposed parameters, above.</td>
</tr>
</tbody>
</table>

(f) The Types of Disputes that Should be Subject to Adjudication and the Limits to the Quantum of the Disputes.

### What Types of Disputes Should Be Adjudicated? Should There Be Limits to the Quantum of the Disputes That Are Subject to Adjudication?

<table>
<thead>
<tr>
<th>Stakeholder</th>
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<tbody>
<tr>
<td>Public Services and Procurement Canada (PSPC)</td>
<td>Adjudication should be seen as one tool in the dispute resolution toolbox. Not all disputes will lend themselves to adjudication, just as not all disputes lend themselves to mediation or arbitration or simple negotiation.</td>
</tr>
<tr>
<td></td>
<td>Adjudication should be limited to those disputes around payment that require quick determinations to allow payment to continue to flow AND for which the decision is not based on complex issues requiring significant paperwork to</td>
</tr>
</tbody>
</table>

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173 CCA Submission at pp. 6-7
174 NTCCC Submission at p. 19.
175 GCAC Submission at p. 6-7.
176 CIQS Submission at p. 3.
177 Coalition Contre Les Retards de Paiement dans la Construction Submission at pp. 8-9.
### What Types of Disputes Should Be Adjudicated? Should There Be Limits to the Quantum of the Disputes That Are Subject to Adjudication?

<table>
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<tr>
<td>Support one position or another. For example, a delay claim would not fit under adjudication because it does not meet either of the conditions above (e.g. the delay claim has built up over weeks/months and deals with work previously paid for to some degree – thus the urgency of payment is not paramount. Additionally, to substantiate a delay claim requires a great deal of documents, schedules, etc... to allow one side or the other to prove/disprove the delay.) Adjudication on the other hand likely works very well when there is a dispute as to whether some item is at one percentage of completion vs another. Cash flow is dependent on this decision and more importantly, a quick decision is required because the situation will have changed in just a few weeks as progress continues to be made.</td>
<td></td>
</tr>
<tr>
<td>Canadian Bar Association (CBA)</td>
<td>The primary purpose should be resolving payment disputes. Parties should also be able to consolidate, on agreement, akin to the Ontario model. Further, at the GC level, parties should be able to consolidate by right to avoid being trapped in a subcontractor/ owner fight.</td>
</tr>
</tbody>
</table>
| Canadian Construction Association (CCA)     | - CCA would support the “targeted” adjudication approach in the Ontario Construction Act, with the focus being on issues around payment.  
- CCA would also support adjudication of disputes other than payment if the parties agree.  
- CCA would support the Ontario approach to consolidation of adjudications initiated at different payment levels where there are common facts.  
- Within the CCA membership there are two views on the question of whether adjudication of disputes should or should not be mandatory if the amount of the dispute exceeds a set threshold.  
  - There is support among CCA’s general contractor members for setting a threshold proportional to the value of a contract or subcontract, beyond which adjudication would require the agreement of the parties. It is felt that some disputes are too complex or of too high a value to resolve on an interim binding basis, and that the consequences of an adverse determination are worse than the delay associated with the judicial process.  
  - CCA’s subcontractor and supplier members favour the Ontario  |

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178 PSPC Submission at pp. 16-17.  
179 CBA Submission at p. 11.  
180 CBA Submission at p. 12.
What Types of Disputes Should Be Adjudicated? Should There Be Limits to the Quantum of the Disputes That Are Subject to Adjudication?

<table>
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<td>approach with no thresholds on adjudication.</td>
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<tr>
<td>• There is a concern over security for payment of an adjudicator's determination and security for recovery should a judicial review be granted and succeed. There is concern expressed by CCA’s general contractor and larger subcontractor members that they may be required to pay an adjudicator’s determination initially, then succeed in a judicial review, but be unable to collect given the passage of time. 181</td>
<td></td>
</tr>
<tr>
<td>National Trade Contractors Coalition of Canada (NTCCC)</td>
<td>The types of disputes subject to adjudication should be those enumerated in section 13.5 of Ontario’s Construction Act along with any other matter that the Minister of Justice may refer to an adjudicator. In addition, the scope of adjudication should include any other matter that the Minister of Justice may refer to adjudication. There should be no limit to the quantum of disputes subject to adjudication. 182</td>
</tr>
<tr>
<td>General Contractors Alliance of Canada (GCAC)</td>
<td>Payment disputes including withholdings Valuation of services or materials including change orders (whether complete or contemplated) and work performed under change directives Disputes involving the payment of any retention Any other matter that the parties to a dispute wish to adjudicate Should exclude delay claims other than direct costs associated with a delay. Should include insurance matters related to performance of work under a construction contract. 183</td>
</tr>
<tr>
<td>Canadian Institute of Quantity Surveyors (CIQS)</td>
<td>By way of example, typical disputes to be adjudicated are: disputes around the following: Scope of work, Quantities, Rates, Alleged Changes, Schedule Extensions, Evaluation of Interim Progress Payments and such similar items. The quantum of the disputes should be as addressed in the Construction Act (Ontario). 184</td>
</tr>
<tr>
<td>Surety Association of Canada (SAC)</td>
<td>Again, we refer to the regime defined in the Ontario Act which identifies seven distinct categories of issues that can be referred to an adjudicator. This list which is set out in Section 13.5 (1) of the Ontario Act focuses almost exclusively on payment and quantum issues, although it does permit the</td>
</tr>
</tbody>
</table>

181 CCA Submission at p. 7.  
182 NTCCC Submission at p. 19.  
183 GCAC Submission at p. 7.  
184 CIQS Submission at p. 4.
### What Types of Disputes Should Be Adjudicated? Should There Be Limits to the Quantum of the Disputes That Are Subject to Adjudication?

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<tr>
<td>adjudication of “Any other matter that the parties to the adjudication agree to, or that may be prescribed” (Section 13.5 (1) 7). SAC would support broadening of this list to include targeted areas where a prolonged dispute could seriously impact a contractors’ ability to execute and maintain a schedule on a project, giving rise to types of payment issues articulated in Section 13.5 (1) of the Ontario Act. One area that might merit such consideration is surety bond disputes. While Section 13.23 of the Ontario Act provides for surety issues to be referred to an adjudicator, the proposed regulations restrict this to disputes under the payment bond only. SAC would support a recommendation to allow core performance bond issues (e.g. the existence of a default under the contract) to be subject to adjudication. Also, SAC encourages a recommendation to allow consolidation of adjudications as set out in Section 13.8 of the Ontario Act, and further, that adjudication of the surety issues be consolidated with contractual disputes where appropriate. 185 Coalition Contre Les Retards de Paiement dans la Construction Any dispute relating to the application, interpretation, execution or resiliation of the contract may be submitted to adjudication. The Coalition believes that this should not be limited to monetary disputes. See section 22.1 of the proposed parameters. 186 Winnipeg Construction Association (WCA) Adjudication ought to focus on issues around payment, including disputes related to obligations under the contract where allegations of non-performance give rise to set-off or non-payment; The opposing views on whether adjudication should be mandatory are difficult to reconcile. The models using a dollar value as a threshold may be arbitrary as the complexity of a dispute is not always proportionate to its monetary value; Concerns with respect to security for payment of an adjudicator's determination and security for recovery should a court overturn an adjudicator's decision are legitimate and this merits consideration of having the adjudication undertaken through the JADR process (or perhaps a variant of that) which would utilize judges or other court officials (perhaps retired judges). 187</td>
<td></td>
</tr>
</tbody>
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185 SAC Submission at pp. 9-10.  
186 Coalition Contre Les Retards de Paiement dans la Construction Submission at p. 8.  
187 WCA Submission at p. 4.
### The Adjudication Process

