



The Time to Act Promptly is Now: A Paper on the Benefits of Prompt Payment and Adjudication Legislation

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1. INTRODUCTION

The construction industry in British Columbia (“BC”) is at a crossroads. As identified in the *Cross-jurisdictional Legislative Comparison of Prompt Payment and Adjudication Regimes Across Canada* report (the “*BCCA Cross-Jurisdictional Comparative Report*”),¹ there has been a major shift in Canadian and international jurisdictions towards the adoption of prompt payment and adjudication legislation applicable to construction.² Despite this, BC has yet to modernize its construction legislation, perpetuating a situation of chronic payment delay throughout the industry. Currently, the ripple effect of late payment is felt far beyond the job site, permeating all aspects of construction and into the general economy of BC.

While frustration with delayed payment on construction projects is at an all-time high in BC, so are levels of support for the adoption of prompt payment legislation. For many years, prompt payment legislation has been recognized as an important means of addressing payment delays by facilitating the timely flow of funds throughout the construction industry.³ Although progress has been slow, the unyielding advocacy efforts undertaken by industry groups in this province are at last gaining traction among policy makers.⁴ After years of encouragement from businesses and industry leaders in BC for the development of prompt payment legislation, and recommendations to this effect from government officials, the BC Standing Committee on Finance and Government recently expressed their commitment to prioritize its enactment.⁵

Although these statements of commitment are reason for optimism, the pursuit of changes to applicable construction legislation must continue. Years of advocacy have demonstrated that stated commitments, without being accompanied by meaningful action being taken by the key levels of government to implement the necessary legislation, will mean that the adoption of a prompt payment regime and the development of a truly economically healthy construction industry will remain elusive.

Building upon the analysis presented in the *BCCA Cross-jurisdictional Comparative Report*, this paper seeks to encourage the BC government to seize the opportunity to adopt prompt payment

¹ Ackerley, G., and Gregus, K., (2023) “[Cross-jurisdictional Legislative Comparison of Prompt Payment and Adjudication Regimes Across Canada](#)” [“*Cross-jurisdictional Comparative Report*”].

² Prompt payment legislation has been enacted in Ontario, Alberta, Saskatchewan. Manitoba, New Brunswick, Nova Scotia and Quebec are at various stages of implementing prompt payment regimes. BC, Newfoundland and Labrador, PEI, and the Territories, are the only province yet to take significant measure in tabling or enacting prompt payment legislation. Prompt payment legislation also exists internationally in jurisdictions include the U.K., United States, Ireland, Australia, New Zealand, Malaysia and Singapore.

³ Notably in 2019, a Select Standing Committee on Finance and Government was created to work with stakeholders to identify the importance of adopting prompt payment legislation in BC. In this Committee’s 2020 Budget Consultation Report, officials recognized the lack of timely payment of contractors, subcontractor and suppliers, and expressed strong support for prompt payment as a way of facilitating cash flow within the industry. See Legislative Assembly of British Columbia (2019) “[Select Standing Committee on Finance and Government Services: Report on the Budget 2020 Consultation](#)” at p.34 and p.36.

⁴ In 2023, the Surrey Board of Trade, BC Construction Association, Electrical Constructors Association, Mechanical Contractors Association and 30 other industry partners sent a joint letter to the BC Attorney General Niki Sharma, explaining the crucial nature of prompt payment legislation highlighting its importance to the economic growth in BC. [Industry Letter to Attorney General Niki Sharma on behalf of the BC Construction Association, the Electrical Contractors Association of BC, The Mechanical Contractors Association, and 30 Industry Partners, 2023](#) [“*Industry Letter to Attorney General Niki Sharma*”].

⁵ Legislative Assembly of British Columbia (2022) “[Select Standing Committee on Finance and Government Service: Report on the Budget 2023 Consultation](#)” [“*Report on the Budget 2023 Consultation*”].

legislation by highlighting the reasons for the strong impetus for change among industry stakeholders and government officials. The following sections will identify “*Key Benefits*” that may be gained with the adoption of prompt payment and adjudication in BC, and the critical ways in which such legislation will provide essential clarity and growth throughout the province.

