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Ontario's New *Construction Act*:

Six Months In

2019 OGRA Conference:
Past Present Future

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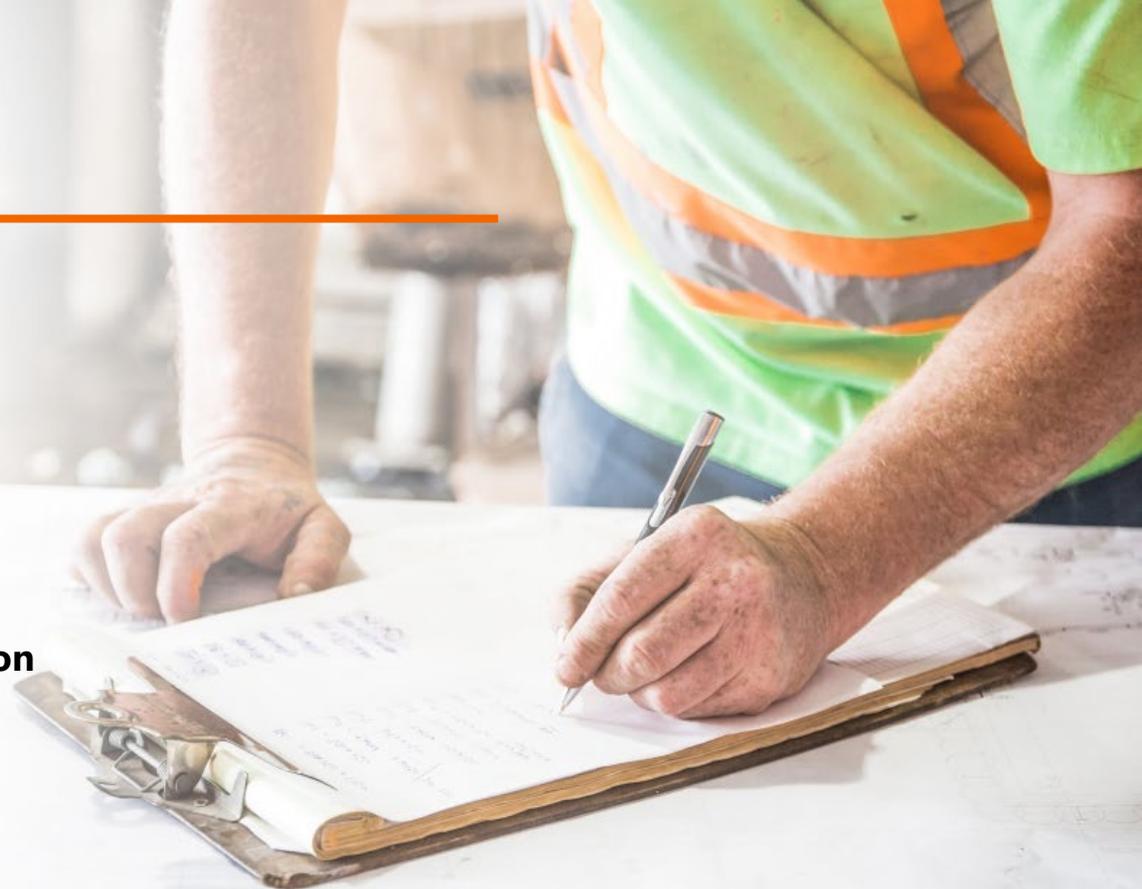


This presentation does not constitute legal advice or a legal opinion on any matter discussed.



Agenda

- **The Legislative Process**
- **Transition**
- **Modernization**
- **Surety Bonds**
- **Prompt Payment and Adjudication**
- **The National Landscape**
- **Practical Implications**
- **Conclusion**



The Legislative Process

- The changes in the new *Construction Act* are being implemented in two-phases:
 - **Phase I:** Modernization provisions, in force as of July 1, 2018; and
 - **Phase II:** Prompt Payment and Adjudication provisions, coming into force October 1, 2019
- **Technical Amendments:** Bill 57, *the Restoring Trust, Transparency and Accountability Act, 2018* received Royal Assent on December 6, 2018

Transition



- **Phase I - Transition Trigger Dates:**
 - Contract entered into on or before July 1, 2018
 - Procurement process entered into before July 1, 2018
 - Lease entered into before July 1, 2018
- **Phase II – Transition Trigger Dates:**
 - Contract entered into on or before October 1, 2019
- **Bill 57 – December 6, 2018:**
 - Modifies the Transition Provision for Phase II to include leases, contracts for improvements, and commencement of a procurement processes on or before October 1, 2019

Transition (cont'd)

- **Commencement of Procurement**

- In accordance with section 87.3(1)(b) of the *Act*, the old *Act* continues to apply with respect to an improvement if a procurement process, if any, for the improvement was commenced before July 1, 2018 by the owner of premises

- **Bill 57: December 6, 2018**

- Defines “procurement process” as “(a) a request for qualifications; (b) a request for quotation; (c) a request for proposals; or (d) a call for tenders.”

