



# ***Trends in Construction Procurement, Contracting, and Dispute Resolution: Where We've Been & Where We're Going***

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***Look at the Future***

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# Agenda

- Procurement
  - Limitations/Exclusions of Liability
  - Reprisal Clauses
  - Tenders vs. RFPs
- Contracts
  - Prompt Payment
  - Parties to the Contract
  - Contractual Limitations of Liability
  - Health and Safety
  - Notices



# Agenda

- Dispute Resolution
  - Limitation periods for claims
  - Adjudication
  - Liens



# Procurement Trends

# Limitations and Exclusions of Liability

- Owners attempt to limit or exclude liability to damages by adding clauses to the terms of tender
- Considering “Contract A” is a “contract”, do these efforts work?

# Limitations and Exclusions of Liability

## *2708266 Ontario Inc. v. City of Toronto* (2022, ONSC)

- Contractor submitted low bid
- City claimed it didn't have the necessary experience itself or through an "affiliated person" despite experience of principal
- City cancelled and re-issued tender and another contractor won
- Court disagreed with City's rejection and found Contract A had arisen with first contractor and that cancellation was groundless

# Limitations and Exclusions of Liability

## ***2708266 Ontario Inc. v. City of Toronto...***

- City relied on *limitation* of liability clause:  
“...the City will have no liability to any bidder or prospective bidder for damages including direct, indirect, special or punitive damages, or for loss of profits loss of opportunity of loss of reputation arising out of or otherwise related to the RFT, participation of any bidder in the RFT process...or the City’s acts or omissions in connection with the conduct of the RFT process, including the acceptance, non-acceptance or delay in acceptance by the City of any bid...”

# Limitations and Exclusions of Liability

## *2708266 Ontario Inc. v. City of Toronto...*

“...if the City is found liable, in any way whatsoever, for any act or omission in respect of the RFT, the total liability of the City to any bidder and **the aggregate amount of damages recoverable shall be no greater than the bidder’s cost of preparing the bid.**”

- Court was prepared to award contractor solely the costs of preparing bid...but asked for further submissions based on *Tercon*



# Limitations and Exclusions of Liability

## *Tercon Contractors Ltd v. B.C.* (2010, SCC)

- Province awarded design-build contract to a proponent who had not been pre-qualified as required
- Tender provided:

“Except as expressly and specifically permitted in these Instructions to Proponents, no Proponent shall have any claim for compensation of any kind whatsoever, as a result of participating in this RFP, and by submitting a Proposal each Proponent shall be deemed to have agreed that it has no claim.”

# Limitations and Exclusions of Liability

## *Tercon (cont'd...)*

- Court held 5-4 that exclusion clause, despite broad wording, was *not* effective to exclude liability for awarding to an ineligible bidder
- Minority thought clause was fine and would have been a complete answer to the claim
- Contractor awarded damages of \$3M for breach of Contract A

# Limitations and Exclusions of Liability

## ***2708266 Ontario Inc. v. City of Toronto*** (2023, ONSC) (Part 2)

- Court considered supplementary submissions based on *Tercon case*
- Clause in question more broadly worded
- No reason (bad faith, etc.) not to enforce
- Damages limited to preparation costs

# Limitations and Exclusions of Liability

- For owners, “secret” may be to allow for a small window of liability (i.e. a “limitation” only) to avoid a total *exclusion* clause being disregarded in clearly unfair situations
- Opportunity to challenge misbehaviour of owners is becoming very rare

# Reprisal Clauses

- Also called “debarment” clauses or “litigation bans”

= practice of banning bidders because of current or past litigation with owner

*...is this practice “legal”?*

# Reprisal Clauses

## Sample Purchasing By-law (2014 version):

### Litigation and Bidders

- a) The City shall not consider any Bids submitted by a Bidder that is in Active or Pending Litigation against the City.
- b) Potential Bidders who are involved with the City in Litigation matters can represent a compromised effort and a higher likelihood of future problems and liability. For these reasons such Vendors will be disqualified.