The future success of prompt payment and adjudication regimes in BC is intimately tied to the overall improvement of the policy and legal frameworks which govern the contractual relationships among those with boots on the ground in BC. Therefore, while the acute impacts of the BC government’s failure to adopt progressive payment legislation to date are apparent throughout this analysis, the purpose of this discussion is to look forward towards the possibility of a more prosperous and sustainable construction industry in BC. In short, this paper will demonstrate that the time for the government to act promptly in implementing prompt payment and adjudication legislation in BC is *now*.⁶

2. THE CENTRAL OBJECTIVES AND BENEFITS OF PROMPT PAYMENT LEGISLATION

2.1 Overview: Essential Components of Prompt Payment Legislation

By way of context, it is important to note that the objective of prompt payment legislation is to facilitate cash-flow down the multi-tiered contractual structure inherent to construction projects through mandatory payment processes that are statutorily imposed upon all parties.⁷ A critical feature of the prompt payment and adjudication regimes in force in Canada is that prompt payment timelines apply regardless of whether these obligations are contained in a contract.⁸ It is also true that parties cannot contract out of the application of prompt payment rules.

The key components of prompt payment legislation generally consist of:

1. Mandatory payment timelines applicable at each level of the construction pyramid;
2. The right of payees to make claims for payment at various stages of the project;
3. Invoicing requirements detailing the form and content of requests for payment;
4. The obligation of payers to evaluate payment claims within reasonable timeframes;
5. The right of payees to suspend performance of the work in situations of non-payment;
6. Statutorily imposed penalties for late payments, including mandatory interest; and

⁶ Although this paper will focus on the topics of prompt payment and adjudication, the analysis is part of a broader discussion of the modernization of the *Builders Lien Act* of BC. As other provinces have found, the exercise of integrating these important new regimes into existing lien legislation can be challenging and must be done carefully to avoid unintended consequences. As part of the adoption of prompt payment and adjudication, a review and possible amendments may be required to existing lien requirements, timelines, holdback rules and claims procedures. That analysis is outside the scope of this paper.

⁷ Reynolds, B., and Vogel, S., (2016) “*Striking the Balance: Expert Review of Ontario’s Construction Lien Act*” [*Striking the Balance*] at p. 160-161.

⁸ *Cross-jurisdictional Comparative Report*, *supra* note 1 at p. 10. Prompt payment regimes in Canada have followed Ontario’s lead, adopting similar provisions to the [Construction Act, R.S.O. 1990, c. C.30](#). Owners must pay contractors within 28 days of receiving a “proper invoice”. If the owner disputes the invoice or amount claimed, they must deliver a “notice of non-payment” to the contractor within 14 days. Contractors and subcontractors must pay their subcontractors within 7 days of receiving payment or provide a “notice of non-payment”.

7. Restrictions on the inclusion of conditional payment clauses in construction contracts.⁹

Where disputes arise between parties to a construction contract, parties may refer the dispute to adjudication for a determination. As will be discussed in later sections, determinations by an adjudicator are generally made within 30 days of the adjudicator receiving the required documents from the parties and are binding on an interim basis until a final decision is made by a court order or in arbitration award.¹⁰

Despite emphatic support from industry stakeholders and the blueprint for implementation created by other provinces, the success of prompt payment and adjudication regimes in BC will depend on the acceptance and support of the courts, construction bar, and government.¹¹ BC can learn from the benefits, challenges, successes, and failures in other jurisdictions to address the nuances of the BC construction market.¹² Although valid concern exists with respect to the drafting and implementation of prompt payment legislation, the discussion below highlights that perceived risks are far outweighed by the potential benefits that BC's construction industry stands to gain should prompt payment and adjudication legislation be enacted.

2.2 Key Benefits Achieved Through the Adoption of Prompt Payment in BC

This section will provide an overview of the central objectives and benefits of prompt payment that policy makers should consider in developing BC's prompt payment regime, and the importance of acting quickly to prevent further stagnation within the industry. This discussion seeks to address a variety of perspectives within the industry, in particular dominant concerns among owners, contractors, consultants, subcontractors, and suppliers, to facilitate continued well-rounded discussion, analysis, and action by policy makers.

