

Final Report:

Builders Lien – Prompt Payment Legislation and Associated Regulations

Introduction

Prompt payment legislation sets timelines by which construction contracts need to be paid and creates a dispute resolution mechanism to efficiently deal with disputes. The purpose of this legislation is generally to improve the financial stability within the construction industry. Several jurisdictions, including Ontario, Saskatchewan and Alberta have legislation in force already, while the remaining governments are in various stages of the process, with some further along in the legislative and regulation development process and others in the very early stages or still contemplating whether they will bring legislation forward.

A. Issues and Outcomes

There was opportunity for jurisdictions contemplating, or in the early stages of developing their prompt payment rules and adjudication processes, to learn from other jurisdictions through a shared body of knowledge and to adopt similar approaches to jurisdictions with models already in place because there is benefit in avoiding regulatory divergence where possible and encouraging jurisdictions to adopt common processes, as outlined in CFTA Article 408. While the ideal outcome from a regulatory cooperation exercise is generally intended to be a single, uniform model across Canada, the reality in this instance with Prompt Payment is that some jurisdictions are already well down the path of developing their legislation regulations while others are just starting or even contemplating this process making harmonization in the near term unlikely.

B. Activities and Deliverables

A jurisdictional scan was undertaken and given the wide distribution of Parties along the legislative development process (with some finished, some in process and others still contemplating) the working group agreed that the most practical course of action was to develop a Best Practices document based on the experiences of those jurisdictions that were already far along in the process.

Jurisdictions with prompt payment rules and adjudication regimes either in development or in place, were asked to provide information on approaches for: designing regulations, designing an adjudication model, consultation, and transition implementation. Consideration for consulting with indigenous groups was added by staff with the federal government.

Views on these issues could help inform legislation, regulations, and implementation processes in other jurisdictions. The primary benefit of the appended Best Practices document is that it can enable jurisdictions to develop high quality and consistent regulations, faster.

C. Participation in the Cooperation Work

PARTY	NAME	TITLE	ORGANIZATION
Alberta	Richard Schlachter	Executive Director Land Titles and Surveys	Service Alberta
Alberta	Curtis Woollard	Director Land Titles North	Service Alberta
British Columbia	Tyler Nyvall	Policy and Legislation Division	Ministry of Attorney General
Canada	François Camire	Director General, National Capital Area Project Delivery (NCAPD)	Public Services and Procurement Canada
Canada	Crawford Kilpatrick		Royal Canadian Mounted Police (RCMP)
Canada	Nick Christou		
Manitoba	Meghan Jede	Senior Policy Analyst – Consumer Protection	Manitoba Labour, Consumer Protection and Government Services
Manitoba	Kathryn Durkin- Chudd	Assistant Deputy Minister – Consumer Protection	Manitoba Labour, Consumer Protection and Government Services
New Brunswick	Patrick Windle	Lawyer, Legislative Development Unit	Office of the Attorney General
Newfoundland and Labrador	Mark Drover	Manager of Policy Development	Public Procurement Agency
Northwest Territories	Matt Fournier		
Nova Scotia (Chair)	Bonnie Rankin	Executive Director of Policy and Planning	Department of Public Works
Nova Scotia (Chair)	Karen McNutt		Department of Public Works
Nova Scotia (Chair)	Andrew MacDonald	Director, Strategic Policy	Office of Regulatory Affairs and Service Effectiveness
Nunavut	Jonathan Alomoto	International and Internal Trade Officer	Department of Economic Development and Transportation
Nunavut	Laura MacKenzie		Department of Economic Development and Transportation

Nunavut	Peter Varga	Policy and Communications Analyst	Department of Justice
Ontario	Sheryl Cameron	Counsel, Justice Policy Branch	Ministry of the Attorney General
Ontario	James Marton	Counsel, Justice Policy Branch	Ministry of the Attorney General
Prince Edward Island	Jon MacDonald	Building Codes Officer, Land Division	Department of Agriculture and Land
Québec	Nadine Gamache	Directrice principale de l'évolution de la réglementation	Secrétariat du Conseil du trésor
Québec	Marie-Andrée Marquis	Représentante du commerce intérieur	Ministère de l'Économie, de l'Innovation et de l'Énergie
Québec	Patricia-Anne De Vriendt	Conseillère, Direction principale de l'évolution de la réglementation	Secrétariat du Conseil du trésor
Saskatchewan	Maria Markatos	Senior Crown Counsel	Ministry of Justice and Attorney General
Yukon	Brian Park	Senior Policy Advisor	Department of Economic Development
ITS	Pat Fortier	Managing Director	Internal Trade Secretariat
ITS	Andrée Dupont	Internal Trade Officer	Internal Trade Secretariat
ITS	Harlee Ostash	Internal Trade Officer	Internal Trade Secretariat