# Reprisal Clauses

## Sample Purchasing By-law (cont'd...):

Definition:

“Litigation (Pending)”

is whereby a potential claimant has demonstrated or manifested an intention to assert a possible claim

- By-law was updated and revised in 2022...

# Reprisal Clauses

## Litigation Against the City (revised)

The City *may* reject Bids or Proposals received from a Bidder or Proponent that is in Litigation with the City, at the sole discretion of the Manager of Procurement Services and/or the Manager of Design and Construction.

Definition (revised):

“**Litigation**” means any unresolved dispute where either a legal proceeding has been commenced or a **threat of legal action has been made in writing.**





## Reprisal Clauses

- what about **legitimate claims** under the contract (delays, unforeseen conditions, etc.)?
- what about exercising **statutory lien rights** for wrongful non-payment?
- what about **adjudication** under the various *Acts*?

# Reprisal Clauses

## *Prime Terra Group Inc. v. Thunder Bay* (2022, ONSC )

- Bidder submitted a bid and would have been lowest bidder
- Bidder's bid was initially accepted but then envelope returned unopened when staff realized that bidder should have been on the disqualified bidders list

# Reprisal Clauses

## *Prime Terra Group Inc. v. Thunder Bay...*

### **Disqualified Bidders List**

The Manager Supply Management will maintain a list of persons from which no Bids will be accepted by the Corporation. **This list will include the names of persons who have performed poorly (or not at all) in past Contracts or who are involved in litigation with the Corporation relating to past Contracts.** Persons whose names are on the list will not be permitted to submit Bids. In addition, the Manager Supply Management may refuse to accept Bids from persons who are affiliated with a person on the list through direct involvement or effective control by one or more of the directing minds of the other person on the list.

The disqualified Bidders list maintained under this Section applies to allow the disqualification of a Bid regardless of whether or not any particular acquisition process has involved a pre-qualification process.

# Reprisal Clauses

## *Prime Terra Group Inc. v. Thunder Bay...*

### Litigants

Unless otherwise permitted by this section, **no Bid shall be accepted from, nor shall any Contract be awarded or extended to any Contractor,** its principals, directors or any officer of that firm, or another related person (as determined by the Manager Supply Management, in his or her sole and unreviewable discretion), **with whom the Corporation is engaged in unresolved litigation.**

# Reprisal Clauses

## *Prime Terra Group Inc. v. Thunder Bay...*

- Court found that reprisal clause was an implied term of Contract A
- Court concluded no intention to form Contract A with a disqualified bidder
- Accepting the disqualified bidder would be unfair to the other bidders (including other disqualified bidders)



# Reprisal Clauses

*How do you combat the practice?*

- Issue policy statements?
- Against Trade Agreements (e.g. CFTA)?
- Advance constitutional arguments?

# Reprisal Clauses

- Canadian Construction Association:

## **Restrictive Bidding Practices by Public Owners**

“CCA opposes the practice by public owners of excluding construction contracting firms and suppliers from bidding their projects, or otherwise penalizing them, solely because of past or current litigation or other contested disputes with that public owner, or other public owners.”

(CCA Policy Statement - September 2014)

# Reprisal Clauses

***Interpaving Limited v. Greater Sudbury*** (2018, Ont. Div. Ct.)

- “Debarment” decision challenged in court
- Court did not find that debarment violated the Canada’s free trade agreements
- “A municipality has essentially the same right as a business person to decide with whom it will do business”



# Reprisal Clauses

## *J. Cote & Son Excavating Ltd. v. City of Burnaby* (2019, B.C.C.A.)

- Contractor banned for 3 years due to legitimate court case over soil conditions
- Court: “municipalities can generally do business with whomever they wish”; courts will usually defer to their decision
- not against *constitutional rights* to use “reprisal clauses”
- leave to SCC denied

# Tenders vs. RFPs

- Trend away from formal tenders, involving “Contract A” to non-binding “Requests for Proposals”
- Approach may lead to confusion of legal rights and obligations, including:
  - **Pricing?** Do “bid” prices have to be “held”?
  - **Fairness?** Is there a legal duty to be “fair”?
  - **“Contractual Terms”?** Do limits of liability apply?
  - **Remedies?** for misconduct by owner?



