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BUILDING INSIGHT

GLAHOLT LLP NEWSLETTER

IN THIS ISSUE

Newfoundland Court of Appeal and Ontario Superior Court of Justice Clarify Scope of Builder's Risk Insurance Policies

Overview

In *Pre-Eng v. Intact*, 2019 ONSC 1700 ("*Pre-Eng*"), the Ontario Superior Court recently confirmed the limited scope and purpose of builder's risk insurance by finding that such policies cover only damage occasioned to property being installed, renovated or constructed by the insured.

Coincidentally, around the same time as the hearing of *Pre-Eng*, the Court of Appeal of Newfoundland and Labrador released its decision in *Dominion of Canada General Insurance Company v. Viking Fire Protection Incorporated*, 2019 NLCA 13 ("*Viking Fire*"), in which it found that a limited scope was consistent with the parties' reasonable expectations and produces a realistic result that the parties would have contemplated in the commercial atmosphere in which the insurance was obtained.

These decisions all but resolve the conflicting jurisprudence with respect to the interplay between builder's risk and general commercial liability insurance (at least for Ontario and Newfoundland).

Background

Pre-Eng v. Intact

In *Pre-Eng*, a contractor was hired to do a number of renovations to a school, which included repairing a roof over the school's gymnasium. As a result of the contractor's negligent work, water leaked through the roof and onto the floor of the gym, causing $250,000 in damages and losses.

The contractor had two types of insurance: builder's risk insurance from Northbridge and commercial and general liability insurance with Intact. The two policies were intended to be complementary: Northbridge would cover anything that fell within the builder's risk policy and Intact would cover everything else.

Both insurers took the position that the other's policy covered the damages and losses caused by the contractor's negligent work, therefore leaving the court to decide whether the builder's risk insurance policy covered only the part of the school that the contractor was actually working on, or the entire school. The case was decided on dual motions for summary judgment.

Dominion of Canada General Insurance Company v. Viking Fire Protection Incorporated

The facts in *Viking Fire* were not that different. In *Viking Fire*, a contractor was responsible for work on a sprinkler system for hospital renovation project. During construction, when work was almost complete, water leaked from the sprinkler system, causing damage to not only the new property (which was directly used in and incorporated into the construction project), but also other areas of the hospital, or what the court referred to as the "pre-existing property".

An application was brought in the Supreme Court of Newfoundland and Labrador to determine, as a question of law, whether the builder's risk policy of the contractor covered the damage to the pre-existing property. The applications judge held that it did. The builder's risk insurer appealed.

Conflicting Case Law from Non-Appellate Courts

Prior to the issuance of these decisions, there was conflicting case law from non-appellate courts with respect to the scope and purpose of builder's risk insurance.

For example, in *Medicine Hat College v. Starks Plumbing & Heating Ltd.*, 2007 ABQB 691 ("*Medicine Hat*"), a case involving a similar builder's risk policy to those in *Pre-Eng* and *Viking Fire*, a contractor was hired to move a gas line for the construction of an entrance to a large building. Shortly after work was completed, a faulty connection between the new and existing gas lines caused an explosion in the penthouse of the building. Notwithstanding that the contractor had not been hired to do any work in the penthouse, the Alberta Court of Queen's Bench concluded that the phrase "property in the course of construction" included the building's penthouse and as a result the damage was covered under the builder's risk policy held by the contractor.

On the other hand, the Ontario Superior Court came to the opposite conclusion in *William Osler Health Centre v. Compass Construction Resources Ltd.*, 2015 ONSC 3959 ("*Osler Health*"). In that case, a contractor was hired to renovate a kitchen in a large hospital. As a result of negligence on the part of the contractor's plumbing subcontractor, flooding occurred in many areas of the hospital giving rise to significant damages. The Court concluded that the builder's risk insurance held by the subcontractor only covered damages to the kitchen itself, not to the other areas of the hospital which had been flooded.