The Importance of the Prime Contract

- It may be difficult to determine the date the prime contract was entered into, as lien claimants other than the contractor may not have access to the prime contract
- Lien claimants have a right to request certain information about the prime contract in accordance with section 39 of the *Act*
- Bill 57 added to the list of information that can be requested:
 - The names of the parties to the contract;
 - The date on which the contract was entered into; and
 - The date on which any applicable procurement process was commenced

Modernization

- There are various elements to modernization including:
 - Transition
 - Lienability
 - Lien Mechanics (preservation, perfection and expiry)
 - Holdback/Substantial Completion
 - Construction Trusts
 - Surety Bonds

Modernization: Lienability

- Increase the time period for preservation to 60 calendar days
- Increase the time period for perfection to 90 calendar days
- Amend the definition of “price” to include certain out-of-pocket costs (“direct costs” resulting from delay)
- New rules for municipal lands
 - Liens will need to be given, not registered on title (October 1, 2019)

Modernization: Holdback and Substantial Performance

- Provide for mandatory release of holdback but not mandatory early release of holdback
- Permit segmented holdback for clearly separable improvements (particularly for AFP projects)



Modernization: Holdback and Substantial Performance (cont'd)

- Permit partial release of holdback (phased or annual basis) in certain circumstances (contract price must be \$10 million or more)
- Notices of non-payment of a holdback must be published in a construction trade newspaper – the owner is required (no later than 3 days after publication) to notify the contractor of the publication
- The contractor can refuse to pay holdback to a subcontractor if the owner does not pay, but the contractor must refer the matter to adjudication and provide notice to its subcontractor(s)
- Release of holdback bond or letter of credit permitted

Construction Trusts

- Review of the trust provisions of the *Act* focused on their utility in the context of an insolvency or bankruptcy
- A particular focus of the review was based on the impact of federal insolvency legislation (i.e. the BIA or the CCAA) on the rights of construction industry participants under the *Act*
- Book keeping model introduced

Surety Bonds

- The Act requires **mandatory surety bonding on public sector projects**. This applies if the contract price exceeds amount prescribed.
- Regulations provide that **s.85.1 of the Act applies to a public contract if the contract price is \$500,000 or more**.
- The requirement for a **labour and material bond** is a coverage limit of at least 50% of the contract price, or such other percentage of the project price as may be prescribed.
- The requirement for a **performance bond** is a coverage limit of at least 50% of the contract price.

Surety Bonds (cont'd)

- AFP Projects are not exempt from requirement to bond. The Act sets out specific bonding thresholds in regulations.
- Section 85.1 requirements for mandatory surety bonds apply in relation to the Contractor Agreement (s.1.1(4))

Surety Bonds (cont'd)

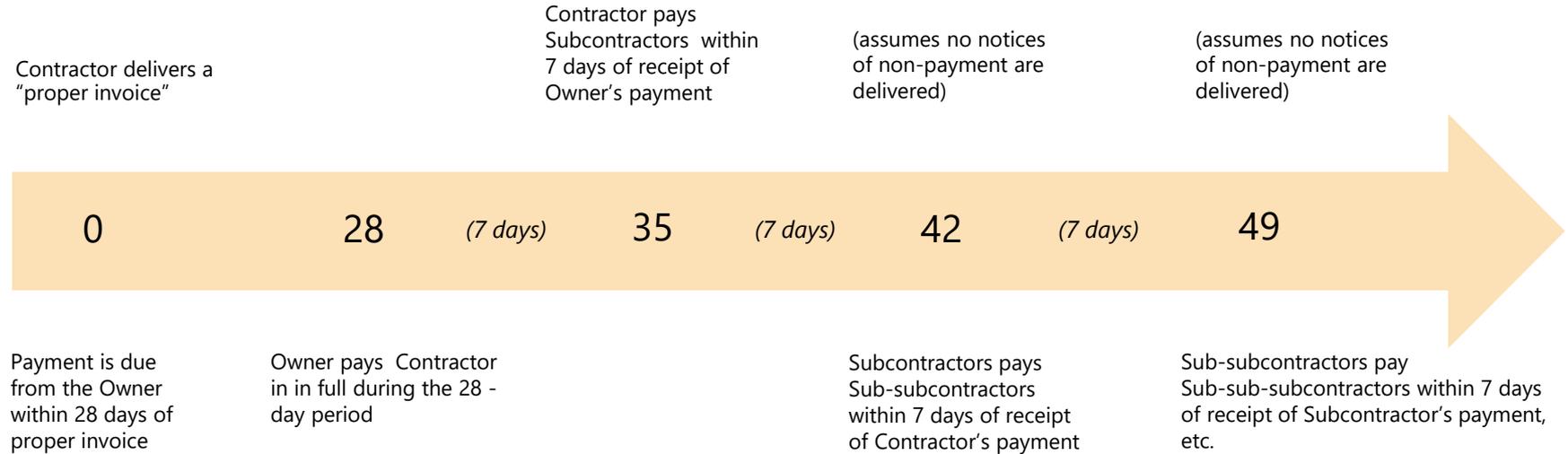
- Minimum coverage limit for surety bonds on AFP projects are provided for in 50 percent of the contract price (if contract price is \$100 million or less) or \$50 million (if the contract price is over \$100 million) (O.Reg 304/18 – s.3)
- There is no limitation on other bonds of security. The Crown, Municipality or Broader Public Sector Organization may require a different coverage limit so long as it exceeds the prescribed minimum (s.85.1(7))
- The package of security must reflect an appropriate balance between the adequacy of security required to ensure the payment of persons supply services or materials under the public contract and the cost of security (s.1.1(4)3)