## Tenders vs. RFPs

- Not entitled to damages for “breach of contract [A]” as in *Tercon*
- Principal way to challenge outcome is through “**judicial review**” of award decision to have it set aside and awarded to proper “winner”

## Tenders vs. RFPs

### *Transdev Canada Inc. v. The Regional Municipality of York* (2023, Ont. Div. Ct.)

- Involved procurement process for bus transit operations and maintenance services
- Losing proponent challenged Council's award to competitor as improper and contrary to RFP
- Court said proper standard of review of award decision was "reasonableness"
- Here, decision was not unreasonable, and the process was fair



# Contracting Trends

# Prompt Payment

- Introduced into Ontario first – October 2019
- Alberta and Saskatchewan next
- Now Federal Government – **Prompt Payment for Construction Work Act**
  - applies to federal government projects in Canada except within the 3 provinces with their own regimes
- Comparison of all current regimes across Canada on BCCA website (except pilot project in Quebec)

# Prompt Payment

## Transition Rules for PPCWA

Contracts	
Contracts entered into on or before December 8, 2023:	Act does not apply until December 9, 2024
Contracts entered into on or after December 9, 2023:	Act applies

Subcontracts	
Subcontracts entered into before December 9, 2024 (where the 'Prime Contract' was entered into on or before December 8, 2023)	Act does not apply until December 9, 2024
All other Subcontracts:	Act applies

# Prompt Payment

## “Proper Invoice” (Fed. PPCWA)

- Must include:
  - a) the date of the invoice and the name, street and mailing address, telephone number and **email address** of the contractor that performed the construction work;
  - b) the period during which the materials or services were supplied;**
  - c) the contract number or other authorization under which the materials or services were supplied;
  - d) a description, including the quantity, if applicable, of the materials or services supplied;
  - e) the amount payable for the services or materials supplied and the payment terms; and
  - f) the name, title, street and mailing address, telephone number and email address of the person to which payment must be made**

... and any other requirements set out in the contract that do not conflict with the Act



# Prompt Payment

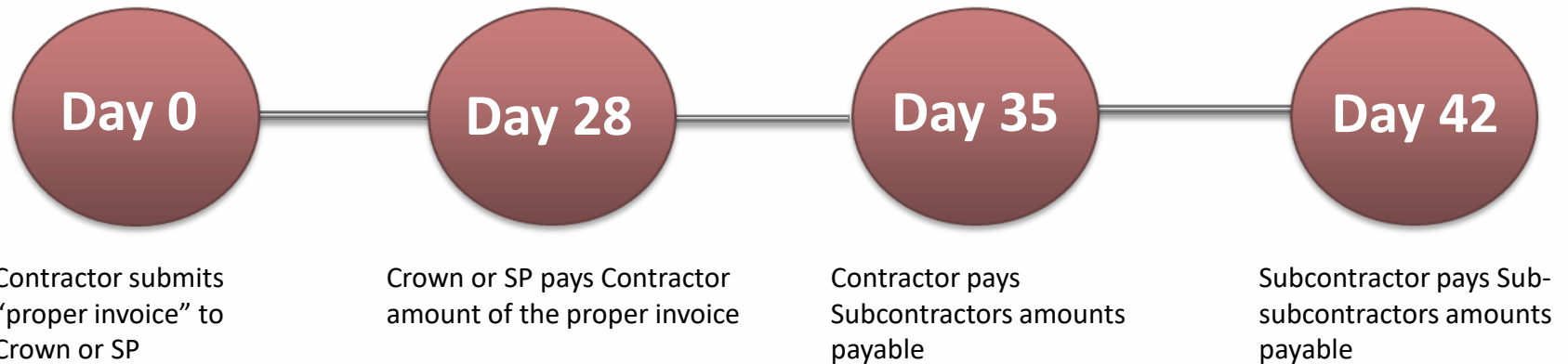
## Notices of Non-Payment

- *Unlike Provincial legislation*, no prescribed form required under PPCWA
- Notice must include:
  - a) a description of the construction work covered by the notice of non-payment
  - b) the amount that will not be paid
  - c) the reasons for the non-payment, including whether the party that must pay does not have the necessary funds to do so as a result of also receiving a notice of non-payment that covers the construction work referred to in paragraph (a); and
  - d) any other information prescribed by the regulation
    - the amount paid that is not in dispute