D. Stakeholders

- Canadian Construction Association
- Construction Association of Nova Scotia

Appendix

Best Practices:

Developing Prompt Payment and Adjudication Regimes for the Construction Industry in Canada

Purpose

The intent of this best practices document is to assist jurisdictions who are contemplating, or in the early stages of developing their prompt payment rules and adjudication processes through a shared body of knowledge. Provincial and territorial jurisdictions may wish to take a similar approach as other jurisdictions who already have models in place – such as Ontario, Saskatchewan, and Alberta – because there is benefit in avoiding regulatory divergence and encouraging jurisdictions to adopt common processes, as outlined in CFTA Article 408. The federal government is also close to finalizing their processes and Nova Scotia is in the process of developing their regulations. Other Jurisdictions are interested in understanding decision points and any lessons learned for choosing various adjudication models.

Jurisdictions with prompt payment rules and adjudication regimes either in development or in place, were asked to provide information on approaches for: designing regulations, designing an adjudication model, consultation, and transition implementation. Consideration for consulting with indigenous groups was added by staff with the federal government. Views on these issues could help inform legislation, regulations, and implementation processes in other jurisdictions. While the ideal outcome from a regulatory cooperation exercise is intended to be a single, uniform model across Canada, the reality is that some jurisdictions are already well down the path of developing their regulations while others are just starting this process.

While alignment among respondents may still occur in some areas, such as standardized formats for forms and prompt payment timelines, the primary benefit of this best practices document is that it will enable jurisdictions to develop high quality and consistent regulations, faster.

The information below was developed primarily on the reported experiences of two entities. The content reflect the views of staff with the Federal Government, which has not yet released their planned process via regulations publicly, and from Ontario Ministry of the Attorney General, who has had a prompt payment and adjudication process in place since 2019. Nova Scotia also provided some supplemental information based on their experience so far. In addition to views on consultation and adjudication models, views on risks and things to avoid are sub-topics considered under each section as well.

1. Suggested Approach for Designing Regulations

Ideally:

a) **Get the endorsement of key construction stakeholders on approach and throughout the development process**

Staff with both the Federal and Ontario governments indicated it was crucial to ensure industry engagement and support for the process of developing the legislation and regulations.

Before starting, federal staff

- sought the involvement and endorsement of key industry stakeholders (the Canadian Construction Association, the National Trade Contractors Coalition of Canada, and the General Contractors Alliance of Canada) on the high-level approach; and then
- Canadian leaders in this area were regularly consulted for feedback to ensure industry support.

Ontario staff agreed that the process had to be

- highly collaborative which would also help inform the industry regarding the changes, and brokered consensus and compromises on key issues that might have resulted in division or strong resistance.

Nova Scotia staff acknowledged

- the Construction Association of Nova Scotia initiated government's review of the Builders' Lien Act to address industry concerns regarding the lack of prompt payment practices.
- Although the Act rests with the Department of Justice, the Department of Public Works has been involved, especially in the engagement process with the industry.

b) **Have broad construction stakeholder representation**

Federal staff noted that

- while it was important to have broad engagement, it also had to be timely to continue to have momentum as the process moved forward.

Ontario staff noted that

- there is benefit in processes that emphasize consultation and collaboration with a variety of construction industry sectors. The industry needs to 'buy-in' and recognize the benefits of prompt payment and adjudication in order for the new regime to work in practice.
- The Attorney General met with a broad range of stakeholder groups.

For Nova Scotia

- the construction association led the creation of a Prompt Payment Coalition to ensure broad representation from the industry.

Each organization agreed that

- using the industry's established networks was vital for maintaining communication with the industry on the progress of the process and opportunities for input/feedback was beneficial.

c) Ensure independent/external expertise to lead consultation and/or be visibly involved in the process

Both staff with the Ontario and Federal governments noted the value of the independent report as the foundation for identifying the issues and their approach, but Ontario stated that the key is about ensuring broad consultation.

Federal process included

- contracting with a highly respected and industry-supported external expert to lead the engagement process with industry representatives from across Canada and other federal government custodians, key to solidifying buy-in from the industry.

Ontario's review of their current Construction Lien Act to assess if it was achieving its policy objectives resulted in

- *Striking the Balance: Expert Review of Ontario's Construction Lien Act:*
The report was informed by over 70 written submissions and dozens of stakeholder meetings chaired by independent experts.

The federal report

- *Building a Federal Framework for Prompt Payment and Adjudication* contained recommendations by industry experts for the foundation of the approach to establish a federal prompt payment regime.