The Ontario Superior Court Decision

In finding in favour of Northbridge, Bawden J. of the Ontario Superior Court of Justice followed the reasoning in *Osler Health*. In his view, a narrower scope of builder's risk insurance reflects the important distinction between it and general commercial liability insurance:

> [11] A contractor may be able to do a great deal of damage to a large structure through negligence but that does not require the builder to insure the entire structure before undertaking his small task. The object of Builder's Risk insurance is to ensure that the builder has sufficient insurance to complete his work in the event of an unforeseen failure. That is what the contract between the builder and the building owner required in this case and in every other case which has been brought to my attention by counsel.
> [12] As Justice Firestone observed in paragraphs 27 to 29 of Osler Health, it would not be commercially viable to impose an obligation on the contractor to obtain Builder's Risk insurance to cover an entire building. If the builder was required to insure the entire structure while working on only one part, (even a part as potentially hazardous as gas lines), the cost of insurance for minor contractors would become prohibitively expensive.

Bawden J. went on to find that there was no ambiguity in this particular builder's risk policy and that the words "property in course of construction, installation, renovation, reconstruction or repair" were sufficiently clear to exclude the gym floor from coverage. He noted that the gym floor was not being installed, renovated or constructed and there was no evidence to suggest that it was.

Lastly, Bawden J. indicated that he was "fortified" in his conclusion by the above-noted recent decision of the Court of Appeal of Newfoundland and Labrador in *Viking Fire*.

The Newfoundland Court of Appeal Decision

In *Viking Fire*, the Newfoundland Court of Appeal applied a three-prong test from *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, and considered the competing decisions in *Medicine Hat* and *Osler Health*.

In overturning the lower court's decision, the Court concluded that the interpretation and analysis undertaken in *Osler Health* better aligned with the law respecting the function of builder's insurance:

> [193] Having considered the conflicting authorities, and the respective analysis and conclusion in Medicine Hat and in William Osler, I am of the view that the interpretation in William Osler accords more directly with the functions of Builders' Risk insurance. The Court in William Osler also adopts an interpretation of the policy language that is consistent with the parties' reasonable expectations, and produces a realistic result that the parties would have contemplated in the commercial atmosphere in which the insurance was obtained.

For these reasons, the Court found that the onus of establishing that damage to the pre-existing property at the hospital fell within the grant of coverage provided under the builder's risk policy had not been met.

Key Takeaways

It appears that the conflicting Canadian case law over the scope of builder's risk insurance policies is close to being resolved. We now have appellate authority from Newfoundland, as well as two decisions in Ontario which suggest that the scope of such policies is to be more narrowly construed than what has been interpreted in Alberta. This will undoubtedly provide greater certainty for insurers and their counsel when it comes to assessing coverage under such policies, at least in the provinces of Ontario and Newfoundland.

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Smart Contracts and Blockchain Technology: Transformation of the Construction Industry

While blockchain originated to serve as the public transaction ledger of cryptocurrency, the technology is now being explored for other purposes. Companies such as Walmart and British Airways have made use of blockchain to track and manage its data. Walmart's system was designed to help track down the source of bad food in case of product recalls. British Airways tested blockchain with the goal of stopping conflicting flight information from being reported at airports and on mobile devices.

It is only a matter of time before the construction industry engages in earnest with blockchain and benefits from the technology.

Block chain is a decentralized data structure, similar to a ledger book maintained by a bank. Each party involved in a blockchain transaction has a copy of the transaction that took place, and the information cannot be modified by another party.

One of the key benefits of blockchain technology is its decentralized nature. The absence of a centralized body means the technology is largely impervious to hacking.

Smart contracts are computer programs built on blockchain technology. Smart contracts use automation to streamline the execution of that contract. The contract is set up based on a series of "if" and "then" conditions. A simple example is if the requisite amount of concrete is delivered to site,

then the concrete supplier gets paid. A contract can be encoded to comply with the terms and conditions of the contract.