1. Key Benefit: Prompt payment legislation provides recourse and enforcement mechanisms to address payment delays which have become normalized in BC.

Across all sectors of BC's construction industry, both public and private, uncertainty, delay, and disputes over payment, result directly from a lack of prompt payment legislation. Delay on top of payment terms of 90 to 120 days have become normalized, in a way that is incomparable to any other industry.¹³ Previous authors have alluded to a distinction between payment delay in the "ordinary course", referring to the prolonged delivery of monthly payment draws following

⁹ *Striking the Balance*, *supra* note 7 at p.177.

¹⁰ *Cross-jurisdictional Comparative Report*, *supra* note 1 at p. 17.

¹¹ *Ibid.*

¹² Following extensive consultation with industry stakeholders, Glenn Ackerley, a co-author of this report, submitted 86 recommendations to the Attorney General of Ontario ("AG") in 2023 focused on addressing gaps in existing prompt payment legislation identified after 5 years of being in force. The AG has since [committed](#) to conduct a comprehensive review of existing legislation and appointed Duncan Glaholt to carry out the review.

¹³ *Report on the Budget 2023 Consultation*, *supra* note 5 at p.55.

applications for payment, and “payment gridlock” occurring where disputes result in serious delays, damages and the cessation of payment.¹⁴

Regardless of the ‘type’ of delay at issue, it is undeniable that the culture of delay embedded within BC’s construction industry persists because the law allows it to. The chronic issue created in the absence of prompt payment legislation is generally *late* payment, rather than outright default.¹⁵ Instances of outright default appear to be far less frequent as construction lien rights, while time-consuming, costly and complicated to pursue, provide a mechanism for recourse and enforcement.¹⁶ Without prompt payment, funds flowing from the top of the payment chain are choked off before they reach trades and their labourers, making subcontractors at the base of the pyramid most susceptible to this “culture of late payment”.¹⁷ Thus, prompt payment legislation provides essential recourse and enforcement mechanisms to address payment delays.

2. Prompt payment legislation facilitates cash-flow down the construction pyramid which is highly susceptible to payment “freeze-ups”.¹⁸

At the heart of this discussion is the tension between contractors who withhold payment to subcontractors until after they have received payment from the owner, and subcontractors who rely on the timely and complete payment of their invoices to meet payroll and business obligations. This tension is created by the unique nature of the construction industry that is based on complex systems of contracting and subcontracting which leverages specialization to maximize efficiency and profit.¹⁹

At the top of this system, commonly known as the *construction pyramid*, is the owner.²⁰ The payment structures below the owner may vary depending on the project delivery model, the contractual relationships between the parties, and how the roles of the parties are assigned. For example, one’s rights under a fixed price contract with a general contractor may differ greatly from a percentage fee arrangement with a construction manager where the trade contractors performing the work are in direct contract with the owner. The consultant, typically an architect or engineer who designed the project, often also serves as payment certifier on the project, but not if the consultant is under contract with the contractor in a design-build project. Finally, subcontracts are often entered into between the general contractor and trade contractor from various sectors within the construction industry, and further tiers of contractual arrangements are entered into between subcontractors, sub-subcontractors and suppliers lower down the construction pyramid.

Understanding the nuanced nature of the construction pyramid is important because in recent decades, the way projects in construction have been delivered has shifted. General contractors no

¹⁴ *Striking the Balance*, *supra* note 7 at p.152.

¹⁵ *Cross-jurisdictional Comparative Report*, *supra* note 1 at p. 8; *Prism Economics and Analysis* (2013) “[The Need for Prompt Payment Legislation in the Construction Industry](#)” [*Prism Report*] at p.3.

¹⁶ *Ibid* at p.12.

¹⁷ *Striking the Balance*, *supra* note 7 at p.159 – 160.

¹⁸ *Prism Report* *supra* note 15 at p.10.

¹⁹ *Ibid* at p.3.

