

Legal update

New legislation for federal construction projects: prompt payment and adjudication becomes law

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Construction and engineering

The *Federal Prompt Payment for Construction Work Act* (Division 26 of Part 4 of Bill C-97, the *Budget Implementation Act*, 2019) received royal assent on June 21, 2019, ringing in new protections for contractors on federal projects.

Broadly, the new legislation:

- enacts a regime to ensure prompt payment to construction contractors and suppliers who have worked on federal projects;
- creates a mechanism for contractors and subcontractors to enforce payment obligations on a dramatically faster timeline than resort to the courts has historically allowed; and
- provides a specific forum for quickly resolving other disputes touching on payment during a construction project.

The new federal legislation effectively adopts recent changes to Ontario's *Construction Act* (formerly the *Construction Lien Act*), which create a new prompt payment and adjudication regime that was previously unprecedented in Canada. While new to Canada, similar prompt payment/adjudication regimes have been in effect in the US (many states and federally) as well as in the UK for many years. There is a view in the construction bar that if the legislation is a success in Ontario (and now federally), it may be adopted in most other Canadian common law provinces.

The federal legislation, with subtle differences, adopts the same prompt payment mechanism as the Ontario legislation which, absent a dispute, requires the owner or payor, to pay the contractor within 28 days of receiving a "proper invoice" (which must meet certain requirements to be effective). Generally speaking, payment must be made down the construction pyramid as follows: owner must pay within 28 days of receiving a proper invoice, general contractor then has seven days from receipt of payment to pay subcontractors, and so on down the line.

The federal legislation includes other facets of the Ontario *Construction Act* such as a "notice of non-payment" (the document the disputing party serves to object to the requirement to pay).

The federal prompt payment regime is also supported by an adjudication process whereby the recipient of a notice of non-payment can contest it. While details of how the adjudication regime will work at the federal level are not yet known, the timelines provided allow for a dispute to be resolved within 60 days from the date of a notice of adjudication (the document used to commence the process). Decisions are made by neutral third-party adjudicators, a roster of which will likely be established closer to the date the legislation comes into force, as is currently happening in Ontario.

Upon reviewing the federal legislation, the scope of disputes that can be adjudicated appears to be somewhat more limited than allowed for under the Ontario *Construction Act*. Another difference between the federal and Ontario legislation relates to timing of when the new rules kick in. The Ontario *Construction Act* includes transition provisions whereby contracts that have been entered into, tendered, or otherwise put to market at the time the prompt payment/adjudication scheme comes into force will continue to be governed by the old legislation.

However, the federal legislation does not apply for a period of one year to contracts entered into prior to the in-force date, which is still to be determined. As such, the legislation *will* apply to existing contracts if they are still underway a year from when the legislation comes into force, which may necessitate contract amendments while the work is in progress, as contract terms inconsistent with the *Act* will likely be unenforceable. There will also be the issue of incorporating by reference the terms of the prime contract into subcontracts downstream contractually.

Takeaways

Clients involved in construction projects on federal lands or in federally regulated industries would be wise to consider how this new legislation may affect their interests and business operations. In many cases, the legislation may require important changes to standard form contracts and/or policies and internal changes as to how process payments and receivables are processed and monitored, respectively.

Our construction group in Ottawa has been dealing with and providing client seminars on the Ontario legislation since well before it received royal assent in late 2017, including attending Senate committee hearings regarding earlier versions of similar legislation. Accordingly, we are well positioned to consult with existing or prospective clients who may be concerned about the implementation of the federal *Act* and its effect on their businesses.

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