# Prompt Payment

Under PPCWA\*

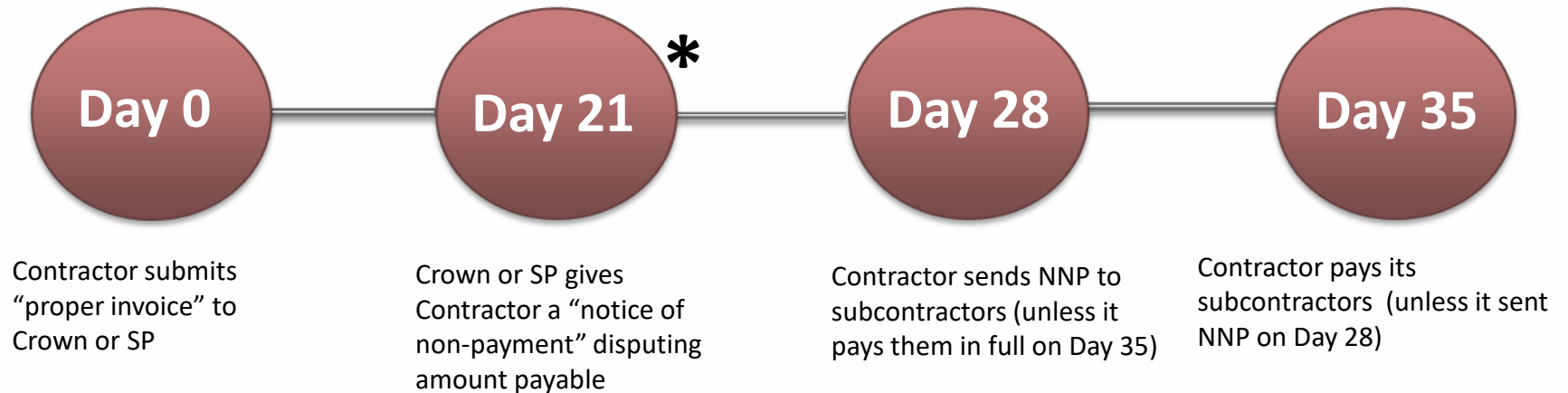
Full Payment



**\*Provinces are similar, but use calendar days, not "business days"**

# Prompt Payment

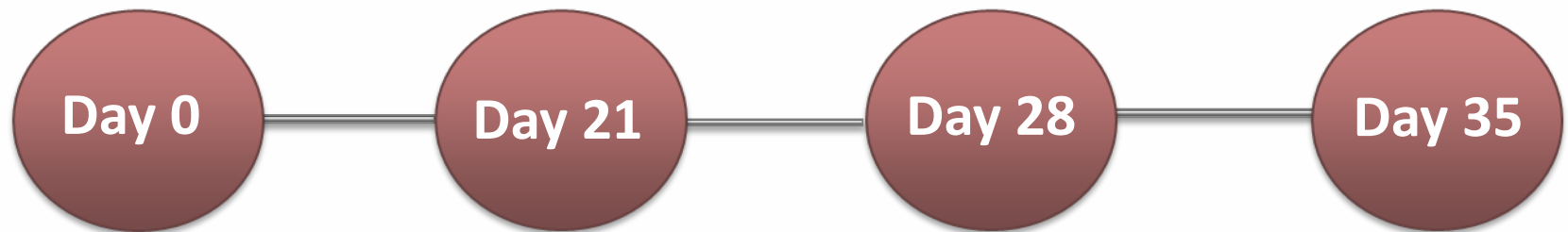
## Owner Disputes Invoice (In Full)