²⁰ Private projects are funded by a combination of bank loans and private equity investment, while public projects are financing by the government, or public-private partnerships models. How projects are finance can add additional layers of payment complexity.

longer employ the majority of their work force in most instances, but instead take on the role of construction manager, while the majority of the work performed is done by trade contractors.²¹ Complexity increases where trade contractors are brought in to work on a project under a sub-subcontract with another subcontractor.²² The nuances of multilayered contractual relationships common on construction projects mean that the negative consequences of late payment are exacerbated.²³ In essence, when the flow of payment down the construction pyramid is interrupted, there is often a knock-on effect down the payment chain impacting parties who may have no involvement in the dispute causing delay.²⁴

An important benefit of prompt payment legislation is that it can establish timelines for payment and notice obligations for non-payment which apply at each tier of the construction pyramid to facilitate cash-flow in a context that is highly susceptible to payment “freeze-ups”.²⁵

3. *Prompt payment legislation can alleviate the disproportionate burden of payment delay borne by parties near the base of the construction pyramid.*

Without prompt payment legislation, most of the payment risk detailed above is borne by parties closer to the base of the construction pyramid, particularly subcontractors and suppliers. In part, this is because construction contracts generally require that the supply of materials and services by trade contractors or suppliers be performed or completed prior to their entitlement to payment crystallizes.²⁶ This payment relationship allows general contractors to preserve their own cash flow to the detriment of subcontractors who rely on the timely and complete payment of their invoices to meet payroll and business obligations and to purchase material to complete the work. As a result subcontractors are often required to essentially finance the project.

The impact of this trend is striking when considering that approximately 90% of BC contractors are small companies, not multinational corporations with hundreds of employees and deep pockets.²⁷ Especially during times of recession, late payment is not only more frequent but more impactful. Small and medium-sized businesses experience greater pressure and stringent terms and credit requirements from lenders, as well as an increased need for cash-flow, forcing many to reduce the amount of work they take on in response. The hardship caused by delayed payment shouldered by subcontractors puts them at greater risk of financial insecurity and insolvency.

With most trade contractors falling under the category of small and medium size businesses with comparatively high cash-flow dependence, and more limited access to bank financing, prompt

²¹ *Prism Report supra* note 15 at p. 9 citing International Labour Office (ILO) (2001) “[The Construction Industry in the Twenty-First Century](#)”.

²² *Prism Report supra* note 15 at p.9.

²³ *Ibid* at p.3.

²⁴ *Striking the Balance, supra* note 7 at para 153.

²⁵ *Prism Report supra* note 15 at p.10.

²⁶ *Striking the Balance, supra* note 7 at p. 161.

²⁷ *Industry Letter to Attorney General Niki Sharma, supra* note 4.

payment which protects the interests of those closer to the base of the construction pyramid will contribute to the overall stability of the construction industry in BC.²⁸

4. *Prompt payment will mitigate the impact of contingent payment clauses and address inequalities of bargaining power among parties while preserving their freedom of contract.*

A key concern among owners and contractors is the impact of prompt payment legislation on the freedom of contract between the parties, which is of course a central tenet of the law governing contractual relationships in the construction industry. However, prompt payment legislation is intended to provide clarity in situations where payment terms are poorly prescribed or unclearly defined. It is not that parties will no longer be able to negotiate the terms of their construction contracts once prompt payment is enacted, rather legislation provides a failsafe where contractual terms are insufficient or exploitative.

Without prompt payment legislation, contingent payment clauses are often present when inequalities of bargaining power persist.²⁹ Contingent payment clauses are provisions that enable one party to delay payment to another even where work has been adequately performed.³⁰ Notably, contingent payment clauses may take different forms, for example:

Pay-if-paid clauses: A ‘pay-if-paid’ clause establishes that a payer is only obligated to pay for the work completed if they themselves have received payment. These clauses typically appear in subcontracts which establish payment by the owner to the general contractor as a condition precedent triggering the general contractor’s obligation to make payment to the subcontractor.

