

# PROMPT PAYMENT AND ADJUDICATION

Impact of upcoming changes on the CRE Industry

BOMA Industry Breakfast

February 15, 2024



## ON THE AGENDA

- Prompt Payment overview
- Adjudication overview
- Getting ready for the new legislation

## PROMPT PAYMENT LEGISLATION

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- Bill 38, *The Builders' Lien Amendment Act (Prompt Payment)*, received royal assent on May 31, 2023
- Regulations still to be issue
- No timeline has been publicly stated for implementation
- The amendments consist of two parts:
  - Prompt Payment
  - Interim Dispute Adjudication
- Builders' lien holdback requirements still apply

## OTHER JURISDICTIONS

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- U.K., Australia, and New Zealand
- In force in other Canadian provinces Ontario (2019), Saskatchewan (2022), and Alberta (2022)
- Other Canadian provinces are at various stages of developing or implementing prompt payment legislation

# INTERNATIONAL HISTORY OF ADJUDICATION

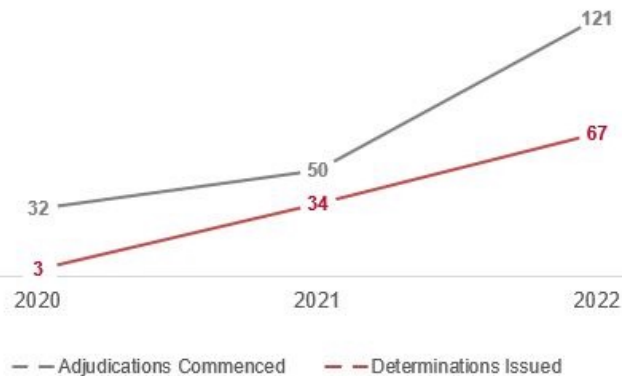
- The UK has over 20 years of experience with adjudication regimes in the construction context
- In its first 10 years, adjudication generated roughly the equivalent of 100 years of case law in the UK
- UK Statistics:
  - Statistics show that the claimant was successful in 2/3 of the cases
  - Around 50% of adjudications involved payment, 6% dealt with defective work, and 15% concerned extensions of time
  - 35% of adjudications were brought by the GC against the owner, 36% were brought by a subcontractor against the GC. Only 7% were brought by the owner against its GC
  - The disputed amount in 70% of adjudications was under \$430,000 CAD

