



## **EXPERT REVIEW OF PROMPT PAYMENT AND ADJUDICATION ON FEDERAL CONSTRUCTION CONTRACTS**

Minister of Public Services and Procurement

### **Information Package**

February 2018

**Singleton Urquhart Reynolds** 150 King St. West, Suite 2512  
**Vogel LLP** Toronto, ON M5H 1J9  
Toronto | Vancouver T 416 585 8600 F 416 585 9458

925 W Georgia St Suite 1200  
Vancouver, BC V6C 3L2  
T 604 682 7474 F 604 682 1283

[singleton.com](http://singleton.com)

**TABLE OF CONTENTS**

- 1. INTRODUCTION.....1**
- 2. PROCESS AND TIMELINE.....3**
- 3. CONTEXT.....4**
- 4. PROMPT PAYMENT .....6**
  - a) International Experience .....6
    - (i) The United States .....6
    - (ii) The United Kingdom .....7
    - (iii) Other International Jurisdictions.....8
  - b) Ontario .....8
  - c) Questions to Consider.....9
- 5. ADJUDICATION .....10**
  - a) International Experience .....10
    - (i) The United Kingdom .....10
    - (ii) Other International Jurisdictions.....10
  - b) Ontario .....11
  - c) Questions to Consider.....12
- 6. BILL S-224 .....13**
- 7. JURISDICTIONAL OPERATION OF THE ACT .....15**
- 8. STAKEHOLDER SUBMISSIONS .....16**
- 9. CONCLUSION .....18**

## 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.<sup>1</sup>

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 50<sup>th</sup> 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.<sup>2</sup>

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.<sup>3</sup> 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

---

<sup>1</sup> <https://www.canada.ca/en/public-services-procurement/news/2018/01/government-seekingrecommendationsonfederalpromptpaymentlegislati.html>

<sup>2</sup> Section 6 of this Information Package addresses Bill S-224.

<sup>3</sup> <https://pm.gc.ca/eng/minister-public-services-and-procurement-mandate-letter>

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 plan<sup>4</sup>), 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.<sup>5</sup> We will draw upon the expertise of others at SURV, including John R. Singleton, Q.C.<sup>6</sup> and Helmut K. Johanssen<sup>7</sup> 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.

---

<sup>4</sup> <http://www.tpsgc-pwgsc.gc.ca/biens-property/divulgate-disclosure/papsdic-apppci-eng.html>

<sup>5</sup> <https://www.singleton.com/people/bruce-reynolds/> and <https://www.singleton.com/people/sharon-vogel/>

<sup>6</sup> <https://www.singleton.com/people/john-singleton/>

<sup>7</sup> <https://www.singleton.com/people/helmut-johanssen/>

## 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:

<b>Event</b>	<b>Date</b>
Delivery of Information Package	February 21, 2018
Western Canada Stakeholder Meetings	March 5-9, 2018
Northern Canada Stakeholder Meetings	March 12-16, 2018
Eastern Canada Stakeholder Meetings	March 19-23, 2018
Central Canada Stakeholder Meetings	March 26-30, 2018
Delivery of Recommendations Package to PSPC	May 1, 2018

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](mailto: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<sup>8</sup> 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.<sup>9</sup>

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

---

<sup>8</sup> See for example, Prompt Payment Ontario, Trade Contractor Survey Results, Ipsos Reid, November 2015.

<sup>9</sup> See for example, Duncan Glaholt, "The Adjudication Option: The Case for Uniform Payment & Performance Legislation in Canada" (2006), 53 C.L.R. (3d) 8.

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.<sup>10</sup> 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.<sup>11</sup>

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.<sup>12</sup> The focus of this

---

<sup>10</sup> 1 USCA §§ 3901 to 3907 (West Supp. 2001).

<sup>11</sup> John P. Miller & Necia B. Hobbes, "Trends in Prompt Payment Acts Governing Private Construction Contracts", Jones Day (March 2013), online: <<http://www.lexology.com/library/detail.aspx?g=92a6fdd4-8ba6-4c59-a334-a4b42ce314ba>> [Miller and Hobbes referring to 31 USC § 3905.

<sup>12</sup> Edward H. Tricker, Kory D. George & Erin L. (Gerdes) Ebeler, "Survey of Prompt Pay Statutes" (2009) 3:1 J Amer C Con Law, updated April 2010 at 2.



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 1998.<sup>13</sup> 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.

---

<sup>13</sup> *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.<sup>14</sup> 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 *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;

---

<sup>14</sup> For greater detail, see the website, [www.constructionlienactreview.com](http://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:

- who can require adjudication and when?
- who can adjudicate a dispute?
- how should an adjudicator be nominated?
- what is the role of an authorized nominating authority?
- what types of disputes should be adjudicated? Should there be limits to the quantum of the disputes that are subject to adjudication?
- what should an adjudication process look like?
- how should the costs of an adjudication process be addressed?
- 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 20<sup>th</sup> 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 23<sup>rd</sup> 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 20<sup>th</sup> 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?

- who can adjudicate a dispute?
- how should an adjudicator be nominated?
- what is the role of an authorized nominating authority?
- what types of disputes should be adjudicated? Should there be limits to the quantum of the disputes that are subject to adjudication?
- what should an adjudication process look like?
- how should the costs of an adjudication process be addressed?
- 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:
  - What kinds of projects would federal legislation implementing prompt payment and adjudication apply to?
  - Are there potential conflicts between such federal legislation and provincial legislation?
  - If so, in view of the doctrine of paramountcy, is there any constraint on the federal legislation?
  - Would some combination of federal legislation and amendments to standard form contracts be appropriate?
  - 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)?
  - 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.



**Singleton Urquhart Reynolds Vogel LLP**  
Toronto | Vancouver

150 King St. West, Suite 2512, Toronto, ON M5H 1J9  
T 416 585 8600 F 416 585 9458

925 W Georgia St Suite 1200, Vancouver, BC V6C 3L2  
T 604 682 7474 F 604 682 1283

[singleton.com](http://singleton.com)