



THE CANADIAN
BAR ASSOCIATION
L'ASSOCIATION DU
BARREAU CANADIEN

May 16, 2019

Via email: FINA@parl.gc.ca

The Honourable Wayne Easter, P.C., M.P.
Chair, Standing Committee on Finance
Sixth Floor, 131 Queen Street
House of Commons
Ottawa ON K1A 0A6

Dear Mr. Easter:

Re: Bill C-97, Division 26 of Part 4 – Federal Prompt Payment for Construction Work Act

The Construction and Infrastructure Law Section of the Canadian Bar Association (CBA Section) is pleased to comment on the *Federal Prompt Payment for Construction Work Act*, set out in Division 26 of Part 4 of Bill C-97, *Budget Implementation Act, 2019, No. 1*.

The CBA is a national association of 36,000 members, including lawyers, notaries, academics and law students, with a mandate to seek improvements in the law and the administration of justice. The CBA Section comprises lawyers across Canada with expertise in construction and infrastructure law, who act for a broad cross-section of stakeholders in the construction industry, including public and private owners, building code authorities, contractors and subcontractors, construction lenders and construction insurers, construction professionals and construction industry associations.

The CBA continues to express serious concern with the Government's use of omnibus bills. The introduction of the *Federal Prompt Payment for Construction Work Act* through an omnibus budget bill hinders opportunities for public or parliamentary scrutiny and decreases effective democratic process and debate. We urge the Government of Canada to limit the use of omnibus legislation and to refrain from using budget implementation bills to enact substantive legislation not directly related to finance, taxation or spending.

The CBA Section has closely followed developments in prompt payment legislation across Canada. In November 2017, we wrote¹ to the Minister of Public Services and Procurement urging the federal government to undertake broad stakeholder consultation before introducing any prompt payment

¹ See CBA Section letter to Minister of Public Services, [online](#).

legislation. In May 2018, we also commented² to the expert review led by Bruce Reynolds and Sharon Vogel.

We thank the government for introducing prompt payment and adjudication legislation beneficial for the construction industry. We now offer our comments on the Act.

Definitions (section 2)

Construction work is defined as “the supply of materials or services, including the *rental of equipment, for the purposes* of a construction project located in Canada”.

Subcontractor is defined as:

- (a) a party to a contract with a contractor under which that party is to perform construction work; and
- (b) a party to a contract with any person — other than Her Majesty, a service provider or the contractor — under which that party is to perform construction work for *the purposes of* the same construction project for which the construction work referred to in paragraph (a) is to be performed.

The broad term “for the purposes of” in these definitions and the reference to “rental of equipment” as *construction work* makes determining the application of the Act – i.e. how broadly and far down the construction chain it is meant to capture – very difficult.

We recommend amending the definitions as follows:

“Construction work” means the supply of materials or services, ~~including the rental of equipment, for the purposes of~~ a construction project located in Canada.

“Subcontractor” means

- (a) a party to a contract with a contractor under which that party is to perform construction work; and
- (b) a party to a contract with any person - other than Her Majesty, a service provider or the contractor - under which that party is to perform construction work ~~for the purposes of~~ the same construction project for which the construction work referred to in paragraph (a) is to be performed.

Service provider is broadly defined as:

a party to a contract with Her Majesty under which that party is to provide Her Majesty with services related to federal real property or a federal immovable and *may*, for the purposes of fulfilling its obligations under that contract, *enter into a contract* with a person for the carrying out of a construction *project*, but does not include a party to such a contract if they are the lessor or lessee of the federal real property or federal immovable.

² See CBA Section submission to Expert Review Panel, [online](#).

The permissive “may enter into a contract” is not appropriate, since involvement in a construction project or construction work is mandatory to subject a service provider to the prompt payment legislation. The term “construction *work*” (as opposed to “construction *project*”) is also more appropriate in this context and is used in other relevant provisions of the Act regarding service providers.

The definition of service provider should be amended as follows:

“Service provider” means a party to a contract with Her Majesty under which that party is to provide Her Majesty with services related to federal real property or a federal immovable and, for the purposes of fulfilling its obligations under that contract, enters into a contract with a person for the carrying out of a construction *work*, but does not include a party to such a contract if they are the lessor or lessee of the federal real property or federal immovable.

Designation of province (section 6)

Section 6(1) allows the Governor in Council to designate any province that has a “reasonably similar” prompt payment and adjudication regime to that in the Act.

Section 6(2), which outlines the provisions of the Act that no longer apply in the event of a designation, is confusing and should be clarified. For example, subsections 6(2)(a) outlines certain provisions that no longer apply to *contractors*. Subsection 6(2)(b) excludes all provisions of the Act for *subcontractors* and *service providers*. Subsection 6(2)(c) allows the application of any provisions of the Act to *contractors* (but not *subcontractors* or *service providers*) to address inconsistency or conflict between the Act and the provincial legislation.

In the event of a designation, it is unclear if the provincial holdback regime applies. Typically, no holdback is required on federal projects as there is no ability to lien. If the provincial holdback applies, it should be specifically stated in the Act. If the holdback does not apply, there would be even fewer protections in the contract chain.

It would be more consistent with provincial regimes and easier to manage for the industry if a default holdback amount was set in the Act, or if the provincial amount was adopted as a default (with contractual ability for the owner to opt-out).

Exempting construction projects from the Act (section 7)

Given the importance of this legislation for the construction industry, it is difficult to understand when an exemption would be warranted. We suggest that exemptions be granted only in extraordinary circumstances and that the Act set out these circumstances.

Notices (various sections)

We recommend adopting a forms regime (similar to Ontario’s *Construction Act*). All forms could be appended to the regulations for ease of use.

Adjudication (section 16)

It is helpful for parties to a construction project to have enumerated grounds for adjudication. Specific grounds should be added to section 16(1) of the Act.

Section 16(5) *Right to information – certificate of completion* should be carved out of section 16 as a stand-alone section. This new *certificate of completion* section should also require that the contractor post a certificate of completion on the federal website or on the website of the province used for completion notices (e.g. Daily Commercial News in Ontario).

Bonding

Most federal projects request bonding. We recommend that this requirement continue and be added to the Act. With no ability to lien the project, contractors, subcontractors and suppliers on federal projects are at a distinct disadvantage to influence the flow of payment. The prompt payment and adjudication provisions of the Act address the flow of payment. However, insolvency of a contractor remains an issue on federal projects.

Performance and payment bonds give assurances that projects will be completed in the event of an insolvent general contractor and ensure a recourse for all sub-trades and suppliers in the event of non-payment.

Regulations (sections 22 and 23)

Pursuant to sections 22 and 23, a significant amount of detail will be in regulations. We look forward to reviewing and commenting on the draft regulations at an early stage of development.

Transitional provisions (section 25)

Section 25 does not address construction work and Alternative Financing Projects (AFP)/P3 projects that have been in the *procurement stage* for several years prior to the Act coming into force. We recommend revising section 25 to address both the contract *signing* and the lead-in *procurement* phase.

We also recommend that section 25 be phrased in the affirmative and state when the Act applies, as opposed to stating when the Act does not apply.

Conclusion

We trust our comments are helpful and offer any further assistance in pursuing the issues we raise.

Yours truly,

(original letter signed Marc-Andre O'Rourke for Collin K. Hirschfeld)

Collin K. Hirschfeld, Q.C.
Chair, Construction and Infrastructure Law