Prompt Payment

- Prompt payment applies to both the public and private sector
- Seeks to ensure that all parties down the construction pyramid are paid promptly
- It will apply to contracts entered into on or after October 1, 2019
- Cannot contract out of prompt payment but parties are free to contract in respect of payment terms (e.g. allow milestone payments, etc.)



Timing of Payments – Full Payment



Practical Implications: Transition to Prompt Payment

- As the introduction of the prompt payment provisions approaches on October 1, 2019, it will be important that all participants in the construction pyramid have readied themselves for both prompt payment, particularly owners
- Contract provisions will need to be reviewed carefully
- An increase in organizational efficiency in processing payments and greater staffing, tracking and management resources is required
- There will also need to be a greater focus on timelines associated with the payment certification process

What is Adjudication?

- Adjudication is an **interim binding** dispute resolution mechanism that is intended to be pragmatic, swift, and flexible.
- Purpose: Unlocks payment gridlock and allows cash to flow down the construction pyramid

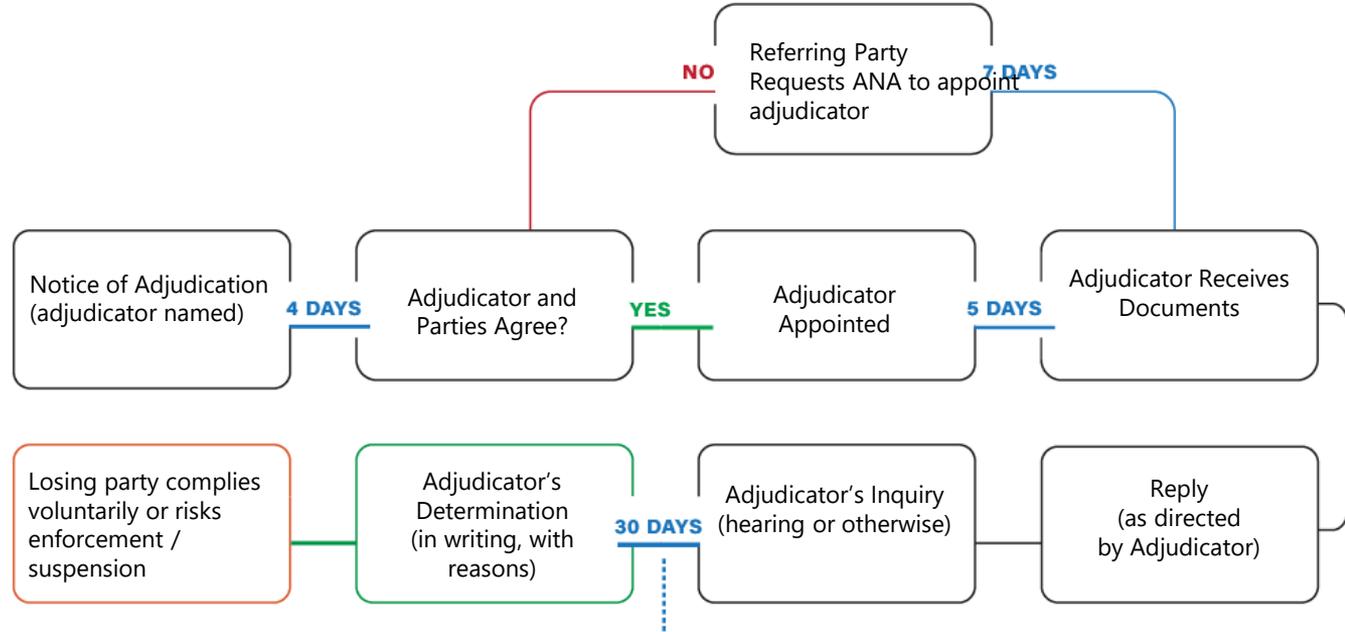


What Claims can be Adjudicated?