These independent reports addressed policy positions which aided in the direction and development of legislation and regulations.

d) Create an advisory group of key industry representatives

Staff with both the Federal and Ontario governments

- created an advisory group made up of representatives from across the industry, to provide feedback on the independent report, concepts, as well as early drafts of the legislation and regulations.

Federal staff stated that

- members of the advisory group were selected in collaboration with the external expert.

Staff with the Ontario government indicated that

- members of the advisory group signed non-disclosure agreements.

Nova Scotia staff concurred that

- working with a smaller group of stakeholders, that reports back to its members, keeps the issues and discussions more focused.

e) Use evidence and models already adopted by others

Federal staff noted that using information already available is very useful and time efficient

- research on various models used both in Canada and other jurisdictions around the world was crucial to informing the best possible approach to address prompt payment.

- They also encouraged drawing on the experiences and consultations of those who have already gone through the development process.

Staff with Nova Scotia has

- gathered primary and secondary information from the jurisdictions who already have provisions in place and appreciate being able to learn from their experiences.
- Nova Scotia will be using various pieces from each of the others as they best relate to Nova Scotia's legislative and civil contexts.

Avoid

Not consulting a wide variety of resources – research, industry experts, stakeholders, other jurisdictions

Federal staff stated the importance of avoiding

- developing regulations in a vacuum, without researching and reviewing current legislation and regulatory concepts, developing policy positions, seeking independent and expert feedback/input from the industry; and
- developing regulations in a silo without consultation with other jurisdictions doing similar work.

2. Suggested Approach for Designing Adjudication Model

Ideally:

a) Do thorough research on models being used

Federal staff recommended

- collecting as much information as possible on models operating in other jurisdictions domestically and internationally.
- Refer to their report: *Building a Federal framework for Prompt Payment and Adjudication*

Nova Scotia has been gathering information on the models being used by other jurisdictions and learning from any experiences with implementation.

b) Ensure the adjudication authority is an independent entity

Federal staff wanted to

- ensure conflict of interest was not an issue by not having the 'owner' within a jurisdiction also be the adjudicator.

Ontario determined that their adjudication authority

- would be an independent, arms length and self-funded body.

Nova Scotia made additional changes to its *Builders' Lien Act* this past fall

- to allow for a third party entity to be appointed as an adjudication authority.

c) Have a well developed scope, concepts and direction based on industry input

Federal staff noted the

- importance of engaging with the industry when developing the adjudication approach.
- Requests for Information were useful in getting input from construction industry on what components they saw as necessary to develop a functional adjudicator model.
- Keep in mind the purpose for adjudication – i.e. lack of prompt payment.

Ontario defined the scope of the general, technical, technological, and financial requirements of ANA services through an application process, and

- emphasized need for ANA to maintain a user-friendly website and an active social media presence to education public and facilitate adjudication procedures.

Nova Scotia staff said

- the Prompt Payment Coalition has been actively involved in ongoing discussions with government regarding prompt payment timelines and an adjudication process.

d) Provide adequate time to find an adjudication authority and for them to get set up

Federal staff mentioned

- the importance of allowing for time to post, receive and evaluate Request for Proposals (RFP) for adjudication authority, and
- operationalization of the adjudication authority.

Ontario ministry staff stated it was

- beneficial to consult with ANA candidates to ascertain market interest in offering the adjudication services, and
- for the selected ANA to be given adequate time to train adjudicators, design websites, and other administrative work and processes.

e) Ensure fair and transparent assessment and selection of an adjudication authority

Ontario indicated the formal assessment of applications and selection process should be

- clear, detailed and fair; and
- ensure fairness by hiring a third party to conduct assessment and selection.

f) Ensure adjudication process will be accessible and not cost prohibitive

Federal staff observed that responses to Requests for Information indicated agreement among stakeholders and that

- there should be no up-front financial infusion to cover start up costs for the authority.

Ontario ministry staff were concerned with proportionality between, on the one hand, the amount in dispute and, on the other hand, the length and complexity of applicable procedures and associated fees.

- Goal was to avoid disputes that would not be cost-effective.
- Some powers/discretion given to the adjudicator in conducting adjudication.
- Established pre-designed adjudication processes with associated flat fees.
- Ensured procedures and fees were predictable and proportionate.
- Adjudication fees are subject to approval of the Attorney General and are publicly posted.

This is also a key concern for Nova Scotia's construction industry.

Avoid:

Choosing multiple adjudication authorities

Both federal and Ontario staff noted that the research and their consultations confirmed that having one adjudication service provider was best

- having more than one could cause some confusion and weaken the adjudication process by introducing variance,
- leading to more post adjudication litigation.