Application of blockchain and smart contracts to Canada's construction industry

Canada's construction industry is ready for a change. Projects are now more complex, wait times for payment have been growing and disputes are taking years to resolve. In Ontario, as part of an overhaul of the *Construction Act* (the "Act") to address these challenges, prompt payment and adjudication were introduced on October 1, 2019. Federal and other provincial governments are in the process of reviewing applicable legislation and implementing prompt payment and adjudication rules as well. This shift across the country presents a perfect opportunity for the industry to examine and embrace technology that can transform the industry: blockchain technology and smart contracts.

Prompt payment and adjudication are governed by procedures, timelines and use of forms, as prescribed by the Act. The deadline for payment is measured from the owner's receipt of a "proper invoice" as defined in section 6.1 of Part I.1 of the Act. A smart contract can be triggered to verify whether the invoice delivered by the contractor meets the criteria set out in section 6.1 of the Act, such as the contractor's name and address, date of the invoice and period for which the services or materials were supplied, and description of the services or materials supplied, and any additional contract criteria for a "proper invoice". Once the program confirms that the invoice meets these "proper invoice" requirements, the program can then be triggered to perform whatever verification process has been agreed upon by the parties.

For example, the owner's payment certifier can be required to submit its independent records and verify these against the contractor's invoice. In the case of the concrete supplier, the delivery of the concrete can be logged into the system, including quantity and price, and matched against the invoice delivered by the contractor. If there is discrepancy in the payment certifier's review or the quantity of concrete delivered, the program could be set up to deliver a notice of non-payment, pursuant to section 6.5(6) of the Act, either deducting the discrepancy from amounts payable or allowing no payment to be made at all. The program could also be set to make full or partial payment within 28 days of receipt of the invoice, depending on whether a notice of non-payment has been issued. If a contractor does not receive payment or a notice of non-payment by the prescribed date, the contract can be programmed to generate a notice of adjudication, or more likely, to prompt the project manager to generate a notice of adjudication per section 13.7 of the Act and to select an adjudicator per section 13.9(2) of the Act.

This simplistic example showcases how the technology can be used to assist parties to comply with the new prompt payment and adjudication regimes. Such an automated system can be customized based on the project's delivery model and the complexity of the contract. By reducing the efforts currently required to sign off on payment applications, smart contracts and blockchain technology can result in greater efficiency and savings for the construction industry.

Another application of blockchain in construction is with the use of Building Information Modelling (BIM). BIM is

technology which allows project participants to work more collaboratively, deliver workflow processes with fewer errors, share information and improve schedule performance. Central to the integration of BIM and blockchain technology are the concepts of trust and collaboration, which are also the principles behind the newest standard form contract issued by the CCDC, the Integrated Project Delivery Contract, CCDC 30 – 2018. However, the use of BIM has raised challenges in terms of verifying and tracking the information. Blockchain, as a decentralized and traceable ledger, could ensure a secure environment for BIM and protect intellectual property rights as every model author's work and changes would be forever recorded.

Another aspect of construction that could greatly benefit from blockchain technology is the storage of project records. All data and records could be held within a public blockchain ledger, immutably time-stamped as to their entry or creation. If a dispute arises and an adjudication is commenced, the underlying information will already be stored, organized and accessible to all parties. This could help to alleviate some of the pressure on the parties to comply with the tight adjudication timeframes or reduce potential challenges to document authenticity. Further, at the end of a project, it has been estimated that 95% of building construction data gets lost on handover to the first owner. Firms in the blockchain industry are developing programs to eliminate this loss of data by encoding all specifications of a building into the blockchain, whether it is the paint colors, ceiling fixtures, or the manuals and warranties so that the service provider can effectively maintain and monitor the building.

Given the existence of standard form contracts, such as the CCDC, RAIC and ACEC documents, and the changing statutory landscape, the Canadian construction industry is well suited to embrace blockchain. Several firms have explored the concept of smart contracts, however use of the technology is still very much in its infancy. The adaption of blockchain is predicated on all parties using a digital system, a goal that the industry is and should continue to be moving towards. One of the key catalysts for prompt payment and adjudication was the industry's desire to create greater efficiency, and blockchain can be the tool that assists parties to think and work in a modern way.