Adjudication applies to a specified subset of issues focused on resolving payment disputes including:

- valuation of services or materials
- payment under the contract/change orders
- disputes of notices of non-payment
- set-offs
- holdback payments
- non-payment of holdback
- issues that the parties may agree to be part of an adjudication

Adjudication Process



Subject to extension (46 days by
adjudicator or as agreed).

Powers of the Adjudicator

An adjudicator may exercise the following powers and any other power of an adjudicator that may be specified in the contract or subcontract:

1. Issuing directions respecting the conduct of the adjudication
2. Taking the initiative in ascertaining the relevant facts and law (inquisitional note)
3. Drawing inferences based on the conduct of the parties to adjudication
4. Conducting an on-site inspection
5. Obtaining the assistance of a merchant, accountant, actuary, building contractor, architect, engineer or other person in such a way as the adjudicator considers fit, as is reasonably necessary to enable him or her to determine better any matter of fact in question
6. Making a determination in the adjudication

Consolidated Adjudication

- Any party to a construction contract or subcontract can refer a dispute to adjudication at any time during the project
- The Act permits consolidated adjudications:
 - a) If the parties agree; or
 - b) If the general contractor elects to proceed with adjudication in relation to the same matter or related matters in respect of an improvement



Adjudication (cont'd)

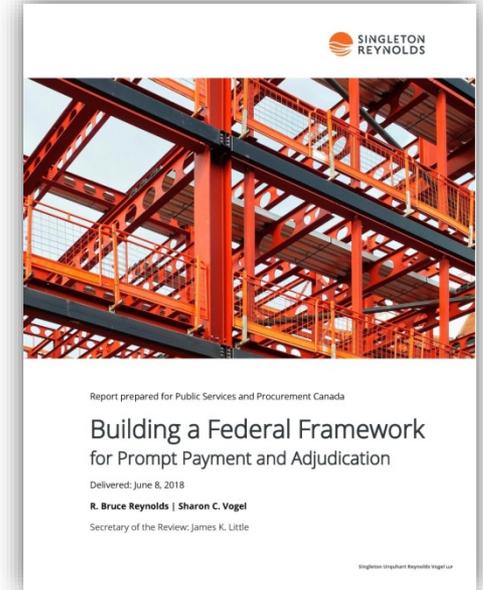
- A single official Authorized Nominating Authority (ANA) will be created
- The ANA to be selected by the Ministry of the Attorney General following a detailed application process
- Requests for Expressions of Interest were due by January 31, 2019
- The ANA will train and certify adjudicators, establish a code of conduct, set default fees, make appointments, resolve fee disputes, establish a public registry of adjudicators, and report annually on adjudications
- Parties may agree on an adjudicator but if no agreement, the ANA will appoint one within 7 days

Practical Implications: Transition to Adjudication

- Parties will need to consider their dispute resolution contract provisions, policies, and practices in light of the advent of adjudication
- Considerable preparation is needed to launch an adjudication, but even more challenging will be the need to respond quickly to an adjudication
- The risk of the “adjudication ambush” will need to be considered – there are no blackout periods

National Construction Law Reform

- Federal Report entitled “Building a Federal Framework for Prompt Payment and Adjudication”, released on August 2, 2018
 - 53 recommendations
 - The Fall Economic Statement committed to prompt payment and adjudication for federal projects



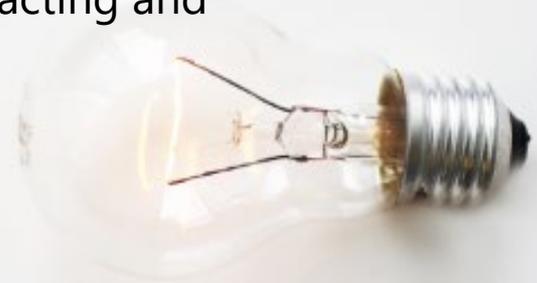
Provincial Reforms

- British Columbia
- Alberta
- Saskatchewan
- Quebec
- New Brunswick
- Nova Scotia



Practical Implications: Summary

- Practical and comprehensive project management at the municipal level is critical
- Continuing education efforts are important throughout this period and will be helpful to prevent issues down the road
- Finally, a shift in mindset and approach to contracting and payment is required by all players



Questions?