#### What Should an Adjudication Process Look Like?

<table>
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| Public Services and Procurement Canada (PSPC)                              | PSPC provided in Appendix A to its submission a simple flow chart of a possible adjudication process. Appendix B to its submission is a draft of a possible adjudication process that was being drafted for consideration in PSPC construction contracts with the Prime Contractor. This process did not include an authorized nominating authority.  
188 PSPC Submission at p. 17.                                                                 |
| Canadian Construction Association (CCA)                                    | Councils have not reached consensus on the degree of discretion that should be given to an adjudicator to determine the process. It is acknowledged that the role of the adjudicator as 'inquisitor' with broad power to investigate and to design a process that is proportional to the dispute in hand is a strength of the adjudication process. There is concern though that broad discretion creates uncertainty and, therefore, risk, including financial risk. For example, the costs to the parties (i.e. direct expense and loss of productivity) associated with participating in the process will be determined largely by the process that the adjudicator designs and will be difficult to predict, budget and manage, especially for smaller and medium sized firms. The time period to initiate an adjudication should be limited to a number of days, (i.e. to 14 days). Referring to the Ontario model, in a situation in which the owner pays the proper invoice in full, but the contractor disputes a subcontractor’s entitlement to payment (either in whole or in part) based on subcontract terms (i.e. other than pay when paid), and issues a notice of non-payment to the subcontractor, the subcontractor should be required to initiate an adjudication of the dispute with the contractor within, say, 14 days or else forfeit its right to adjudicate (except by agreement). The adjudication process should include the right and a timeline for the respondent to make an initial submission to the adjudicator. In the Ontario model the participation and timelines for submissions (if any) by the respondent are within the discretion of the adjudicator.  
189 CCA Submission at pp. 7-8.                                                                 |
| National Trade Contractors Coalition of Canada (NTCCC)                     | Time is of the essence in an adjudication process. The procedures should reflect this overriding requirement.  
An adjudicator should be appointed within seven days of a dispute being referred to adjudication.  
Within five days of the appointment of an adjudicator, the party seeking the adjudication should be required to file a written statement of its claim and the rationale for the claim. The party responding to the claim should be required to file a written response within five days of the statement of claim being filed.  
The adjudicator should have wide powers to determine the adjudicative process, including the delivery of written submissions only or the use of oral evidence and submissions. Generally, NTCCC recommends the provisions of |
## What Should an Adjudication Process Look Like?

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<td>section 13.12 of Ontario’s Construction Act in this respect.</td>
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<tr>
<td></td>
<td>Upon application by any party, an adjudicator should have the authority to consolidate disputes into a single adjudicative process.</td>
</tr>
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<td></td>
<td>An adjudicator should be empowered to recommend mediation of a dispute, provided that such mediation not prejudice the validity of the adjudication process, or absent consent of all parties, the timing of such adjudicative process.</td>
</tr>
<tr>
<td></td>
<td>The adjudicator should be required to render a written decision within 30 days of being appointed.</td>
</tr>
<tr>
<td></td>
<td>There should be a publicly accessible web portal that lists adjudications that are in process and which contains all adjudication decisions.</td>
</tr>
<tr>
<td>General Contractors Alliance of Canada (GCAC)</td>
<td>It is the position of the GCAC that the parties to a construction contract should be permitted broad discretion to agree to an adjudication procedure. However, to address circumstances where parties have not agreed to an adjudication process and in order to ensure that the process remains fair, streamlined, and accessible, the federal legislation and associated regulations should prescribe the following minimum standards to which all adjudications must adhere:</td>
</tr>
<tr>
<td></td>
<td>• The party wishing to commence adjudication must serve a written notice of adjudication.</td>
</tr>
<tr>
<td></td>
<td>• The notice of adjudication should provide, at minimum, a brief description of the dispute, and the quantum claimed.</td>
</tr>
<tr>
<td></td>
<td>• Where there are multiple adjudications arising out of the same or related events, the contractor should retain the unfettered right to consolidate the adjudications.</td>
</tr>
<tr>
<td></td>
<td>• Within 5 days of appointing the adjudicator, the party initiating the adjudication must provide to the adjudicator and the opposing party/parties:</td>
</tr>
<tr>
<td></td>
<td>• A copy of the contract/subcontract; and,</td>
</tr>
<tr>
<td></td>
<td>• Any documents upon which that party intends to rely upon in the adjudication;</td>
</tr>
<tr>
<td></td>
<td>• The adjudicator must provide written reasons of his or her decision</td>
</tr>
<tr>
<td></td>
<td>• The adjudicator’s written reasons must be provided within 30 days of the date upon which the party who initiated the adjudication provided</td>
</tr>
</tbody>
</table>

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190 NTCCC Submission at pp. 19-20.
## What Should an Adjudication Process Look Like?

<table>
<thead>
<tr>
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<tbody>
<tr>
<td>their documents.</td>
<td>• The legislation should provide guidance regarding when a decision of an adjudicator may be set aside on judicial review.</td>
</tr>
<tr>
<td>• Any party who wishes to bring an application for judicial review of the adjudicator’s decision must bring a motion for leave to bring the application within 30 days of the adjudicator’s decision.</td>
<td></td>
</tr>
<tr>
<td>Beyond these minimum standards, the GCAC believes that the parties should be permitted wide latitude to agree to an adjudication procedure, including but not limited to selecting their adjudicator and agreeing the process by which submissions can be made.</td>
<td></td>
</tr>
<tr>
<td>Canadian Institute of Quantity Surveyors (CIQS)</td>
<td>As the Construction Act (Ontario). Process should be pre-defined with timelines and limited provision for challenge.</td>
</tr>
<tr>
<td>The adjudicator has full discretion with respect to the adjudication procedure as set out in section 27.1 of the proposed parameters.</td>
<td>[Translation]</td>
</tr>
<tr>
<td>27. Adjudicator’s authority</td>
<td>27.1 With regard to the dispute submitted to him or her, the adjudicator shall have full discretion to manage the presentation of the evidence and the hearing of the parties. The adjudicator may, among other things, call a third party to the adjudication if he or she deems the party’s presence necessary for achieving a full resolution of the dispute.</td>
</tr>
<tr>
<td>Winnipeg Construction Association (WCA)</td>
<td>We agree that designing a process proportional to the dispute is a strength of the adjudication compared to the courts, but along with that comes uncertainty. Again, it is very difficult to balance these two competing priorities;</td>
</tr>
<tr>
<td>Timelines to file for an adjudication should be limited and the process should include the right for the respondent to make an initial submission to the adjudicator, which timelines could be set by the adjudicator.</td>
<td></td>
</tr>
</tbody>
</table>

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191 GCAC Submission at pp. 7-8.
192 CIQS Submission at p. 4.
193 Coalition Contre Les Retards de Paiement dans la Construction Submission at p. 10.
194 WCA Submission at p. 4.
(h) The Costs of Adjudication

### How Should the Costs of an Adjudication Process Be Addressed?

<table>
<thead>
<tr>
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</thead>
<tbody>
<tr>
<td>Public Services and Procurement Canada (PSPC)</td>
<td>Like any dispute, the issue should be resolved where possible by discussions between the two parties. In order to ensure both parties make an attempt, the costs of adjudication should be borne equally by the two parties in the dispute. However, if the adjudicator believes that one side or the other was being difficult and unfair, then the adjudicator should have the right to assign a different percentage of costs from the normal 50%-50% split.(^{195})</td>
</tr>
<tr>
<td>Canadian Construction Association (CCA)</td>
<td>CCA would support the Ontario model.(^{196})</td>
</tr>
<tr>
<td>National Trade Contractors Coalition of Canada (NTCCC)</td>
<td>The costs of adjudication should generally be borne equally by the payer and the payee(s) who are parties to the dispute. There should be an exception in the case of adjudications which are determined to have been frivolous, vexatious, and abuse of process or other than in good faith.(^{197})</td>
</tr>
<tr>
<td>BGIS Global Integrated Solutions Canada LP (BGIS)</td>
<td>BGIS recommends that we consider an approach that apportions costs to the parties wrongfully delaying payment or wrongfully initiating adjudication.(^{198})</td>
</tr>
<tr>
<td>General Contractors Alliance of Canada (GCAC)</td>
<td>In the case of two party adjudication, the costs should be apportioned equally between the two parties subject to the discretion of the adjudicator to make a different allocation of costs in circumstances where a party to an adjudication has acted in a manner that is frivolous, vexatious, an abuse of process or other than in good faith. In the case of multiparty adjudications, the fees should be allocated on the basis of the discretion of the adjudicator considering the value of the initial claims made by each party and the value of the adjudication determination in respect of each party.(^{199})</td>
</tr>
<tr>
<td>Canadian Institute of Quantity Surveyors (CIQS)</td>
<td>Shared equally by the parties. Adjudicator should be authorized to award costs in exceptional circumstances.(^{200})</td>
</tr>
</tbody>
</table>

\(^{195}\) PSPC Submission at p. 17.  
\(^{196}\) CCA Submission at p. 8.  
\(^{197}\) NTCCC Submission at p. 20.  
\(^{198}\) BGIS Submission at p. 7.  
\(^{199}\) GCAC Submission at p. 8.  
\(^{200}\) CIQS Submission at p. 4.
### How Should the Costs of an Adjudication Process Be Addressed?