**\*Provincial legislation is 14 days**

# Prompt Payment Scenarios

## Owner Disputes Invoice (Partially)



Contractor submits  
“proper invoice” to  
Crown or SP

Crown or SP gives  
Contractor a “notice of  
non-payment” disputing  
amount payable

Contractor sends NNP to  
subcontractors (unless it  
pays them in full on Day 35)

Contractor pays subcontractors  
in full or, provided it gave a  
NNP on Day 28, on a rateable  
basis\*

*\*Contractor distributes amounts received rateably: first to subcontractors (and itself) whose work is not covered by the NNP, then any remaining amounts to subcontractors (and itself) whose work is partially covered by the NNP.*

*\*Question: Does the Contractor know which subcontractors’ work is being paid for?*

# Prompt Payment

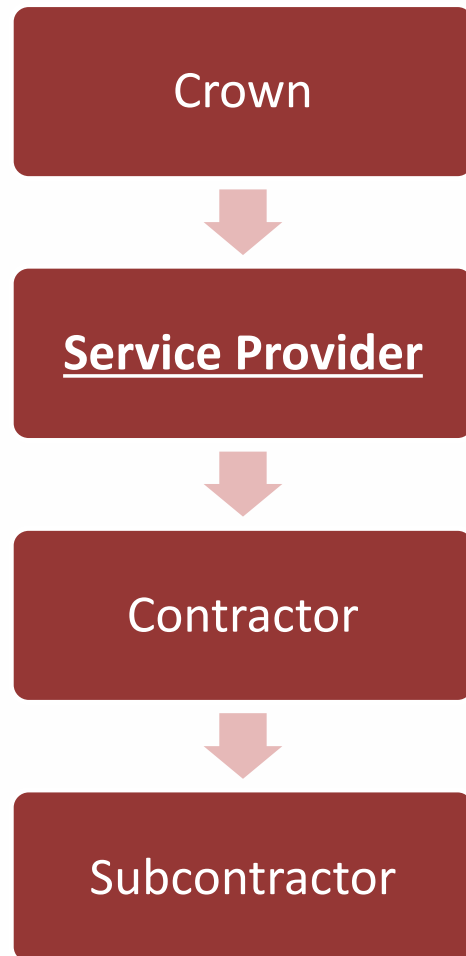
## Contractual implications

- Payment timing needs to be coordinated with form of contract
- CCDC-2 2020 aligns with *provincial* legislation
- Role of payment certifier is now secondary to statutory process
- Contracts now often require submission of “draft” invoice submission to allow review in advance of “proper invoice”

# Parties to the Contract

- Trend to have government owner “outsource” contracting for work to third-party project management service provider (e.g. BGIS, CBRE, Colliers, JLL, etc.)
- Contracts are entered into by PMSP as “owner”; PMSP pays contractor
- What is impact of this practice on legal rights & responsibilities?
  - effect on **lien rights**?
  - effect on **prompt payment** rules?

# The “Service Provider”



**Who** is the “Service Provider”?

- Another “owner”?
- A “contractor”?
- The “owner’s *agent*”?



# Parties to the Contract

- What is impact of this practice on legal rights & responsibilities?
  - effect on **lien rights**?
  - effect on **prompt payment** rules?