Pay-when-paid clauses: A ‘pay-when-paid’ clause allows for the delay of payment from one party to another party when payment to the first party is delayed. Here the non-payment risk is not fully shifted to the second party, as the first party is still obliged to pay even if they never actually receive payment themselves. The key problem with these clauses is that they often morph into pay-if-paid clauses when payment is never received by the first party. Here again most of the risk is shifted to subcontractors for an owner’s default in payment.³¹

In construction, some imbalance of power among contracting parties is almost inevitable. Generally, negotiating strength is concentrated at the top of the construction pyramid, thus those lower down often have a more diminished ability to freely negotiate the terms of their contract. In part this is because for every one project undertaken by the owner, there are typically multiple general contractors who may bid on the job. Depending on the scope of the project, location, economic conditions, and relative strength of the bidding contractors, the bargaining power of the

²⁸ *Prism Report supra* note 15 at p.9.

²⁹ *Ibid* at p.3.

³⁰ *Cross-jurisdictional Comparative Report, supra* note 1 at p.11.

³¹ *Striking the Balance, supra* note 7 at p.193 citing J. Marc MacEwing, “Navigating the Perils of ‘pay-when-paid’” (September 23 2009) *Journal of Commerce*.

general contractor entering the prime contract will vary. Where power imbalances are particularly acute, a contractor may accept onerous late payment clauses without the ability to suspend work or recover interest on delayed payments.³² Contingent payment clauses imposed unilaterally by owners during the procurement process often trickle down the construction pyramid into subsequent contracts, until the party at the lowest point of the payment chain has no one left to shift risk to.³³ In addition to this, subcontractors tend to have the least amount of bargaining power given the comparatively larger number of trade contractors available to bid the work.

Considering the concern of various stakeholders with respect to the use of contingent payment clauses can assist in understanding the importance and benefits of prompt payment legislation:

a) *Contingent payment terms are highly susceptible to abuse.*

On some projects, invoicing and payment requirements are so onerous that delay is practically inevitable.³⁴ Actors higher up the payment chain may be incentivised to delay payment to preserve their own working capital and reduce their need for bank financing.³⁵ Where no meaningful consequence for delayed payment exists, all payment risk is borne by the payee, typically subcontractors and suppliers.³⁶ For example, subcontractors may complete work on time and consistent with their obligations under the contract but because they lack the bargaining power required to resist a pay-when-paid clause during the negotiation phase, they must later fund the performance of the work.³⁷ Further, general contractors raise concern that without a pay-when-paid clause, they will be required to fund the performance of the work by subcontractors to the benefit of the owner who refuses or fails to pay.³⁸ The impact of this is particularly acute where an owner exercises a right to set-off or withholds payment for long periods of time.³⁹

A core benefit of prompt payment legislation is that it creates a form of statutory pay-when-paid clause that allows contractors to withhold payment in the event of an owner's non-payment but imposes an obligation upon the contractor requiring them to provide detailed notice and an undertaking to take necessary steps to enforce the payment owed to them. Without such an undertaking or detailed notice, payment cannot be withheld. This benefit will address the frequent abuse of contingent payment clauses, as well as situations of unjustified non-payment or delay described below.

³² *Prism Report supra* note 15 at p.3.

³³ *Ibid* at p.13.

³⁴ *Striking the Balance, supra* note 7 at p.160.

³⁵ *Prism Report supra* note 15 at p.3.

³⁶ *Prism Report supra* note 15.

³⁷ *Striking the Balance, supra* note 7 at p.192 citing Duncan W. Glaholt & John Margie, "Getting Paid: Holdbacks and Other Selected Topics" (1997) (Paper delivered at the Canadian Institute, 6th Annual Construction Superconference, Toronto, 1997).

³⁸ *Striking the Balance, supra* note 7 at p.193 citing Juan Pablo Alvarez (2006) "[Alberta Construction Industry Communiqué: Pay When Paid clauses](#)".

³⁹ *Striking the Balance, supra* note 7 at page 194.

b) Contingent payment clauses encourage unjustified or unexplained delay.