3. Suggested Approach for Consultations

Ideally:

a) Conduct extensive engagement of a broad sampling of industry stakeholders

Each entity agreed on the importance of consultation/engagement:

- Consultation was deemed absolutely necessary and staff would encourage other jurisdictions to conduct extensive consultations with stakeholders before drafting legislation and regulations.
- Extensive engagement by the federal government included crown custodians, primary real property service providers and industry representatives from construction industry.
- Federal staff hired industry expert to ensure a comprehensive list of representatives was formed so could receive questionnaire.
- In Ontario, Attorney General met with key stakeholders to hear feedback on recommendations in the initial report. Held 30 stakeholder meetings with 60 key groups, including govt ministries and broader public sector.
- Engagement sessions with Nova Scotia's industry were initially held in 2019 and there have been ongoing discussions with the coalition and the Construction Association. Further opportunities for feedback are planned as the development of regulations progress.

Federal staff mentioned that

- consultations conducted in other jurisdictions can be reviewed/referenced allowing for more targeted consultation by others.

Staff with Nova Scotia noted

- the value in having information from the consultations held in other jurisdictions.

b) There is real risk a broad range of stakeholders are not represented or feel heard

Staff with both the federal and Ontario governments also agreed

- it was crucial to ensure all stakeholders are somehow represented, have an opportunity to be heard since different sectors have potentially diverging goals and interests.
- Challenge was giving meaningful feedback in a short timeframe.
- Federal staff believe it was necessary to bring the three largest industry stakeholders representing different industry sectors together to reach a consensus on approach and details behind the policies that led to the development of the legislation and regulations.
- Ontario staff noted the delicate balance in addressing stakeholder interests, the perspectives of government ministries, and the broader public sector.

c) Have an engagement plan

Federal staff emphasized

- it was key to ensure industry was involved so brought in expert stakeholders to design and lead engagement process.

Staff for Ontario developed three phases to their engagement process:

1. Reviewed existing legislation to identify key issues and invited stakeholders to make written submissions.
 2. Consultation process with more than 30 meetings with over 60 key interest groups, including government ministries and broader public sector.
 3. Convened expert advisory group of legal experts from the industry to develop independent report.
- Even once Ontario's Bill was introduced and the Attorney General solicited feedback from the industry, which was assessed by the Ministry and experts, which led to numerous amendments when the Bill was considered by the Standing Committee on the Legislative Assembly.

d) Create an advisory group

Federal staff used an advisory group to facilitate discussions

- around the concept of prompt payment and adjudication; enabling concise and targeted consultation when required to work through specific aspects of the federal prompt payment approach.

Ontario used an advisory group to facilitate

- broad consensus on three core issues: maintaining and modernizing lien and holdback process, new prompt payment regime, and targeted adjudication to resolve disputes.

Nova Scotia's Prompt Payment Coalition led by the construction association

- has been the primary voice of the industry,
- with other opportunities for feedback by the broader industry being provided at crucial points in the development process.

e) Ensure the consultation process is open and transparent and provide regular updates back to stakeholders

Staff with both governments noted the importance of an open and transparent engagement/consultation process

- feedback through the federal engagement process was included as addendums to the independent report and regular updates were provided to the key stakeholders as key milestones in the process were achieved.
- Participating stakeholders in the Ontario process received regular email updates on the status of the review process and the legislation. A website was also created to provide information about the progress of the review, and access to stakeholder submissions, summaries of meetings, and the final report.
- Regular meetings with the Coalition and the Construction Association has provided ongoing information sharing with their member organizations.

Avoid:

Government led consultation if want to gain industry support

Staff with the federal government believe using government representatives to lead the consultation would not be well received by the industry.

- It will not appear to be open, honest or impartial.
- Ensure consultation is led by well respected industry expert.

4. Suggested Structure for Transition Rules

Ideally:

a) Ensure the transition plan is based on feedback from the Industry

Both federal and Ontario staff highlighted the importance for the industry to provide feedback on transition plans

- feedback from industry experts assisted the federal government with the recommendations report.

Ontario also found it useful to use the

- RFEOI process to gather feedback on a range of issues, including input into implementation timelines.

Although yet to be determined, the Prompt Payment Coalition of Nova Scotia has provided their advice on transition plans.

b) Carefully consider whether existing contracts will be included or grandfathered

Federal construction contracts tend to be very large (\$100s of Millions), multi-year contracts – a decade in some cases.

- Hence, transition plans to the Federal Prompt Payment regime will not grandfather existing contracts, however it will provide for a one-year deferral period for projects already underway.
- There is an ability to exempt certain federal contracts in certain cases.