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<tbody>
<tr>
<td>Coalition Contre Les Retards de Paiement dans la Construction</td>
<td>Each party is responsible for 50% of the fees barring exceptional circumstances. See sections 32.1 and 32.2 of the proposed parameters.(^{201})</td>
</tr>
</tbody>
</table>
| \[Translation\] \[32. Adjudicator’s fees and expenses\]
  \[32.1\] Any provision in a construction contract relating to the distribution among the parties of all or part of the fees and expenses of the adjudicator, the parties or the experts is null and void. Each party is responsible for the payment of its own fees and expenses and for those of its experts.  
  \[32.2\] The adjudicator has discretion to order the distribution among the parties of the fees and expenses incurred in fulfilling his or her mandate. Notwithstanding this distribution, the parties shall remain jointly and severally liable for the fees and expenses of the adjudicator until full payment has been made. |
| Winnipeg Construction Association (WCA)                                      | Costs should be fixed by the adjudicator and should be proportionate to the parties "success" in the adjudication.\(^{202}\)                                                                                  |

\(201\) Coalition Contre Les Retards de Paiement dans la Construction Submission at p. 11.
\(202\) WCA Submission at p. 4.
\(203\) PSPC Submission at p. 17.
\(204\) CCA Submission at p. 8.

(i) The Process of Enforcement

### What Should the Process for Enforcing Adjudication Decisions Look Like?

<table>
<thead>
<tr>
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</thead>
<tbody>
<tr>
<td>Public Services and Procurement Canada (PSPC)</td>
<td>This is unknown. It is clear that there must be enforcement otherwise the decisions will be ignored. PSPC’s understanding is that with a decision of an adjudicator, it may be relatively quick to get support from the courts – but PSPC is unsure what the costs would be to get the courts to enforce an adjudication decision and what relatively quick means in timing.(^{203})</td>
</tr>
<tr>
<td>Canadian Construction Association (CCA)</td>
<td>CCA would support the approach in the Ontario Construction Act (section 13.20) for enforcing a determination as if it were an order of the court upon filing of the determination with the court.(^{204})</td>
</tr>
</tbody>
</table>

\(203\) PSPC Submission at p. 17.
**What Should the Process for Enforcing Adjudication Decisions Look Like?**

<table>
<thead>
<tr>
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<tbody>
<tr>
<td>National Trade Contractors Coalition of Canada (NTCCC)</td>
<td>An adjudicator’s decision should be binding. In the event that one party does not comply with the adjudicator’s decision, the other party should be able to enforce the decision in the same manner as an order of the court. The adjudicator’s decision should be subject to judicial review in only the limited instances enumerated in section 13.18 (5) of Ontario’s Construction Act. Otherwise, such decision should be binding upon the parties, subject to their right to have such decision reviewed at the end of the project in such court or arbitration proceedings as may be available.205</td>
</tr>
<tr>
<td>General Contractors Alliance of Canada (GCAC)</td>
<td>• Right of suspension upon failure to pay an adjudication determination within a prescribed time [10 days]</td>
</tr>
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<td></td>
<td>• A party should be permitted to file an adjudication determination with the court and the determination should be enforceable as if it were an order of the court. The party filing the determination should notify the other party (or parties) of the filing within a prescribed time [10 days].206</td>
</tr>
<tr>
<td>Canadian Institute of Quantity Surveyors (CIQS)</td>
<td>Summary judgement with limited room for appeal.207</td>
</tr>
<tr>
<td>Surety Association of Canada (SAC)</td>
<td>SAC submits that a determination by an adjudicator should be binding on an interim basis on the parties involved. Once a determination has been made and filed with the Court, the determination should be “enforceable as if it were an order of the court” (Section 13.20 (1); <em>Construction Act</em> of Ontario).208</td>
</tr>
</tbody>
</table>

205 NTCCC Submission at p. 20.  
206 GCAC Submission at p. 8.  
207 CIQS Submission at p. 4.  
208 SAC Submission at p. 10.
### What Should the Process for Enforcing Adjudication Decisions Look Like?

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| Coalition Contre Les Retards de Paiement dans la Construction | Under the proposed parameters, the adjudicator’s decision is effective immediately. However, it is not final. In order to ensure a party’s compliance, the decision could be brought before the ordinary courts for homologation. See sections 28.5, 29.1 and 29.2 of the proposed parameters.  

[Translation]  

28.5 The decision of the adjudicator is immediately enforceable, but is not final unless an ordinary court of law renders a final or interlocutory decision upholding it.  

29. Non-compliance with the adjudicator’s decision  

29.1 If one party fails to comply with a decision of an adjudicator, the other party may apply to the ordinary courts to have the decision homologated.  

29.2 For the purposes of approving the adjudicator’s decision, the rules set out in articles 946 to 946.6 of the Quebec Code of Civil Procedure apply with adaptations as required. Any monetary conclusion of the adjudicator’s decision shall be deemed to be increased by 10% if it is necessary for a party to apply to the ordinary courts for homologation or enforcement of the decision. |
| Winnipeg Construction Association (WCA)               | Adjudication decisions should be enforced as an order of the court upon filing of the determination with the court. |

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209 Coalition Contre Les Retards de Paiement dans la Construction Submission at pp. 10-11.  

210 WCA Submission at p. 5.
Appendix 5
BLG Opinion dated June 1, 2018
File No. 036383.000001

June 1, 2018

Delivered by E-Mail

R. Bruce Reynolds and Sharon Vogel
Singleton Urquhart Reynolds Vogel LLP
150 King St West, Suite 2512
Toronto, Ontario M5H 1J9

Dear Mr. Reynolds and Ms. Vogel:

Re: Legal Opinion

I. Introduction

You have asked for our opinion concerning: (1.) the constitutionality of possible federal “prompt payment” legislation; (2.) the interaction of federal and provincial prompt payment legislation; and (3.) the extent to which similar objectives could be achieved by contractual rather than by legislative means. The second issue, concerning how federal and provincial prompt payment legislation would interact, was the subject of two questions in the consultation package provided to stakeholders for comments in your consultation process.

For the purposes of our opinion, we have assumed that federal prompt payment legislation would have the following key features. It would:

(a.) Apply to all construction contracts let by the Federal Crown or a Crown Agency;

(b.) Set out timelines for payment of amounts payable under contracts and subcontracts;

(c.) Provide that payments must be made within these timelines unless the payor provides a notice of non-payment as provided for in the legislation and subject to holdback obligations;

(d.) Provide that amounts not paid on time bear interest at a specified rate; and
(e.) Establish interim adjudication processes for resolution of disputes about payment subject to determination by a court, arbitrator or by the parties by written agreement.

You have asked that our opinion be responsive to each of the following ways in which the Crown or a Crown Agency may be involved in a construction project:

(a.) Construction of a federally owned building on federally owned land for federal purposes; federal construction projects on “lands reserved for the Indians”\(^1\); and federal construction projects for defence purposes;

(b.) Construction of a part of a federal undertaking or of a work declared to be for the general advantage of Canada;

(c.) Construction of a part of a federally regulated industry.

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

You have also asked us to consider whether the federal government could achieve the goals of prompt payment legislation by inserting appropriate provisions in its contracts and insisting that contractors and subcontractors working on the project do the same. In addition, you have asked for our views on what other, more flexible legislative options might be available.