# Parties to the Contract

## *Arcamm v. Avison et al.* (2023, ONSC)

- Electrical contractor owed monies for emergency work and filed lien
- Brought a motion for judgment for amount owing against building owner and property manager who hired contractor
- Court said amount owed by owner only; property manager was acting as owner's agent
- For lien purposes, the "owner" has to have an ownership interest in the land

# Contractual Limitations of Liability

## *Centurion Apartment Properties Limited Partnership v. Sorenson Trilogy Engineering Ltd., (2024, BCCA)*

- Current owner of building suffering structural issues
- Responsible engineer had worked for design builder, not owner, so claim was a “tort” claim, not contract claim
- Engineer had limit of liability clause, limiting liability to fees

# Contractual Limitations of Liability

## *Centurion Apartment Properties Limited Partnership ...*

- Court found liability could exist in tort based on *Winnipeg Condominium v. Bird* case (1995, SCC)(the “dangerous defects” case)
- Limit of liability clause doesn’t protect engineer from tort liability to *owner*
- ANSWER? An indemnity from design-builder for any excess liability above agreed upon limit

# Health and Safety

## *R. v. Greater Sudbury (City)* (2023, SCC)

- Contractor carrying out water main repairs
- Lack of fencing and flagman
- Pedestrian struck and killed by a road grader
- Contractor, as “constructor”, was charged and pleaded guilty
- City had sent inspectors to site
- City also charged, as “employer”

# Health and Safety

## *R. v. Greater Sudbury (City)...*

- Lower courts dismissed charges against City
- Court of Appeal said that sending inspectors made City an “employer”
- SCC split 4-4 on appeal, so C of A decision stands
- Degree of control over site not a relevant factor:  

This Act is specifically designed to expand historically narrow safeguards and seeks to promote and maintain workplace health and safety by expressly imposing concurrent, overlapping, broad, strict, and non-delegable duties on multiple workplace participants in what was known as the “belt and braces” strategy.
- Due diligence is to be determined at trial



# Giving Timely Notices

1. Notices under contracts
2. Notices under bonds
3. Notices under insurance policies
4. Notices under statute

# Giving Timely Notices

## Notice Requirements Under Contracts

- Send notices in accordance with the terms of the contract
  - Extensions of time
  - Additional monies
- Watch for waiver and release language connected with notices of dispute
- Make sure email is a permissible form of notice!

# Giving Timely Notices

## Notices under Bonds

- Performance bonds and labour material payment bonds often have specific notice requirements
- Make sure notices are sent in time

## Notices under Insurance Policies

- Check the policy to confirm if there are any notice requirements
- Put insurer on *timely* notice



# Giving Timely Notices

## Notice under Statutes

- Notices under lien legislation can include:
  - Written notices of lien
  - Written claims for lien
  - Notices of non-payment (in prompt payment regimes)
  - Notices of non-payment of holdback
  - Requests for information

# Giving Timely Notices

## *Elite Construction Inc. v. Canada* (2021, ONSC)

- Contractor worked on jail project
- After late completion, contractor filed claim of \$4M for delays and extras, based on “expert report”
- Contractor blamed owner for delays due to change orders and other reasons

# Giving Timely Notices

## *Elite Construction Inc. v. Canada...*

- Contract provided:

6.5.4 If the Contractor incurs or sustains any extra expense or any loss or damage that is directly attributable to any neglect or delay that occurs after the date of the Contract on the part of Canada in providing any information or in doing any act that the Contract either expressly requires Canada to do or that would ordinarily be done by an owner in accordance with the practice of the trade, the Contractor shall give Canada written notice of intention to claim for that extra expense or loss or damage **within ten working days of the date the neglect or delay first occurred.**

# Giving Timely Notices

## *Elite Construction Inc. v. Canada...*

- Contract also provided:

**If the Contractor fails to give a notice** referred to in paragraph 4) and a claim referred to in paragraph 5) of GC6.5 within the times stipulated, **an extra payment shall not be made to the Contractor in respect of the occurrence.**

- Requests for extensions of time also had to be timely
- Other contract language addressed change orders having to include *all* costs

# Giving Timely Notices

## ***Elite Construction Inc. v. Canada (2021, ONSC)***

- Contractor also argued “waiver of strict compliance” by Canada, so contractor didn’t have to comply either
- Contractor also argued “*quantum meruit*” and unjust enrichment” for payment of extras
- Court rejected these arguments
- Summarized as: “grumblings of a contractor not sufficient for notice”

# Giving Timely Notices

## *Symtech Innovations Ltd. v. Siemens Canada Limited* (2023, ONSC)

- Claimant installed building automation system for Siemens on TTC project
- Claimant sought delay damages
- Siemens moved to dismiss claim in the lien action
- Court dismissed “prolongation” claim based on lack of timely notice and “equivalent project relief” clauses



# Dispute Resolution

# Limitation Periods

As provided in the BC *Limitation Act*:

## Basic limitation period

6 (1) Subject to this Act, a court proceeding in respect of a claim must not be commenced more than 2 years after the day on which the claim is discovered.