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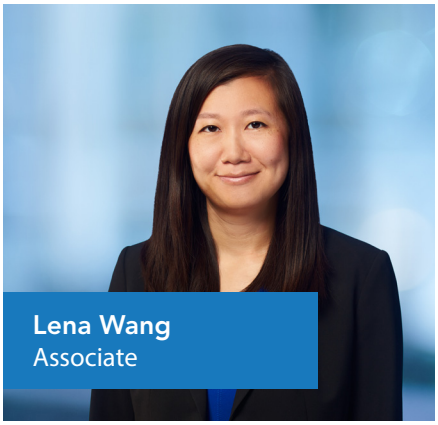

How Do Suppliers Fit Within the New Prompt Payment Regime?

The lag between a subcontractor completing its work on a project and the subcontractor being paid has been a longstanding source of tension in the construction industry. In the past, subcontractors typically had to wait for the contractor to be paid by the owner before money would flow down to them and, even then, there was no guarantee that they would be paid within weeks or even months of completing work on a project. Adding to the tension was a desire to preserve the working relationship with the contractor, which sometimes prevented subcontractors from pursuing what they were owed.

On October 1, 2019, the prompt payment and adjudication provisions of the *Construction Act* (the "Act") came into effect. The provisions establish a new dispute resolution process, adjudication, and contain strict timelines for payment, which aim to ensure that those who provide services or materials to a construction project are paid on a timely basis.

The prompt payment timelines are triggered by the contractor's submission of a "proper invoice" to the owner. Unless the contract provides otherwise, proper invoices must be given to the owner on a monthly basis. Upon receipt of a proper invoice, the owner has twenty-eight calendar days to pay the contractor in full. After being paid, the contractor has seven days to pay the subcontractors whose work was included in the proper invoice and so on down the chain.

At each level, a party can give a Notice of Non-Payment to the party it owes payment to. Such notice must specify the amount being disputed and provide all the reasons why payment is not being made in full or in part. Disputes that are the subject of a Notice of Non-Payment can be referred to adjudication. Provided no Notice of Non-Payment is issued, it would take no more than forty-two days for payment to flow down the chain from an owner to a sub-subcontractor. Some in the industry are hopeful that the new regime will increase transparency and help to mend the relationship between contractors and subcontractors by ensuring timely payment of invoices; others are less optimistic.

There have been questions about how suppliers fit within the new regime. Suppliers are not defined in the Act. A subcontractor is defined in the Act as "a person not contracting with or employed directly by the owner or an agent of the owner but who supplies services or materials to the improvement under an agreement with the contractor or under the contractor with another subcontractor and includes a joint venture entered into for the purposes of an improvement or improvements". Based on this definition, suppliers can be subcontractors for the purpose of the Act and there is no reason why prompt payment would not apply to them. Therefore, if suppliers are contracting directly with a contractor, then the trigger for prompt payment obligations runs from the date the contractor's proper invoice is received by the owner, which will presumably include amounts owed to suppliers under that invoice.

However, the Act allows a contractor and subcontractor to agree to payment timeframes which do not necessarily match the contractor/owner payment timeframes. If a contract between a contractor and an owner stipulates that proper invoices are to be submitted monthly or some other lengthier period, which is permissible under the Act, and the subcontract between the contractor and the supplier states that invoices are to be paid in fifteen days or some other shorter period, which the Act also allows, the prompt payment rules will not mean that the contractor only has to pay the supplier once it receives money from the owner. This could result in a situation where the contractor is obligated to pay the supplier out of pocket.

To avoid or reduce such tension with suppliers, contractors should attempt, as much as possible, to align payment periods up and down the chain. This is likely a feasible solution for conrtacts withsmaller suppliers, but where the contract is with a specialty supplier or a larger player in the industry, such parties may use their bargaining power to negotiate for shorter payment periods.

As prompt payment now applies to all contracts entered into on or after October 1, 2019, unless a procurement process for that contract was commenced before that date, contractors should keep these considerations in mind when working with suppliers. The position of suppliers in the prompt payment regime will become more clear as this issue is litigated.