We have not considered how prompt payment legislation of this nature would interact with existing statutory provisions, regulations or directives in relation to payments or dispute resolution under federal government contracts.\(^2\)

II. Overview of Opinion

The state of the jurisprudence and the absence of the precise form of the potential legislation do not permit us to give you an unequivocal opinion.

The legislation being contemplated deals with aspects of the law of contract between the “owner” and the contractor and among the contractor and subcontractors. At first blush, legislation dealing with contractual relations, and especially contractual relations among non-federal government

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


We have not addressed the operability of provincial construction lien provisions with respect to federal projects. We note that the Supreme Court of Canada has held that such provisions do not operate with respect to federal undertakings where the sale of the property subject to the lien would result in the fragmentation or dismemberment of the undertaking: see e.g. Campbell-Bennett v. Comstock Midwestern Ltd., [1954] S.C.R. 207; CNR v. Nor-Min Supplies, [1977] 1 SCR 322.
parties such as the contractor and subcontractors, would be considered as falling within exclusive provincial legislative jurisdiction in relation to property and civil rights in the province.

Prompt payment legislation would not, in our view, be found to be within the “core” of any head of federal power. It follows that provincial prompt payment legislation of general application would apply to federal projects, subject, as we will discuss, to federal paramountcy.

The constitutional validity of federal prompt payment legislation will turn on two factors: the purpose and effect of the legislation and whether it is integral to a federal head of power. It will be helpful to elaborate on both briefly.

We turn first to purpose and effect – i.e., the “pith and substance” – of the legislation. If that purpose and effect are seen as ensuring the orderly and timely completion of federal construction projects, the prospects of federal legislation being upheld are significantly improved.

We understand that the purposes and effects of the legislation include: assuring orderly and timely building of federal construction projects by avoiding the disruptive effect and possibly gridlock which arises from non-payment down the supply chain; avoiding increased construction costs that result from bidders adding a contingency amount to allow for late payment; and, reducing the risk of disruption of federal construction projects because of the insolvency of subcontractors and suppliers. (When we refer in our opinion to the orderly and timely completion of federal construction projects, we intend to include all of these matters in that reference.)

If, however, the primary focus of the legislation is seen as being to strengthen the stability of the construction industry and to lessen the financial risks faced by contractors and subcontractors as, for example, in the purpose clause of Bill S – 224, the purpose and effect of the law could be seen as relating to contracts, a matter generally within exclusive provincial legislative competence. In that case, the prospects of the legislation being found to be valid federal legislation would be significantly reduced.

The second factor is concerned with whether the “matter” addressed by the legislation is integral to a federal head of power. It follows that the answer to the question of whether that link between the “matter” and a head of federal power is made out will be strongly influenced by the particular federal power relied on for particular types of projects.

In our opinion:

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

With respect to other types of federal projects, the case for constitutionality is much weaker. Federal prompt payment legislation that is made to apply to any construction contract entered into by a government institution (i.e. any department or ministry, Crown Corporation and wholly owned subsidiaries of Crown Corporations) regardless of the head of legislative power under which the government institution operates with respect to that construction contract is, in our opinion, unlikely to be upheld as valid federal legislation.

With respect to the adjudication aspects of the potential legislation, we doubt that there would be any constitutional problem arising from s. 96 of the Constitution Act (i.e., the core of superior court jurisdiction) given that the adjudication scheme leads only to interim decisions and does not purport to oust the jurisdiction of the courts. We will not address this aspect further.

The federal government could achieve the goals of prompt payment legislation by inserting appropriate provisions in its contracts and insisting that contractors and subcontractors working on the project do the same. There is no constitutional impediment to the federal government doing this by way of contract. In our opinion this approach will yield more certain results than legislation in situations in which the constitutionality of federal legislation is in doubt.

Federal legislation could be drafted so that it would not apply in jurisdictions with substantially similar provisions or so that it would apply to projects designated by a Minister.

III. Brief Review of Key Constitutional Principles

We think it useful to provide a brief discussion of the legal context in which the questions that you have asked will be resolved. We do this for several reasons: these questions are not directly covered by authority; there is some confusion in the jurisprudence on some fundamental points of constitutional analysis; and the analysis in this area is often heavily fact-dependent.

A. The two-step division of powers analysis

The analysis to determine whether a law or parts of a law fall within federal or provincial legislative jurisdiction under the Constitution Act 1867 proceeds through two main steps.
(i) **Determine the “pith and substance” of the law**

At the first step, one determines the subject matter or “pith and substance” of the law whose constitutional validity is in question. This analysis identifies the law’s “dominant purpose or true character” or “the ‘matter’ to which it essentially relates.”

Both the law’s purpose and its legal and practical effects are considered as part of this analysis. But it is the purpose and effects of the law, not its form, that determine its true character.

Where the challenged provisions are part of a larger legislative scheme, the pith and substance of the challenged provisions must be considered in the context of that larger scheme. This is because the nature of the larger scheme may influence the assessment of the purpose and/or effects of the challenged provisions. We have assumed that the potential prompt payment legislation would not be part of a larger legislative scheme that would inform the “pith and substance” analysis. If it were, that larger legislative context would have to be considered.

The law’s “dominant purpose” is decisive in the pith and substance analysis; the law’s secondary objectives and effects have no impact on its constitutionality. Thus, where the “matter” of legislation is squarely within federal or provincial legislative authority, it may have substantial effects on matters that, considered on their own, would be outside that legislative authority. This point is often expressed by saying that “incidental effects”, that is, effects that may be of significant practical importance but are collateral and secondary to the mandate of the enacting legislature, do not alter the constitutionality of an otherwise valid law.

*Nykorak v. Attorney General of Canada* is a good example of this principle in operation. The main question concerned the constitutionality of a provision in federal legislation deeming a member of the armed services to be a servant of the Crown. It was argued that the legislation was within the exclusive jurisdiction of the provinces because its purpose and effect was to confer civil rights of action upon the Crown and upon third persons, things that were not necessary to the exercise of the federal power over militia, military and naval service and defence under s. 91(7). The Court unanimously rejected this argument, commenting that once legislation comes “squarely within” a head of exclusive federal jurisdiction (in this case, s. 91(7)) it may nonetheless “incidentally affect property and civil rights in the province.”

(ii) **Assign the “matter” to the classes of subjects set out in s. 91 and 92.**

At the second step of the division of powers analysis, the law is assigned a place in the division of powers in the Constitution. The analysis that leads to this assignment focuses on the question of...
whether the “matter” of the law is “in relation to” one of the “classes of subjects” established under s. 91 and 92 of the *Constitution Act, 1867.*

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

Canadian constitutional law also recognizes that even where the “matter” of legislation may at first appear to fall within the legislative competence of one level of government, it may be assigned to a head of power of the other level where the matter is closely connected to that head of power. The *Nykorak* case is again an example. While at first look, the civil rights of a soldier would seem to be a matter of property and civil rights assigned to the provincial legislatures, the Court concluded that it was in fact properly assigned to Parliament by virtue of its jurisdiction under s. 91(7) in relation to “militia, military and naval service, and defence.”

**B. The interaction of federal and provincial prompt payment provisions**

As we noted at the beginning of our opinion, the second and third questions in the consultation package deal with the relationship between provincial and federal prompt payment legislation. These questions ask:

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

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

(i) *Concurrency*

The doctrine of concurrency holds that, where possible, courts should favour the operation of statutes enacted by both levels of government where the pith and substance analysis leads to the conclusion that those laws are properly within the legislative competence of both. This doctrine is based on two realities that flow from our commitment to the “pith and substance” approach.

One is that legislation that, in pith and substance, relates to a class of matters properly within the legislative jurisdiction of one level of government will incidentally affect matters within the competence of the other. The second is the recognition that legislation may have more than one “matter” and that the different matters may relate to different heads of legislative jurisdiction. This is the so-called “dual aspect” doctrine mentioned earlier. These two realities each produce the

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9 The language in quotations comes from the opening words of sections 91 and 92. Parliament has exclusive legislative authority “in relation to all matters not coming within” the classes of subjects assigned to the provinces by s. 92 and this authority extends “to all matters coming within the classes of subjects” set out in s. 91. The provincial legislatures have exclusive legislative authority “in relation to matters coming with the classes of subjects” set out in s. 92.