# EXPERIENCE IN OTHER JURISDICTIONS

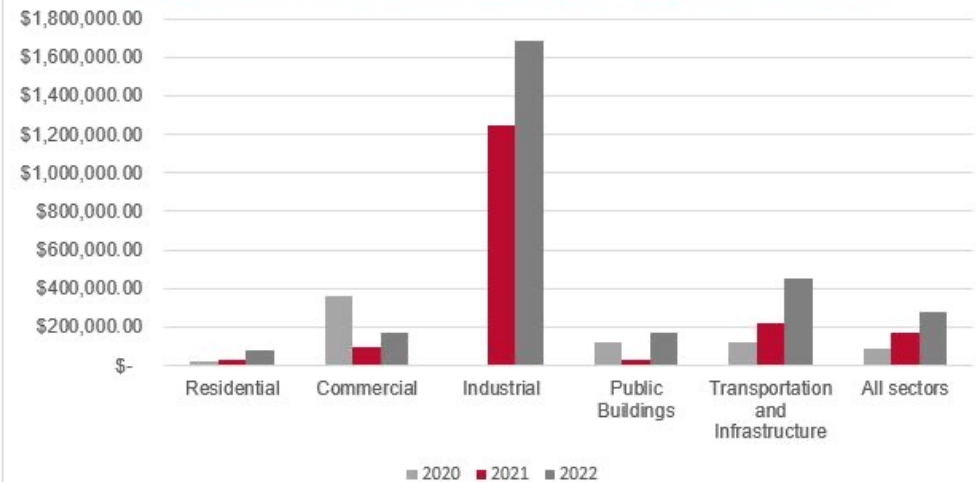
**MLT A IKINS**

WESTERN CANADA'S LAW FIRM

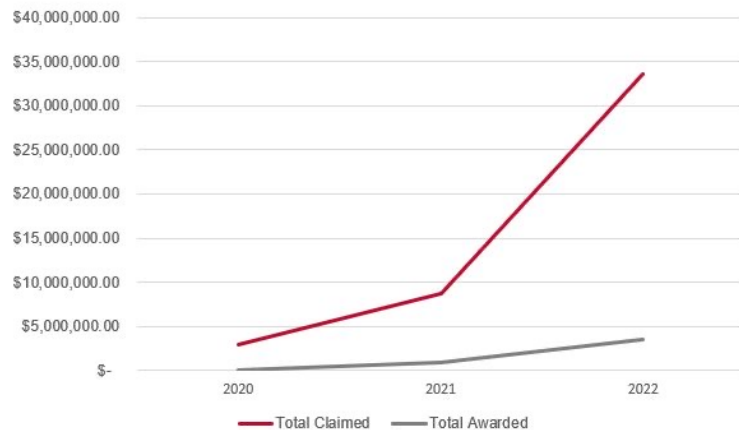
**ADJUDICATIONS COMMENCED AND DETERMINATIONS ISSUED**



**AVERAGE AMOUNT CLAIMED BY INDUSTRY SECTOR**



**VALUE OF ADJUDICATION DISPUTES**



Average Adjudication Claim	2020	2021	2022
Residential	\$22,148.87	\$26,778.92	\$82,935.06
Commercial	\$361,349.37	\$99,646.64	\$171,734.88
Industrial	\$ -	\$1,246,107.41	\$1,687,672.50
Public Buildings	\$120,174.39	\$32,631.78	\$167,753.39
Transportation and Infrastructure	\$124,047.83	\$224,545.03	\$449,042.90
<b>All sectors</b>	<b>\$90,828.57</b>	<b>\$174,193.18</b>	<b>\$277,168.44</b>



## TRANSITIONAL RULES

- Applies to contracts and subcontracts entered into on or after the legislation comes into force
- Where the new rules will **NOT** apply:
  - *Contracts or subcontracts entered into before the day before the legislation comes into force*
  - *Professional fees and charges of architects and engineers*
  - *Where The Builders' Lien Act doesn't apply (i.e. pre-existing exceptions for certain provincial highways and Manitoba Hydro contracts)*
- Unlike Saskatchewan, no industry exemptions currently contemplated in Manitoba
- Alberta has exemptions for certain public sector projects and recent **new** exemption for specified mega projects



# PROMPT PAYMENT OVERVIEW





## PROMPT PAYMENT

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- The legislation establishes a scheme for prompt payment under construction contracts
- Mandates timely payment of progress amounts owing in respect of the contract price by owners and contractors
- This new scheme requires a “proper invoice”

# PROPER INVOICE

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- **Unless the contract provides otherwise**, proper invoice must be given to the owner **every month**.
- Does **not** prohibit invoicing due on milestones or making a proper invoice contingent on testing or commissioning
- Proper invoice requirements:
  - Contractor's name and address
  - Date of the invoice, and period when the services/materials were supplied
  - Identification of the contract under which the services/materials were supplied
  - Description of the services/materials
  - Amount payable, and payment terms
  - Name and contract information of the person to receive payment
  - Meets any other requirements of the contract



## PAYMENT OF PROPER INVOICE

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- The owner must pay the invoice within **28 days** of receiving the proper invoice from the contractor
- Parties **cannot** contract out of the 28 day payment period
- Issuing an invoice **cannot** be conditional on payment certification, but can be conditional on testing and commissioning
- The owner may dispute payment of all or a portion of the invoice

## DISPUTING PAYMENT OF A PROPER INVOICE

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- An owner who disputes payment, must send a notice of non-payment within **14 days** of receiving the “proper invoice”
- The notice of non-payment can be in relation to the full amount or partial amount of the proper invoice
  - An owner disputing a partial amount of the invoice, must pay the undisputed amount within **28 days** of receiving the “proper invoice” from the contractor
- Notice of non-payment must follow a prescribed form and specify the dispute amount, and reasons for non-payment
- Disputed payments may be resolved through adjudication