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Case Comment: *Blake v. Blake*, 2019 ONSC 4062

What's worse than losing your client's motion? Losing your client's motion paired with a substantial costs award against your client because you neglected to bring a critical case to the court's attention.

Blake v. Blake is an important cautionary tale for all lawyers: read all of the articles that your firm publishes. A judge may make a factual inference that you know about the case your firm wrote about, especially if you practice in a specialized firm.

In *Blake v. Blake*, a trustee of his mother's estate was sued by his siblings and brought a summary judgment motion to dismiss the siblings' claims. The trustee's counsel argued that summary judgment should be granted dismissing the claims on three grounds. The trustee's main argument was that a notice of objection was out of time due to the expiry of a limitation period. The motion was easily dismissed.

The then year-old case *Wall v. Shaw* was directly on point and immediately disposed of the trustee's argument. It holds that a Notice of Objection is not subject to a limitation period under the *Limitations Act*, and the decision was upheld by the Court of Appeal, sitting as a panel of the Divisional Court.

Unfortunately, neither lawyer brought *Wall v. Shaw* to the court's attention. Justice Daley found the case himself without any in-depth research. Critically, in November of 2018 the trustee's lawyer's firm published a detailed blog post about *Wall v. Shaw*. Justice Daley drew a factual inference that counsel for the trustee had knowledge of the case when the blog was published, and Justice Daley concluded that counsel for the trustee purposefully neglected to bring Wall v. Shaw to the court's attention.

Of importance is Justice Daley's analysis of the conduct of counsel for the trustee. Justice Daley noted important duties governing lawyers' conduct, including the duty of competence, the duty of candour, and the rule that a lawyer has a positive duty to inform the court of all relevant binding authorities, irrespective of whether they support or undermine the party's position, even if opposing counsel has not cited the authority. Lawyers are obliged to distinguish these cases in order to advocate for his/her client.

Justice Daley outlined two principles related to counsel's obligation to inform the court of relevant authorities: (1) when a lawyer is aware of a relevant authority, the failure to bring it to the court's attention could be seen as an attempt to mislead the court; and, (2) even when a lawyer does not know about the authority, ignorance may be insufficient because lawyers have a duty to conduct reasonable research.

Justice Daley identified the following factors as relevant to counsel's duty to the court:

1. Binding cases must be raised if they are relevant.

2. Non-binding yet persuasive cases need not necessarily be raised, but counsel should raise the case if it is on point and from the same jurisdiction. Decisions from courts on the same level may be binding under the rule of horizontal *stare decisis*.

3. When a lawyer states that they did not know about the authority, to determine whether the lawyer ought to have known about the case, the court can ask whether the authority was easy to find. If the case was unique and pertained to a specialized area of law, it is less likely that the court will impute knowledge of that case on the lawyer.

4. Lawyers cannot decide on their own whether a case is distinguishable. If the case is relevant, lawyers must bring the case to the court's attention, and the judge can distinguish if they see fit.

Since the applicants were successful in defending the summary judgement motion, they were *prima facie* entitled to costs. Justice Daley concluded that counsel for the trustee breached his duty to the court by failing to bring *Wall v. Shaw* to the court's attention. Counsel's failure to comply with his professional duty was reflected in the costs award, where the trustee was ordered to pay substantial indemnity costs of approximately $90,000.00.

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Construction Law Reform Across Canada: Prompt Payment and Adjudication

Note that an earlier version of this article was first published on www.slaw.ca

Construction law is being reformed at the federal and provincial levels across Canada. The changes will have wide-ranging impacts across the construction sector and related industries. Among the changes are "prompt payment" reforms that impose legislated payment deadlines on private and public construction contracts, as well as a new fast-track private dispute resolution regime called "adjudication."

Any lawyer with clients in the construction supply chain ought to take careful note to avoid being caught unprepared by new deadlines and new dispute resolution forums introduced by the legislation. Alternative dispute resolution ("ADR") professionals may also be interested in the new adjudication regimes, procedures, and decision-making bodies being created to take the place of courts in construction disputes.