10 *Securities Reference, supra* note 4 at para 66.
result that both federal and provincial legislation in relation to the same subject matter may be constitutionally valid.

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

This means that provincial prompt payment legislation of general application would apply to federal construction projects. Assuming that federal prompt payment legislation is also valid in relation to federal constructions projects in certain situations, both the provincial and federal prompt payment schemes would operate concurrently with respect to those projects, subject to federal paramountcy which we will discuss next.

(ii) Federal paramountcy

If otherwise constitutional federal and provincial laws are in conflict, the doctrine of federal paramountcy resolves the conflict by holding that the federal law prevails. This doctrine would govern in the event that there were (otherwise constitutional) prompt payment legislation in effect in the province in which a federal project subject to federal prompt payment legislation was being built.

There is a subtle jurisprudence about the nature of a conflict that invokes the paramountcy doctrine. The basic principle is that federal paramountcy operates only in situations in which there is actual operational conflict between the federal and the provincial laws or in which compliance with the provincial law would frustrate the purpose of the federal law. Absent a conflict in these senses, the fact that federal and provincial legislation deal with the same or a related subject matter is not enough to invoke federal paramountcy.

(iii) Interjurisdictional Immunity

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

The more recent law on inter-jurisdictional immunity requires us to be cautious about relying on some of the older authorities. The Supreme Court has held quite recently that “interjurisdictional immunity is of limited application and should in general be reserved for situations already covered by precedent. This means in practice that it will be largely reserved for those heads of power that deal with federal things, persons or undertakings, or where in the past its application has been

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11 For recent applications of these tests, see e.g. Saskatchewan (Attorney General) v Lemare Lake Logging Ltd, [2015] 3 SCR 419; 407 ETR Co v Canada (Superintendent of Bankruptcy), [2015] 3 SCR 397.
considered absolutely indispensable or necessary to enable Parliament or a provincial legislature to achieve the purpose for which exclusive legislative jurisdiction was conferred …”\textsuperscript{12}

The “core” of legislative power protected by inter-jurisdictional immunity is narrower than the full scope of that power. Legislative authority generally extends beyond the “core” to matters that are closely integrated or integrally connected to the power. This distinction between the scope of a power and its “core” is nicely illustrated by \textit{British Columbia (Attorney General) v. Lafarge Canada Inc.}\textsuperscript{13}

The relevant aspect of the case was concerned with the scope of federal jurisdiction over non-Crown lands in the Port of Vancouver. The Court found that land use controls put in place pursuant to the federal \textit{Canada Marine Act}\textsuperscript{14} were “closely integrated” with shipping and navigation, a federal legislative power. It followed that they were within the legislative powers of Parliament. The Court also concluded, however, that these land use controls were not “absolutely indispensable and necessary” to the federal jurisdiction over navigation and shipping and therefore were not within the “core” of that power. It followed that provincial jurisdiction was not ousted in this area and that otherwise valid federal and provincial laws could operate concurrently, subject to federal paramountcy.

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

It follows that:

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

\section*{IV. \textbf{Analysis of the Prompt Payment Scheme}}

For ease of reference, we set out again our assumption in relation to the key features of potential federal prompt payment legislation. It will:

(a.) Apply to all construction contracts let by the Federal Crown or a Crown Agency.
(b.) Set out timelines for payment of amounts payable under contracts and subcontracts;

\begin{itemize}
\item 12 \textit{Canadian Western Bank, supra} note 3 at para 77.
\item 13 2007 SCC 23.
\item 14 SC 1998, c 10.
\end{itemize}
(c.) Provide that payments must be made within these timelines unless the payor provides a notice of non-payment as provided for in the legislation and subject to holdback obligations;

(d.) Provide that amounts not paid on time will bear interest at a specified rate; and

(e.) Establish interim adjudication processes for resolution of disputes about payment subject to determination by a court, arbitrator or by the parties by written agreement.

We will apply the two-step division of powers analysis (pith and substance and assignment to the listed powers) to legislation of this nature.

A. The pith and substance of the potential legislation

As we have noted earlier, to determine the legislation’s pith and substance, we must consider both its purpose and its legal and practical effects.

A good deal will turn on what the purpose of the legislation is found to be. We pause at this basic question in light of the purpose clause in the prompt payment legislation that has been passed by the Senate, Bill S – 224. That Bill’s purpose, as set out in s. 2, focuses on contractual matters; the Bill is “to strengthen the stability of the construction industry and to lessen the financial risks faced by contractors and subcontractors by providing for timely payments to them under construction contracts involving government institutions.” While a purpose clause in legislation is not determinative of a court’s assessment of the legislation’s true purpose, these stated purposes focus on the contractual dimensions of construction projects. Thus, if the purpose clause of Bill S – 224 is an apt statement of the purpose of federal prompt payment legislation, it seems likely that the pith and substance of it would be found to be the contractual relations regarding payment among contractors and subcontractors, a matter that would generally fall within exclusive provincial jurisdiction.

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

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

Having made that assumption, we also point out the importance of an appropriately framed purpose clause in the potential prompt payment legislation and of ensuring that there is a strong factual record to support this statement of purpose.

B. The class or classes of subject to which the “matter” relates?

The class or classes of subject to which the “matter” of the potential legislation should be assigned is not directly settled by authority; the answer depends, among other things, on the nature of federal involvement in the construction project.

Given that the “matter” of the legislation is assuring the orderly and timely completion of federal construction projects, the main competing heads of power will be, one hand, the provincial legislative authority over contracts by virtue of s. 92(13) of the *Constitution Act* and, on the other, various heads of federal legislative power including in relation to public property (s. 91(1A), defence (s. 91(7)) and federal undertakings (e.g. s. 92(10)).

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

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

C. Analysis of the Legal and Factual Questions

(i) The legal test

The legal test for the required link or relationship between the “matter” of the legislation and the head of federal power asks whether the “matter” of the legislation is an “integral element” of the federal head of power. This test has been applied with respect to a number of federal heads of power. We will discuss two examples.

The first is *Clark v. Canadian National Railway Co.* The issue was whether a negligence action on behalf of a small boy, who had been seriously injured when struck by a C.N.R. train, was time-barred by virtue of the 2-year limitation period set out in the federal *Railway Act*. The action would not have been time-barred under the general provincial limitation legislation.

A unanimous Supreme Court held that the federal limitation provision was beyond the legislative authority of Parliament to the extent that it purported to apply to an action for damages for personal injury arising under provincial law. The Court noted that rights of action for damages for personal injury and the procedure relating to them are matters falling within exclusive provincial legislative jurisdiction under s. 92(13) (property and civil rights) and 92(14) (procedure in civil matters) of the *Constitution Act 1867*. Parliament, on the other hand, has exclusive legislative jurisdiction in relation to railways and works declared to be for the general advantage of Canada (s. 91(29) and 92(10)).

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16 [1988] 2 SCR 680 [*Clark*]
17 RSC 1970, c R-2, s 342(1).
The Court set out two key principles that are directly relevant to our opinion in this matter.

First, undertakings falling within federal competence under s. 92(10) are subject to provincial laws of general application,\(^1\) provided that the application of the provincial laws does not “bear upon those subjects in what makes them specifically of federal jurisdiction.”\(^1\) In other words, provincial laws cannot intrude into the core of federal legislative power by virtue of interjurisdictional immunity. Thus, provincial contract law of general application applies to federal construction projects in the absence of federal legislation because, as we explained earlier, this “matter” would not be found to be at the core of any federal power.

Second, the constitutionality and applicability of federal legislation enacted under the powers conferred on Parliament by s. 91(29) and 92(10) (that is, undertakings connecting a province with another or others etc.) depend on whether the challenged provisions are an “integral element” of a federal head of power.\(^2\)

In applying these principles, the Court’s reasons display some lack of clarity about the distinction between the “core” and the “integral element” analysis:

[A] limitation provision relating to an action for personal injury caused by a railway cannot be said to be an integral part of federal jurisdiction. The core federal responsibility regarding railways is to plan, establish, supervise and maintain the construction and operation of rail lines, railroad companies and related operations. The establishment of general limitation periods which affect those injured by the negligence of the railway is not, to our mind, part of that core federal responsibility or of any penumbra sufficiently proximate to satisfy the test articulated in the cases …”. Such limitation periods are not an integral part of jurisdiction over railways, but rather … “an attempt to reframe for the benefit of railway undertakings the general legal environment of property and civil rights in which these undertakings function in common with other individuals and enterprises.”\(^2\) (emphasis added)

We can conclude that a matter that would otherwise fall within provincial legislative authority will only be found to be within federal competence if it is an “integral element” of a federal head of power. In the Clark case, whether a limitation period was two or three years for an action arising out of a personal injury caused by a train was not such an integral element of the federal power in relation to railways.