## PAYMENT WITH CONTRACTORS AND SUBCONTRACTORS

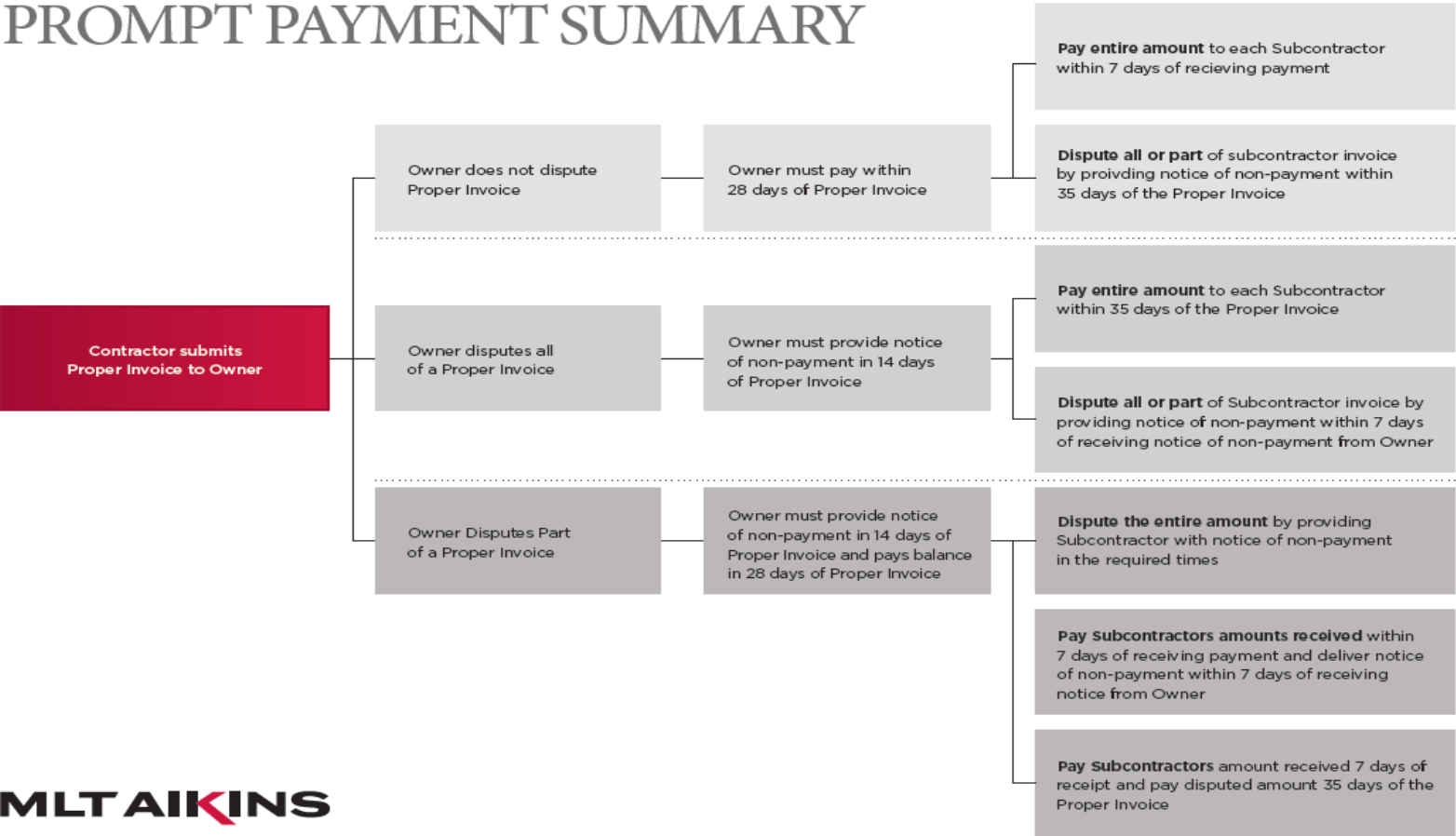
Where the contractor does not receive the full amount from the owner:

- If the owner has not paid the entire invoice, the contractor is still required to pay the subcontractor within **35 days** of the date of the proper invoice to owner
  - Contractor must pay subcontractors the amount received within **7 days**
    - If the amount withheld relates to a specific subcontractor, the remaining subcontractors must be paid
    - Otherwise, the amount received must be paid to subcontractors on a proportionate basis
  - Contractor must either:
    - Pay remaining amounts to subcontractors within **35 days** of Proper Invoice
    - Provide notice of non-payment (in the prescribed form) to subcontractors within **7 days** of receiving notice of non-payment from owner

## NON-PAYMENT WITH CONTRACTORS AND SUBCONTRACTORS

- The Contractor must provide notice of non-payment to a subcontractor if the subcontractor is not being paid either because
  1. The owner is disputing payment to the contractor, or
  2. The contractor is disputing payment to the subcontractor
- The notice must be sent either within **7 days** of receiving the notice of non-payment from the owner or before the end of the **35 day** payment period available to the contractor when paying the subcontractor
- If a contractor does not provide notice to its subcontractor within the specified time period, then the contractor must pay the original amount due
- In situations where a Contractor is not paying a Subcontractor due to Owner non-payment, it must initiate an adjudication within 21 days of notifying the Subcontractor of the non-payment

# PROMPT PAYMENT SUMMARY





# ADJUDICATION OVERVIEW



## ADJUDICATION – GENERAL

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- Modeled on system used in other provinces
- Described as “rough justice”
- Parties cannot contract out of adjudication
- Parties cannot preselect the adjudicator in their contract
- Each adjudication shall only concern “a single matter” unless the parties and adjudicator agree otherwise
- An adjudication decision does not restrict the authority of a court or arbitrator to come to a different decision in later proceedings

# ADJUDICATION – AVAILABILITY

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## A party may initiate adjudication for (section 103):

1. A dispute that is the subject of a notice of non-payment
2. A failure to submit a proper invoice
3. A failure to make a payment in accordance with the required time periods
4. A dispute in respect of the valuation of work, services or materials provided
5. A dispute in respect of a payment under a contract or sub-contract, including in respect of a change order, whether approved or not, or a proposed change order
6. A dispute in respect of a set-off provided for by section 83
7. A matter agreed to by the parties to the adjudication
8. Any other matter set out in the regulations.

Adjudication is **not** available after a contract or subcontract is completed.

# INTERIM DETERMINATION

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- An adjudication award is a “pay now, fight later system”
- Is legally binding, unless and until it is replaced by:
  - A decision of the court
  - By written agreement between the parties
  - As a result of an arbitration under The Arbitration Act
  - Or upon application to have it set aside
- In the words of an English commentator:
  - “Argue now at speed, pay now if the adjudicator decides you must, and have a more full, detailed, final and forensic argument later if you wish”
- Essentially, adjudication has created an additional layer of dispute resolution within the construction claims process
  - Traditional methods of litigation and arbitration will likely still follow the end of the project
  - Resources may be better conserved for a later lawsuit or arbitration

## RESPONDING TO AN ADJUDICATION

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- Very tight timeline to respond -> will put a premium on good project/document management
- Experiences in other provinces suggest, the parties will only have about 10-15 days to respond with all reply documents and argument
- Significant advantage to claimants – can assemble documents in advance and chose the timing



## ADJUDICATOR'S POWERS AND DUTIES

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- What an adjudicator may do:
  - *Issue directions respecting the adjudication process*
  - *Ascertain the relevant facts and law, including by making inquiries without the parties being present*
  - *Draw inferences based on the conduct of the parties to the adjudication*
  - *Conduct an on-site inspection of the applicable improvement*
  - *Obtain assistance (from a merchant, accountant, actuary, building contractor, architect, engineer or other person) before making a determination*
- What an adjudicator must do:
  - *Conduct the adjudication in an impartial matter*
  - *Make a Determination in writing with reasons in 30 days of receiving documents from initiating party (subject to procedures allowing extension of 30-day time limit)*

# ADJUDICATOR'S DECISION

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- Adjudicator must make a decision within **30-35 days** of receiving notice of adjudication, unless the parties and adjudicator agree to extend the period
  - Actual deadline depends on what date the contract documents are received by the adjudicator
  - Time period can be extended by 14 days at the adjudicator's request with written consent of the parties or such time period specified in the contract with written agreement and consent of adjudicator
- The adjudicator's decision must be written and state the reasons for the determination
- Limited options for setting aside determinations (e.g. legal incapacity, invalid contract, jurisdiction, fraud, bias, procedural fairness, etc)