## General discovery rules

8 Except for those special situations referred to in sections 9 to 11, a claim is discovered by a person on the first day on which the person knew or reasonably ought to have known all of the following:

- (a) that injury, loss or damage had occurred;
- (b) the injury, loss or damage was caused by or contributed to by an act or omission;
- (c) that the act or omission was that of the person against whom the claim is or may be made;

**(d) that, having regard to the nature of the injury, loss or damage, a court proceeding would be an appropriate means to seek to remedy the injury, loss or damage.**



# Limitation Periods

- When does time start to run on claims during a project with ADR provisions?
- ***PQ Licensing S.A. v. LPQ Central Canada Inc. (2018, ONCA)***
  - informal contractual dispute process (in franchise agreement) had to run its course
  - here, mediation had to happen before arbitration
- ***Install-A-Floor Limited v. The Roy Building Limited (2022, NSSC)***
  - Court applied PQ to CCDC 17 dispute process

# Statutory Adjudication

- Allows for “timely” resolution of disputes during project
- Adjudication authorities run process and govern adjudicators
- Adjudicators make decisions within 30 days
- Parties bound by decision until subsequent court or arbitration decision
- Decision is enforceable like judgment
- Must be paid or contractor can suspend work

# Statutory Adjudication

## What can be adjudicated? (Ontario)

**13.5 (1)** Subject to subsection (3), a party to a contract may refer to adjudication a dispute with the other party to the contract respecting any of the following matters:

1. The valuation of services or materials provided under the contract.
2. **Payment under the contract**, including in respect of a change order, whether approved or not, or a proposed change order.
3. **Disputes that are the subject of a notice of non-payment** under Part I.1.
4. Amounts retained under section 12 (set-off by trustee) or under subsection 17 (3) (lien set-off).
5. Payment of a holdback under section 26.1 or 26.2.
6. Non-payment of holdback under section 27.1.
7. **Any other matter that the parties to the adjudication agree to, or that may be prescribed.**



# Statutory Adjudication

## Contractual Implications

- How does process fit within negotiation, mediation and arbitration ADR framework?
- What other types of disputes can be adjudicated?
- When does a “claim” become a “dispute”?

# Timing of Lien Claims

## ***TDM Excavating & Contracting Ltd. v 1046416 B.C. Ltd.*** (2023 BCSC)

- Lien claimant contractor had done site servicing work for a subdivision
- Lien was challenged for being out of time – past “completion”
- Rest of building program still underway
- “improvement” was considered to be whole development, not just contract work so lien still in time

# Timing of Lien Claims

## *TDM Excavating & Contracting Ltd. ...*

- BLA:
  - 20(2) A claim of lien that is not governed by subsection (1) may be filed no later than 45 days after
    - (a) the head contract has been completed, abandoned or terminated, if the owner engaged a head contractor, or
    - (b) ***the improvement has been completed*** or abandoned, if paragraph (a) does not apply.
- Analysis would have been different in Ontario
  - “completion” applies to every contract

# Amount of Lien Claims

## *Darwin Construction (BC) Ltd. v. PC Urban Glenaire Holdings Ltd.* (2023 BCCA)

- Contractor involved in a townhouse project
- Following a dispute, owner terminated contract
- Contractor filed a \$3M lien claim
- Owner challenged amount and contractor produced no support to back up claim
- Court ordered entire lien to be cancelled as “excessive” and “and abuse of process”
- MORAL: Be able to back it up!



***Questions?***

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