\(^{18}\) Clark supra note 16 at para 46. There is a further issue to consider in relation to Crown immunity. In the Interpretation Acts of most provinces and in the Federal Act, a statute does not bind the Crown unless it so provides expressly or by necessary implication. See generally, Sullivan, note 15 at s. 27.1 ff

\(^{19}\) Ibid, quoting from Bell Canada v Québec (Commission de la santé et de la sécurité du travail), [1988] 1 SCR 749 at 762 – 3.


\(^{21}\) Ibid, at para 54.
The “integral element” test was first articulated in that form in a construction case, *Construction Montcalm Inc. v. Quebec (Minimum Wage Commission)*.\(^{22}\) At issue in *Montcalm* was whether provincial minimum wage and related legislation covered a contractor’s employees in the province who were constructing the runways at Mirabel Airport.\(^{23}\) Montcalm’s main submission was that aeronautics is an area of exclusive federal jurisdiction and that construction of an airport and the conditions of employment of those building it were properly part of aeronautics. Although there was applicable federal as well as provincial legislation, there was found to be no conflict between them. And so the applicability of the provincial legislation turned on the doctrine of inter-jurisdictional immunity: did the provincial legislation invade the core of federal jurisdiction in relation to aeronautics?

The Court divided. The majority of the Court speaking through Beetz J. found the provincial law to be applicable. In the course of doing so, the majority noted that Parliament will have legislative authority in relation to matters that would otherwise be within provincial competence where the matter is an “integral part” of the federal authority.

\[
\text{… Parliament has no authority over labour relations as such nor over}
\text{the terms of a contract of employment; exclusive provincial}
\text{competence is the rule [citation omitted]. By way of exception}
\text{however, Parliament may assert exclusive jurisdiction over these}
\text{matters if it is shown that jurisdiction is an integral part of its}
\text{primary competence over some other single federal subject.}\]
\(^{24}\)

Montcalm’s first argument in favour of exclusive federal jurisdiction was based on the federal power in relation to aeronautics. The majority used the language of “integral to” even though the issue turned not on the full scope of federal legislative competence but on whether the operation of provincial law was ousted by interjurisdictional immunity.

\[
\text{The construction of an airport is not in every respect an integral part}
\text{of aeronautics. … In my opinion what wages shall be paid by an}
\text{independent contractor like Montcalm to his employees engaged in}
\text{the construction of runways is a matter so far removed from aerial}
\text{navigation or from the operation of an airport that it cannot be said}
\text{that the power to regulate this matter forms an integral part of}
\text{primary federal competence over aeronautics or is related to the}
\text{operation of a federal work, undertaking, service or business.}\]
\(^{25}\)

The majority emphasized that the nature of Montcalm’s ordinary business did not make it a federal undertaking. Its occasional work on federal contracts on federal lands did not make it one. This holding puts in doubt the idea that federal jurisdiction over the general contractor necessarily means that there is also federal jurisdiction over the relationship between the general contractor

\(^{22}\) [1979] 1 SCR 754 [*Montcalm*]
\(^{23}\) RSC 1970, c L-3.
\(^{24}\) *Construction Montcalm Inc v Quebec (Minimum Wage Commission)*, [1979] 1 SCR 754 at 768 ["Montcalm"].
\(^{25}\) Ibid, at 771.
and subcontractors. *Montcalm* was mainly concerned with inter-jurisdictional immunity rather than with the full ambit of federal legislative power. However, the fact that the Court held that the wage rates between the contractor and its employees were not within the core of federal power suggests that the scope of federal power in relation to federal dealings with a contractor cannot necessarily be equated to the scope of federal power in relation to the dealings between the contractor and its employees.

The majority of the Court also rejected Montcalm’s argument that provincial law does not apply on federal Crown lands. This argument had its basis in s. 91(1A) which gives Parliament exclusive legislative authority in relation to “the public debt and property.” Noting that “Federal Crown lands do not constitute extra-territorial enclaves within provincial boundaries,”\(^2^6\) the majority concluded that the provincial minimum wage scheme did not relate to federal property or to any other federal subject, but rather to civil rights.

The key point for our purposes in *Lafarge* (which we discussed earlier), *Clark*, and *Montcalm* is that, generally speaking, matters of contract law fall within exclusive provincial legislative competence except to the extent that aspects of contract law are “an integral element of [Parliament’s] primary jurisdiction over some other matter.”\(^2^7\) Whether a matter is “integral” to a head of power turns on the court’s assessment of how central the matter is to the effective exercise of the power.

Of course, how the “integral element” or “closely integrated” test applies depends on the head of federal power that is engaged. We will turn shortly to considering various possible heads of federal power in relation to the question of whether prompt payment provisions are integral to the exercise of those powers.

(ii) The factual inquiry

Having established the legal test, the next step is to apply that test to the facts. The cases show that this part of the analysis may often be heavily focused on facts relating to the operation of the activity in question.

At this point, it will be helpful to discuss the various ways in which a construction project could be thought to be “federal” and to examine the factual elements that have been relied on to establish or refute federal legislative authority. For the purposes of the constitutional analysis and in light of your instructions, there are four scenarios that need to be considered.

(a.) Construction of a federally owned building on federally owned land for federal purposes; federal construction projects on “lands reserved for the Indians”; and federal construction projects for defence purposes

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

\(^{2^6}\) *Ibid*, at 764.

\(^{2^7}\) *Ibid*, at 770.
The “property” to which the s. 91(1A) power relates is property owned by the Crown in right of Canada or by an agent of the Crown such as a Crown corporation or an agent of the Crown. The Crown must have an interest in the property in order for it to fall within the scope of this head of legislative power. The word “property” in this section is used in its broadest sense and includes every kind of asset and partial interest. LaForest, in his 1969 treatise, sums up the scope of this power as follows:

… the Dominion’s [i.e. federal] legislative power under this head is quite extensive. In exercising the power it may pass laws that would normally fall within provincial competence. … Moreover, if the federal government has an interest in property it may legislate respecting that property in such a way as to displace ordinary provincial law.

The broad scope of federal legislative power in relation to its property was succinctly stated by Middleton J.A. in the 1930 Ontario Court of Appeal decision in R. v. Red Line Ltd.: “The right of the Dominion to control and regulate its own property appears to me to be incontestable and not call for any elaborate discussion.” This legislative authority has been exercised by enactment of a number of federal acts relating to federal property.

It follows that federal legislation will be valid where it is in pith and substance in relation to the control or regulation of federal property or is integral to those activities. The orderly and timely completion of federal construction projects is on federal land likely falls within this general power to control and regulate the property.

We have gone back to a 1930 decision of the Ontario Court of Appeal for guidance because the leading cases in relation to s. 91(1A) mostly deal with the extent to which provincial legislation applies to federal property and therefore do not deal directly with the scope of the federal power beyond its “core”. However, those cases are somewhat helpful for present purposes because they make a number of comments about what is within the “core” of federal jurisdiction over property.

We have already discussed Construction Montcalm. But it is worth noting again that the majority of the Supreme Court of Canada held that conditions of employment of workers employed by a contractor on a federal project on federal lands did not fall within the core of federal legislative competence in relation to property. The Court did not address but rather assumed the constitutionality of the federal minimum wage legislation, the Fair Wages and Hours of Labour Act. In other words, the majority of the Court assumed that federal jurisdiction extended to certain

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29 LaForest, supra note 28 at 134 citing among other cases Reference Re Employment and Social Insurance Act, [1936] SCR 427 at 431 (per Rand J and Davis J (dissent)).
30 LaForest, supra note 28 at 135.
31 (1930), 54 CCC 271 (ONCA).
33 RSC 1970, c L-3.
conditions of employment on the basis that they were integral to the effective exercise of the federal power even though they were not within the core of the federal power.