Given Statistics Canada's estimates that the construction sector employs roughly 1.437 million Canadians and makes up six percent of Canada's gross domestic product, reforms of this magnitude will be felt from coast to coast. What follows is a breakdown of the construction law legislative developments at the federal and provincial levels across Canada.

Federal government's new *Federal Prompt Payment for Construction Work Act*

Federal construction legislation governing prompt payment or adjudication does not currently exist in Canada, but a recent federal bill has received royal assent and may come into force in the near future.

On April 8, 2019, the federal government introduced the *Federal Prompt Payment for Construction Work Act* in its omnibus budget bill C-97. The bill has passed first, second, and third reading, and received royal assent on June 21, 2019. There has not yet been any determination as to when the Act will come into force.

After the legislation comes into force, Canada will have its first construction laws governing projects on federal lands. Provincial legislation has existed for years that sets out contractors' lien and trust rights when they are unpaid, however, those provincial statutes do not generally have application on federal lands. The introduction of federal construction legislation will impact all construction industry stakeholders that supply or contribute to public construction projects with federal connections (e.g. military bases, airports, fisheries, and work performed on other federal Crown lands).

Notably, lien rights do not form a part of the federal Act. Instead, the Act has both prompt payment and adjudication mechanisms to enforce construction contractors' rights to be paid in a timely fashion. The prompt payment and adjudication provisions have important similarities to the reforms adopted in Ontario and in other provinces.

Prompt payment at the federal level and in Ontario's new *Construction Act*

Prompt payment reforms are legislated deadlines to pay contractors and subcontractors for supplying labour, services and materials to construction projects. While the concept is new in Canada, prompt payment laws have been in force in the United Kingdom and most jurisdictions of the United States for many years.

In both the not-yet-in-force federal Act and Ontario's new *Construction Act*, property owners will be obligated to pay a contractor 28 days after receipt of a proper invoice. Subcontractors are required to be paid seven (7) days thereafter. The deadline to pay further sub-levels of contractors is a further seven (7) days per level. This is intended to keep construction funds flowing down each level of the project supply chain without delay.

Several important deadlines may impact parties' rights to dispute payments under this new regime. For example, if the property owner intends to dispute an invoice or refuse payment, a dispute notice needs to be sent to the contractor 21 days after receipt of a proper invoice. Similarly, a contractor needs to send a dispute notice to its subcontractor 28 days after delivery of the proper invoice. Subcontractors must send similar notices to their subcontractors seven (7) days thereafter. Subject to minimum requirements in the legislation and regulations, parties may agree between themselves what constitutes a "proper invoice" and timing for delivery of invoices in order to exert greater control over these timelines. However, parties may not make payment of an invoice conditional on the approval of a payment certifier or project owner.

Whether these new prompt payment laws apply depends on each statute's transition provisions. In the case of Ontario, it varies depending on the date of the contract between the owner and contractor, or of any procurement process for that contract, and whether the work relates to a leasehold interest. The federal legislation appears to have a more straightforward deadline by which all contracts entered into will be considered to be subject to the new laws. That date will depend on when

the federal act finally comes into force.

The transition provisions will make it critical for lawyers and construction stakeholders to request and obtain information about project in order to assess the construction laws that are applicable to each project.

Adjudication at the federal level and in Ontario

The newly legislated requirement to pay construction stakeholders promptly is not absolute. Payment demands will continue to be met with the myriad objections commonplace in construction projects: delay, deficiencies, poor workmanship, overbilling, and other contractual disputes. Owners and stakeholders across the construction supply chain have the option in the prompt payment legislation to resolve these payment disputes using a new dispute resolution process called "adjudication."

Adjudication has been a key dispute resolution mechanism of the United Kingdom construction industry for many years. Similar to arbitration, adjudication is intended to be a flexible "fast track" process to resolve disputes among parties in the construction supply chain.

Both the federal legislation and Ontario *Construction Act* contain requirements to give notice prior to referring a dispute to adjudication. The acts also provide a framework for the process to appoint and select an adjudicator.