The two main remedies included in other regimes in Canada designed to mitigate the impact of unjustified or unexplained delays are statutorily imposed mandatory interest on late payments and a right to suspend performance of the contract if the payer fails or refuses to make payment as instructed by an adjudicator.⁴⁰ Most jurisdictions have included a statutory requirement that interest be applied to delayed payments at the greater rate of either the pre-judgment interest rate contained in the applicable legislation, or the contractual rate determined by the parties.⁴¹

These remedies are important as contingent payment clauses often do not require payers to provide a statutory declaration that they have not yet received payment.⁴² This means that payees often have no ability to challenge or dispute the non-payment which the payer claims when invoking their right to withhold payment under a pay-when-paid clause. In most cases where a contingent payment clause exists, payees do not have the ability to suspend performance of the work regardless of the length of the payment delay. Without the obligation to pay interest on late payments, payers are incentivized to delay payment.

c) No legal recourse without privity of contract.

In principle, delayed payment under a contingent payment clause is only justified when payment delay occurs at a higher level in the construction pyramid.⁴³ The problem is that owners have taken advantage of the fact that parties at lower levels of the pyramid often do not have a contractual relationship (or “privity of contract”) with parties higher on the construction pyramid who have caused the delay.⁴⁴ Without privity of contract, there is generally no legal ability to sue for payment default or delay. With no ability to compel one’s payer to pursue payment from payers higher up the pyramid, payment risk falls on the payee lower down on the payment chain.

Importantly, prompt payment legislation allows payers to delay or withhold payment to subcontractors if they themselves have not been paid provided the contractor chases the payment owed by the owner through adjudication.⁴⁵ This requirement on the contractor to pursue the owner for payment prevents owners who refuse to pay the contractor for completed work from being unjustly enriched at the expense of the unpaid subcontractors who do not have privity of contract with the owner and the means to pursue the owner directly.

⁴⁰ *Striking the Balance*, *supra* note 7 at p.200.

⁴¹ *Prism Report supra* note 15 at p. 12. For example, the *Construction Act* applies the rates provided for in the *Courts of Justice Act*, R.S.O. 1990, c. C.43.

⁴² *Prism Report supra* note 15 at p.18.

⁴³ *Prism Report supra* note 15 at p.19.

⁴⁴ *Ibid.*

⁴⁵ *Cross-jurisdictional Comparative Report*, *supra* note 1 at p.13-14.

5. ***Prompt payment legislation provides consistency with respect to applicable timelines, payment obligations, and enforcement mechanisms across all sectors of the construction industry.***

Many stakeholders have developed their own internal processes for ensuring that payment is made promptly or have sophisticated mechanisms for tracking, evaluating and approving payment on projects; however, there are also many that do not. A core purpose of prompt payment legislation is to ensure that on all types and sizes of projects the flow of funds down the construction pyramid in the ordinary course continues so that the acute and chronic impact of delayed payment is mitigated.

Currently on most projects, money flows from the owner to the general contractor, through to their subcontractors and sub-subcontractors, based on a “satisfactory progress system.”⁴⁶ Typically, a payment certifier retained by the owner, often an architect or engineer, must confirm that there has been satisfactory performance or completion before authorizing payment for amounts claimed.⁴⁷ On smaller projects, it may be the owner itself responsible for evaluating claims for payment and performance.

Stakeholders operating within this system have raised important concerns which should be considered when developing prompt payment legislation in BC to ensure that such legislation is practically useful, for example:

Subcontractor Concerns: Subcontractors are frequently faced with payment delay caused by financing issues or the insolvency of general contractors or owners on private projects, disputes over deficiencies (or alleged deficiencies), and competing demands for funds from payers.

Owner Concerns: Owners are often frustrated by unexplained delays, a lack of communication with respect to project schedule, and a lack of proper accounting and invoicing.

Contractor Concerns: Contractors must frequently mitigate the impact of payment delay caused by overly bureaucratic invoicing and payment approval processes, and the challenge of maintaining strong relationships with key trades where the Owner delays or refuses to make payment.⁴⁸

While the reasons for systemic late payment may vary among public and private projects, as does scale, the negative consequences of related delays are consistent in both contexts. Whether payment delay results from financing or cash-flow issues in the private sector, or overly bureaucratic payment approval processes in the public sector, long outstanding accounts

⁴⁶ *Prism Report supra* note 15 at p.10.