The outcome was different in *Commission de Transport de la Communauté Urbaine de Québec v. Canada (National Battlefields Commission)*. The case concerned whether the guided bus transportation service on the Quebec National Battlefields Park, which was federal property, required a permit from the provincial transport regulator. The Court held that it did not. It assumed the constitutionality of the federal legislation. The Court found that establishing this transport service in the territory of the federal park was an “integral part” of the mandate conferred by the federal statute and that applying the provincial scheme would constitute a “massive and intrusive impact” on the vital and essential aspects of the federal service.

The constitutionality of the proposed federal prompt payment scheme under this head of federal power will turn on the answer to the question of whether the prompt payment of invoices by all involved with the project on federal land is integral to the federal legislative authority in relation to public property.

In our opinion, it is likely but not certain that a court would so find. Even though prompt payment provisions would not be found to be at the “core” of federal legislative power in relation to public property, it is our view that the scope of federal authority in relation to public property would likely be found to extend to these matters. Control of activities on property are likely “integral” to the ownership of that property.

We turn now to consider Parliament’s exclusive legislative authority over “lands reserved for the Indians.” This power differs from that over property (s. 91(1A)) in two respects.

First, this power relates not only to reserves as defined in the *Indian Act*, but to “all lands reserved, upon any terms or conditions, for Indian occupation.” Thus, a good deal of the “land reserved for the Indians” is not owned by the federal Crown; this grant of legislative power does not carry with it proprietary rights that do not otherwise exist. Second, this power must be read subject to s. 35 of the *Constitution Act 1982* which entrenches the “existing aboriginal and treaty rights of the aboriginal peoples of Canada.”

The power over “lands reserved for the Indians” has been interpreted broadly to include, for example, exclusive federal legislative jurisdiction over the right to possession and occupation of lands on a reserve, subject, as noted, to the constitutional entrenchment of aboriginal and treaty

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36 *Constitution Act*, s 91(24).
37 R.S.C. 1985, c. I-5, s. 2(1) “reserve”
38 *St. Catherine’s Milling and Lumber Company v The Queen* (1888), 14 AC 46 at 59 (PC Canada); quoted with approval in *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 174.
39 Peter Hogg, *Constitutional Law of Canada*, 5th ed. (Toronto: Thomson Reuters, 2016) at section 28.1(c) [“Hogg”].
40 Enacted as Schedule B to the *Canada Act* 1982 c 11 (U.K.).
rights. However, most of the cases deal with the applicability of provincial laws on reserve lands rather than with the scope of federal legislative power in relation to reserve lands.

The analysis of the constitutionality of federal prompt payment legislation in relation to federal projects on “lands reserved for the Indians” will thus be similar to that with respect to federal projects on public property. The question will be whether the prompt payment provisions are in pith substance in relation to, or integral to “lands reserved for the Indians.”

Federal prompt payment legislation could be seen as affecting aboriginal and treaty rights which, in turn, gives rise to the question of whether there is a duty to consult with aboriginal peoples in relation to that legislation. There is appellate authority holding that the duty of the Crown to consult with indigenous people does not extend to the enactment of legislation. If this is correct, there is no legal duty to consult with indigenous peoples concerning the enactment of federal prompt payment legislation. However, the Supreme Court of Canada heard and reserved judgment on an appeal raising the question of whether the duty to consult applies to the legislative process on January 15, 2018. The issue must therefore be considered to be unsettled until the Court renders its judgment. In any event, there is no legal impediment in the way of the Crown conducting consultations in relation to the impact of prompt payment legislation on indigenous interests.

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

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

(b.) Construction of a part of a federal undertaking or of a work declared to be for the general advantage of Canada;

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

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

(a) lines of steam or other ships, railways, canals, telegraphs and other works and undertakings connecting the province with any other or others of the provinces, or extending beyond the limits of the province;

(b) lines of steam ships between the province and any British or Foreign Country; and

(c) such works as, although wholly situate within the Province, are … declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more of the Provinces.

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

Finally, Parliament acquires legislative jurisdiction over works declared to be for the general advantage of Canada.47

There is an abundant jurisprudence in relation to federal labour relations jurisdiction with respect to these sorts of works and undertakings. Since the Stevedores Reference48 in 1955, it has been settled that Parliament may regulate employment in works, undertakings or businesses within its legislative competence.49 The employment must, in a functional or operational way, be integral to the undertaking. As expressed in one leading judgment, “Parliament is vested with exclusive legislative jurisdiction over labour relations and working conditions when that jurisdiction is an integral part of its primary and exclusive jurisdiction over another class of subjects …”50 (emphasis added)

The following quotation from Hogg’s treatise gives a helpful overview of how this requirement has been applied:

The fact that an employer is an interprovincial railway will not sweep a group of employees into federal jurisdiction, if they operate a hotel which is functionally separate from the railway. The fact that employees are engaged in constructing a runway at an airport will not sweep them into federal jurisdiction, if their work is simply construction, unrelated to the tasks of design or operation that would be an integral part of aeronautics. The fact that the employer is a company operated by Indians, and the business is on an Indian reserve, will not sweep employees into federal jurisdiction, if their work is simply the manufacturing of shoes. The fact that employees’ wages are subsidized by the federal government, as part of a federal

47 See e.g. British Columbia v Canada, [1994] 2 SCR 41.
48 Re Industrial Relations and Disputes Investigation Act (Can), [1955] SCR 529.
49 Hogg, supra note 39 at section 21.8(b).
50 Bell Canada v Québec (Commission de la santé et de la sécurité du travail), [1988] SCR 749 at 761 – 2; for more recent examples, see NIL/TU, O Child and Family Services Society v BC Government and Service Employees’ Union 2010 SCC 45; Tessier Ltee v Québec (Commission de la santé et de la sécurité du travail), 2012 2 SCR 3.
job creation programme, will not sweep construction workers into federal jurisdiction.51 (emphasis added)

The question with respect to all of these areas of federal activity will be whether the terms of payment and resolution of payment disputes is integral to federal legislative authority in relation to the activity. To paraphrase the language used in Lafarge, is the prompt payment scheme an integral aspect of Parliament’s authority to build, regulate and control the undertaking?

In this category of case, the contractors and subcontractors generally will not themselves be federal undertakings.52 Thus, the question will be whether payment provisions are integral to the operation of the particular undertaking.

Most of the leading cases are concerned with inter-jurisdictional immunity – that is, with whether otherwise constitutional provincial legislation cannot apply to these federal undertakings. This case law identifies not the full scope or outer limits of federal jurisdiction, but the core of that jurisdiction into which the provinces cannot intrude even in the absence of federal legislation.53 The jurisprudence was thoroughly reviewed by the Supreme Court in Canadian Western Bank.54 It is helpful to understand what is at the “core” of the particular federal power, but we must bear in mind that the content of the “core” is generally narrower than the full scope of federal legislative competence.

Two cases from the Supreme Court are particularly helpful.

The first is Clark which we discussed earlier. The question was whether a provincial limitation period applied to a negligence action brought by a person injured when struck by a train. The Court held that it did, commenting that the core federal responsibility regarding railways is to “plan, establish, supervise and maintain the construction and operation of rail lines, railroad companies and related operations.”55 While the Court used the language of “core”, the case concerned the limits of federal jurisdiction, not interjurisdictional immunity. In our view, therefore, the language of “plan, establish, supervise and maintain the construction and operation of” a federal undertaking can be relied on in assessing the scope of federal legislative powers. The question therefore would be whether the prompt payment legislation is integral to maintaining and operating the federal undertaking in question.