Ontario's *Construction Act* goes further and sets legislated timelines to provide an adjudicator prescribed documents and for adjudicators to make a decision. The decision turnaround times under the provincial Act are exceptionally short. Adjudicators may be required to release a decision as quickly as 30 days after receiving the documentation prescribed by the Act. The regulations have set out further details including, among other things, the experience requirements to become an adjudicator, adjudicator powers, and the consolidation of adjudications.

Ontario's nominating authority for adjudicators, Ontario Dispute Adjudication for Construction Contracts ("ODACC"), recently previewed five adjudication processes and an example adjudication timeline as part of the application package to become an adjudicator. The pre-determined processes range from adjudications in writing only to 30-minute oral submissions for each side by way of webcast. Adjudicators will also have discretion to determine a custom procedure in consultation with the parties to the dispute.

The short deadlines and turnaround times in the federal act and Ontario's new *Construction Act* will no doubt cause challenges. Information disparities between each level of the construction supply chain may make applicable deadlines difficult to assess. For example, without the date of the relevant contract or the submission date of a proper invoice by the contractor, subcontractors may remain in the dark about whether the new legislation applies and when applicable notice deadlines expire.

Notwithstanding the anticipated growing pains, the implementation of Ontario's *Construction Act* is well underway. The province's rolling transition provisions have created a shifting landscape whereby different provisions will apply to different contracts in the industry well into the foreseeable future. Adjudication was rolled out in Ontario starting on October 1, 2019. How the process unfolds may influence how quickly and to what degree adjudication is implemented in other provinces across Canada.

Prompt payment and adjudication across the provinces from coast to coast

Prompt payment and adjudication laws

are under contemplation or underway in an additional six provinces. The legislation being contemplated tends to adopt and/or share features with the laws already in force in Ontario and introduced at the federal level, as follows:

- On April 12, 2019, Nova Scotia gave royal assent to Bill 119 to amend the *Builders' Lien Act*, which includes provisions for prompt payment deadlines, "proper invoices" and adjudication. The amended act has not yet come into force. Notably, no transition provisions are included in order to "grandfather" old contracts under the old act.

- On May 15, 2019, Saskatchewan gave royal assent to Bill 152 to amend *The Builders' Lien Act*, which includes provisions for prompt payment deadlines, "proper invoices" and adjudication. The amendments are not yet in force. Transition provisions will allow contracts entered into prior to the "in force" date to ignore the amendments and proceed under the previous act.

- On May 23, 2019, British Columbia introduced Bill M223, the *Builders Lien (Prompt Payment) Amendment Act, 2019*, which includes provisions for prompt payment deadlines and "proper invoices". BC's Bill M223 is currently in first reading and may be modified as it makes its way through the legislature. The current language of the bill does not currently provide for an adjudication process.

- On June 3, 2019, Manitoba introduced private member's Bill 245, which proposes the creation of *The Prompt Payments in the Construction Industry Act*. This bill follows an earlier prompt payment regime that died after second reading in the province's legislature in 2018. Manitoba's legislation similarly provides for prompt payment deadlines, "proper invoices" and adjudication. The adjudication provisions are optional, minimalistic and refer to regulations to be drafted.

- New Brunswick and Quebec have also begun investigating prompt payment as a potential policy to adopt in the future.

Given the speed and breadth of change across Canadian jurisdictions in the construction sector, legal practitioners would be well advised to stay informed of future developments. Opportunities will continue to emerge for ADR professionals interested in resolving disputes in the construction arena as an adjudicator. Overall, the implementation of these new laws, transition provisions that vary by province, and the impact of contractual idiosyncrasies will continue to make construction law an interesting space for the foreseeable future.