## PAYMENT AFTER ADJUDICATION

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- After receiving the determination, the owner must pay the contractor the full amount determined by the adjudicator, within **10 days** of the determination
- Adjudication determinations can be enforced as an order of the Court
- If the owner defaults, the contractor or subcontractor may suspend work until receiving the full amount
  - Contractor/subcontractor is entitled to compensation for reasonable losses or costs incurred to resume work
- Unpaid party is also entitled to interest at the **higher** of the *King's Bench* interest rate or the contractual interest rate (if specified)

# ADJUDICATOR'S FEE AND COSTS

- The parties and adjudicator are to agree on the adjudicator's fee
- If they disagree, the Authority will determine the amount (other provinces use a fee schedule)
- Fee is to be split equally, unless the adjudicator determines one party should pay more of the fee (or all of the fee) because it did not act in good faith during the adjudication, or acted frivolously, vexatiously, or in an abuse of process
- Parties are to bear their own costs (except when there is an abuse of process)

Amount Claimed on Notice of Adjudication	Adjudication Fee
≤ \$9,999	\$800
\$10,000 ≤ \$24,999	\$1,000
\$25,000 ≤ \$34,999	\$2,000
\$35,000 ≤ \$49,999	\$3,000
\$50,000 ≤ \$249,999	Adjudicator hourly rate of \$250
\$250,000 ≤ \$499,999	Adjudicator hourly rate of \$400
\$500,000 ≤ \$1,000,000	Adjudicator hourly rate of \$500
> \$1,000,000	Adjudicator hourly rate of \$750





# GETTING READY

# KEY CONSIDERATIONS

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## 1. Have your contracts been updated to reflect the new payment cycle?

- Have master contracts and other contract templates/guides been updated?
- What requirements does your organization usually have for invoicing? (timesheets reviewed and approved, specific administrative requirements, etc.)
- Is there a tracking system for which contracts/projects are covered by Prompt Payment?

## 2. What procurement model is being used?

- Consider developing milestone payment systems for suitable projects
- Will a payment certifier be used? What invoice review timelines can be secured with the payment certifier (should be less than 14 days or it is not useful)
- Will all payment and commercial matters be resolved prior to contract award? (Schedule of Values set, pricing and payment model firmed up, etc.)

## 3. When may it be appropriate to require added contract security?

- What is the contractor's credit risk?

## KEY CONSIDERATIONS

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### 4. How will upcoming projects be financed?

- If reliant on outside sources (lenders, government or other funding), how long does it typically take to obtain releases for payment?
- Are draw / credit conditions aligned with the new system?
- Is cashflow sufficient to make payments in case financing is delayed?

### 5. Have you considered what additional resources may be required?

- Will additional people/systems be required to manage the administrative burden of faster payment and/or responding to disputes?

## KEY CONSIDERATIONS

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### 6. What document and project management systems are being used?

- If a third party consultant is involved, do you have ready access to documents?
- What documents are likely to be needed if there is a dispute?
- Are your project management personnel trained and experienced in handling disputes?

### 7. How are invoices handled by on construction projects?

- What approvals does an invoice require to get paid?
- What would need to change (if anything) to ensure that any issue that would lead to non-payment (or short payment) is communicated to the contractor within 14 days?
- Is invoicing from a contractor handled on a single project basis or is it spread across multiple projects/scopes/sites?
- Is accounting/finance capable of making payment within 28 days of receipt of the invoice?
- Are any process improvements needed to meet the 14 and 28 day deadlines?

# PROMPT PAYMENT READINESS STRATEGIES

## 1. Templates

- a. *Make sure contract templates meet the requirements*
- b. *Use as an opportunity for a general refresh?*

## 2. Contracting and Procurement Strategy

- a. *Can procurements/contracts be structured in a way to streamline compliance with the new timelines?*

## 3. Training

- a. *Get everyone in your organization ready (project team, finance, consultants, management, etc.)*

## 4. Processes

- a. *Evaluate current processes (invoice review, payment) to eliminate chokepoints that will make it difficult to meet new payment timelines*

# Q & A