The second helpful authority is the Lafarge case that we have referred to earlier. It concerned the scope of federal legislative authority in relation to navigation and shipping. The following comments by Justices Binnie and LeBel are particularly relevant for present purposes:

The federal power [i.e. the power under s. 91(10) power over navigation and shipping] also includes the infrastructure of navigation and shipping activities. This enables the federal

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51 Hogg, supra note 39 at section 21.8(b); references omitted; emphasis added.
52 See, for example, Montcalm, where the project was the construction of a federal undertaking (the runways of an airport), the contractor was not a federal undertaking, service or business.
54 Canadian Western Bank, supra.
55 Clark, supra note 16.
government to build or regulate the necessary facilities like ports and to control the use of shipping lands and waterways.\textsuperscript{56} (emphasis added)

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

The same approach would apply in relation to a project declared to be for the general advantage of Canada.\textsuperscript{57}

\textit{(c.)} Construction of a part of a federally regulated industry.

By way of example, banks fall within federal jurisdiction under s. 91(15), federal legislative power in relation to aeronautics is supported by the power to legislate for the Peace, Order and Good Government of Canada in the preamble to s. 91 and the same head of power supports federal jurisdiction in relation to atomic energy.\textsuperscript{58} Would federal prompt payment be valid in these areas of federal legislative authority?

The same analytical approach based on the “integral” test would apply in this context. The key question would be whether prompt payment is integral to the operation of, for example, a bank, an airport or a nuclear reactor. However, we think that in general it will be harder to uphold federal jurisdiction in this context: it will be more difficult to sustain the position that the timeliness of payment is integral to these areas of federal regulation.

\textit{(d)} Construction of a building that is built in partnership among Canada, a province and a private party for some non-federal, or at least not exclusively federal purpose and construction projects which the federal government funds in whole or in part (including Indigenous Peoples projects); and P3 projects in which the federal government is a participant.

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

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

V. \textbf{Can the Interaction of Federal and Provincial Legislation Be Made More Predictable?}

We discussed earlier the legal principles governing the interaction of federal and provincial legislation. To sum up, provincial prompt payment legislation of general application would apply

\begin{itemize}
\item \textsuperscript{56} \textit{Lafarge, supra} note 12 at para 62.
\item \textsuperscript{57} See for example \textit{Ontario Hydro v. Ontario (Labour Relations Board), [1993] 3 SCR 327}
\item \textsuperscript{58} \textit{Ibid.}
\end{itemize}
to federal construction projects in the province unless provincial competence is ousted by interjurisdictional immunity or provincial legislation is rendered inoperative by federal paramountcy. As to interjurisdictional immunity, in light of the Montcalm and Lafarge cases, this scenario is unlikely to arise. As for federal paramountcy, its operation depends on there being a conflict, either operationally or with the purpose of the federal legislation. The most recent authorities define conflicts in this context quite restrictively.\(^{59}\)

Relying on these doctrines to resolve questions about how federal and provincial legislation interact would create uncertainty. What constitutes the “core” of a head of legislative power or what constitutes a “conflict” between federal and provincial legislation are often highly contestable. For this reason, we think that consideration should be given to providing for a more predictable way of addressing the interaction of federal and provincial prompt payment legislation.

One device worth considering is the one used in the federal Personal Information Protection and Electronic Documents Act.\(^{60}\) It provides that part of the Act does not apply if the Governor in Council is satisfied that provincial legislation is “substantially similar” and makes an order exempting the organization, activity or class from the application of the relevant part of the Act.\(^{61}\) A similar approach could be used in federal prompt payment legislation. The Governor in Council could be given authority to exempt all or certain types of federal construction projects from the federal legislation if satisfied that there were substantially similar provincial legislation.

Another possibility would be for governments to propose to the Uniform Law Conference of Canada that it take up the topic of prompt payment legislation for a model or uniform law. If prepared and adopted by the various jurisdictions, this approach could achieve consistency of treatment within and among jurisdictions and avoid potential constitutional controversies.

Yet another possibility would be for the legislation to provide that it applies to projects designated by a Minister, along the lines of the designation process under the Canadian Environmental Assessment Act, 2012.\(^{62}\) The ministerial designation would not strengthen (or weaken) the case for constitutional applicability of federal legislation to the designated project and the scope of the designation power itself would be subject to constitutional scrutiny. But the designation process would permit a case by case analysis of the strength of the claim for federal jurisdiction and the decision not to designate could avoid the nuanced inquiries of the paramountcy analysis that might otherwise be required.

VI. Achieving Prompt Payment Goals by Contract

You have asked us to consider whether some combination of legislation and revision of standard form contracts might be the best approach. This raises the question of the limits, if any, on the ability of the Federal Crown as a contracting party to build a prompt payment scheme into its contracts.

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59 See, for example, Saskatchewan (Attorney General) v. Lemarre Lake Logging Ltd, [2015] 3 SCR 419.
60 S.C. 2000, c. 5 [“PIPEDA”].
61 Ibid, at section 26(2).
62 S.C. 2012, c. 19, s. 52; see e.g. s. 14(2)
Generally, the Crown has the power of a natural person to enter into contracts and is not confined in this regard within the limits of its power to legislate. This general statement is subject to the Crown complying with statutory requirements and to the further qualification that the contractual arrangements are not, in substance, regulation of a matter beyond the legislative competence of that order of government. Provided that the contracting parties voluntarily assume their respective obligations, there is no legislative power being exercised.

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

VII. Conclusion

In our opinion:

- The strongest case for constitutionally valid federal prompt payment legislation is with respect to legislation in relation to federal projects on federal lands. The courts have generally understood federal legislative powers to be wide in relation to federal property. The case for federal jurisdiction would be similarly strong for federal projects on “lands reserved for the Indians” and in relation to “defence.” It is likely, although not certain, that federal prompt payment legislation in relation to these projects would be found to be within the legislative authority of Parliament.

- There is also a good, but by no means certain case to be made for the constitutionality of federal legislation in relation to the construction of federal works and undertakings and works declared to be for the general advantage of Canada.

- With respect to other types of federal projects, the case for constitutionality is much weaker. Federal prompt payment legislation that is made to apply to any construction contract made by a government institution (i.e. any department or ministry, Crown Corporation and wholly owned subsidiaries of Crown Corporations) regardless of the head of legislative power under which the government institution operates with respect to that construction contract is, in our opinion, unlikely to be upheld as valid federal legislation.

- With respect to the adjudication aspects of the potential legislation, we doubt that there would be any constitutional problem arising from s. 96 of the Constitution Act (i.e., the core of superior court jurisdiction) given that the adjudication scheme leads only to interim decisions and does not purport to oust the jurisdiction of the courts.

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64 YMHA, supra.

65 Hogg, supra note 39 at section 6.8(a).

66 We have not considered whether these sorts of provisions are permitted under the existing statutory framework for federal contracts as we thought that question was beyond our terms of reference.
The federal government could achieve the goals of prompt payment legislation by inserting appropriate provisions in its contracts and insisting that contractors and subcontractors working on the project do the same. There is no constitutional impediment to the federal government doing this by way of contract. In our opinion this approach will yield more certain results than legislation in situations in which the constitutionality of federal legislation is in doubt.

Federal legislation could be drafted so that it would not apply in jurisdictions with substantially similar provisions or that it would apply to projects designated by a Minister.

Yours very truly

Thomas Cromwell

Guy J. Pratte
Appendix 6
Federal Prompt Payment and Adjudication Chart
Federal Prompt Payment and Adjudication Process

Contractor submits proper invoice to owner
(monthly or as specified in contract)

Owner Receives Invoice

Owner Disputes All or Part of Invoice
- Owner disputes invoice and delivers notice of non-payment within 14 days
- Pays undisputed amounts

Owner Pays Within 28 Days

Contractor Pays Subcontractor Within 7 Days

Subcontractor pays sub-subcontractor within 7 days

Contractor or Subcontractor Refers Dispute to Adjudication
(Decision within 46 days (or as agreed))

Owner Does Not Comply Within 10 Days
Contractor/Subcontractor:
- Suspends work until payment is made, and begins enforcement actions on the decision

- Demobilization and remobilization costs are paid
- Mandatory interest is paid
- Contractor/subcontractor remobilizes

Owner Complies with the Decision
- Owner complies with the decision and pays contractor within 10 days
- Contractor pays sub-contractor within 7 days
- Sub-contractor pays sub-contractor within 7 days

Contractor starts litigation/arbitration after adjudication

Parties agree to treat the adjudicator's decision as final