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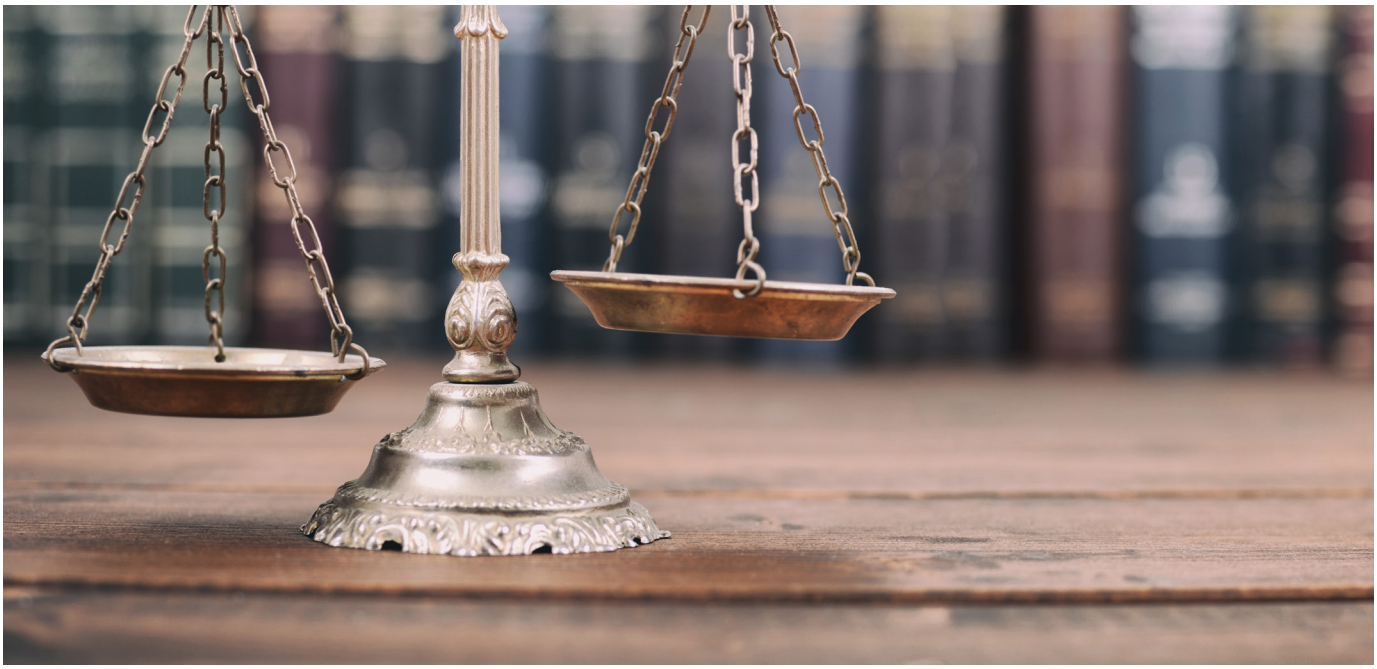

Building Insight Podcasts

Episode 10: Trust Remedies
June 2019

John Margie, partner, and Andrew Salvador, associate, discuss trust remedies under the *Construction Act*.

glaholt.com/linktopodcast10

Episode 11: Prompt Payment
July 2019

Charles Powell, partner, and Lena Wang, associate, discuss the incoming prompt payment regime with Joshua Strub, Corporate Counsel and Director of Contracts at PNR Railworks.

glaholt.com/linktopodcast11

Episode 12: Practice Directions
August 2019

Pavle Levkovic, associate, and Darina Mishiyev, law clerk, discuss important practice directions for construction lawyers in Toronto.

glaholt.com/linktopodcast12

Episode 13: Diversity in Construction Law: A Focus on Female Leadership
September 2019

Lena Wang, associate, and Kaleigh DuVernet, associate, discuss female leadership in construction law with Sandra Astolfo, partner at WeirFoulds LLP, and Lea Nebel, partner at Blaney McMurtry LLP.

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Episode 14: Adjudication
October 2019

Duncan Glaholt, partner, and Jacob McClelland, associate, discuss the arrival of statutory adjudication under the *Construction Act*.

glaholt.com/linktopodcast14

Episode 15: A Lawyer's Duty to the Court: Lessons from *Blake v. Blake*
November 2019

Katherine Thornton, associate, and Jackie van Leeuwen, articling student, discuss a lawyer's duty to the court and the lessons learned from the Superior Court of Justice case *Blake v. Blake*.

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