Ontario's Prompt Payment regime began in October 1, 2019 and

- did not apply to contracts entered into, or procurement processes for an improvement that is the subject of a contract that was commenced, prior to this date.¹

c) Consider basing transition rules on the date relevant contracts are signed

Federal government staff

- believe it is important for the industry to be informed regarding the timing of prompt payment regulations, their release and potential implementation timeframes.
- Hence the one year deferral period for existing contracts and an immediate impact on new contracts.

d) Ensure the industry is well aware of how to utilize the prompt payment and dispute resolution processes

Federal staff

¹ Ontario's transition rules were discussed in case of Crosslinx Transit Solutions v. Form and Build Supply Inc. 2021 ONSC 3396.

- ensured the industry was provided with information on how to navigate within the world of prompt payment.
- Saw this responsibility falling on the major industry associations such as the Canadian Construction Association.

Staff with the ministry of Ontario

- Believe the more informed the parties are about the process, the more likely they are to utilize it.
- As noted earlier, built into the scope of the authority to maintain a user-friendly website and an active social media presence to educate the public and facilitate adjudication procedures.

Nova Scotia staff noted

- the Construction Association of Nova Scotia is already anticipating conducting education sessions.

e) Avoid duplication and confusion, consider having similar prompt payment regimes to those already operational

Since federal contracts take place in provincial/territorial jurisdictions and

- to avoid confusion, inconsistency or additional costs, the Federal government is willing to designate a province or territory's prompt payment regime if it has a reasonably similar system as the federal regime.

Ontario would also encourage

- other jurisdictions to promote alignment with Ontario's regime, to the extent feasible.

Nova Scotia is using learnings from the other jurisdictions and applying them to its specific legislative and civil contexts. For example, we anticipate having similar prompt payment timelines to the other jurisdictions.

Avoid:

Not allowing enough time to operationalize the authority and have their processes in place before the effective date

Staff with federal government also noted it was

- important to not lock in the effective date without confirming the time necessary for the adjudication authority to be operationalized.
- Timing must coincide with implementation and proclamation of the legislation/regulations.

5. Indigenous Considerations

Ideally:

a) **Ensure to invite Indigenous leaders to participate in engagement processes**

The federally engaged experts reached out to Indigenous groups/firms for feedback on federal prompt payment and little interest was identified at that time; however, indigenous firms are represented by various construction associations across Canada, and the experts also met with the Mi'kmaq Confederacy of PEI.

At this time, only Federal contracts on reserves will be applicable to the federal prompt payment regime. This applies to both the primary contactor as well as subcontractors.

Summary of Key Learnings:

1. Suggested Approach for Designing Regulations

Ideally:

- a) Get the endorsement of key construction stakeholders on approach and throughout the development process
- b) Have broad construction stakeholder representation
- c) Ensure independent/external expertise to lead consultation and/or be visibly involved in the process
- d) Create an advisory group of key industry representatives
- e) Use evidence and models already gathered by others

Avoid

Not consulting a wide variety of resources – research, industry experts, stakeholders, other jurisdictions

2. Suggested Approach for Designing Adjudication Model

Ideally:

- a) Do thorough research on models being used
- b) Ensure the adjudication authority is an independent entity
- c) Have a well developed scope, concepts and direction based on industry input
- d) Provide adequate time to find an adjudication authority and for them to get set up
- e) Ensure fair and transparent assessment and selection of an adjudication authority
- f) Ensure adjudication process will be accessible and not cost prohibitive

Avoid:

Choosing multiple adjudication authorities

3. Suggested Approach for Consultations

Ideally:

- a) Conduct extensive engagement of a broad sampling of industry stakeholders
- b) There is real risk if a broad range of stakeholders are not represented or feel heard

- c) Have an engagement plan
- d) Create an advisory group
- e) Ensure the consultation process is open and transparent and provide regular updates back to stakeholders

Avoid:

Government led consultation if want to gain industry support

4. Suggested Structure for Transition Rules

Ideally:

- a) Ensure the transition plan is based on feedback from the Industry
- b) Carefully consider whether existing contracts will be included or grandfathered
- c) Consider basing transition rules on the date relevant contracts are signed
- d) Ensure the industry is well aware of how to utilize the prompt payment and dispute resolution processes
- e) Avoid duplication and confusion, consider having similar prompt payment regimes to those already operational

Avoid:

Not allowing enough time to operationalize the authority and have their processes in place before the effective date

5. Indigenous Considerations

Ideally:

- a) Ensure to invite Indigenous leaders to participate in engagement processes