⁴⁷ *Ibid.*

⁴⁸ In 2015, Ipsos Reid was commissioned by Prompt Payment Ontario during the initial consultation process in Ontario prior to the modernization of the *Construction Act* to conduct a survey considering the impact of late payment among trade contractors. The results of this survey informed the recommendations made in the *Striking the Balance Report* which highlighted the impact of frequent bureaucratic delays. Such delays have been cited as a main cause of disputes among owners and general contractors as well as general contractor insolvency, which have an indirect impact on trade contractors. Similar concerns appear to be prevalent in BC today.

receivables are an issue across the industry. From a broad policy perspective, having one applicable prompt payment regime free of carve-outs will help avoid a situation in which the benefits of prompt payment are undermined by an unnecessarily complex patchwork of rules that cause inevitable confusion and exacerbate current concerns.⁴⁹

Imagine for example the confusion and additional administrative strain that would exist if on a major construction project, prompt payment legislation applied to 70% of the various trade contractors working on the project, but for the remaining 30%, separate payment timelines had to be negotiated. Further, it would be unreasonable to create a regime where entities with existing processes, or those who currently pay promptly, are exempt from the application of new prompt payment legislation. Logistically, it would not be efficiently possible for there to be a case-by-case evaluation of which entities have sufficient mechanisms in place to exempt them from the application of the framework.⁵⁰

The inclusion of carve-outs is an important differentiating feature of prompt payment and adjudication regimes currently enacted in Canada. In Ontario, prompt payment and adjudication rules are designed to facilitate widespread transparency and stability across *all* sectors of the industry by mandating timelines for payment applicable to every construction contract, public or private. By contrast, both Alberta and Saskatchewan have included carve-outs exempting certain projects and actors from the application of prompt payment and adjudication legislation.⁵¹

The problem with the Alberta and Saskatchewan approaches, in addition to the administrative confusion referred to above, is that where exemptions to the application of prompt payment and adjudication legislation are created, existing issues creating payment delay and disputes on construction projects persist unaddressed. If prompt payment does not apply to all projects and stakeholders, regardless of size, reputation or influence, the core objectives of the legislation are undermined. Exclusions open the door for a relatively few major players in the industry to side-step prompt payment rules at the expense of smaller stakeholders who comprise the majority of the industry in BC. Giving preferential treatment through special exemptions is inconsistent with principles of fairness and equity.

Ultimately, the more streamlined payment processes can be made across the entire industry through prompt payment legislation, the more opportunity there will be for success. Prompt payment will reduce administrative and practical management burdens on business owners, in-house counsel, and accounting staff by streamlining payment, invoicing and notice processes

⁴⁹ *Cross-jurisdictional Comparative Report*, *supra* note 1 at p. 7.

⁵⁰ *Striking the Balance*, *supra* note 7.

⁵¹ In Alberta, section 1.1 of the *Prompt Payment for Construction Work Act*, [RSA 2000 Chapter P-26.4](#) provides an exception for projects where the prime contract is entered into with the Provincial Government of Alberta. In such cases prompt payment rules do not apply at any level of the construction pyramid, meaning no protection is provided for industry members on such project beyond existing requirements contained in the *Public Works Act*, or in the Province of Alberta's standard form and negotiated contracts. In Saskatchewan, section 5.1 of The Builders' Lien Regulations, RRS c B-7.1 Reg 1 ["B-7.1 Reg 1"] certain actors are excluded from the application of prompt payment rules, including those who enter contracts for the services or materials on any improvement with respect to a mine or mineral resources, infrastructure in connection with the generation, transmissions or distribution of electrical energy, architects, engineers, and land surveyors. See *Cross-jurisdictional Comparative Report*, *supra* note 1 at p.7.

across all sectors of the industry. Subcontractors and small- to medium-sized businesses can take comfort that regardless of what sector of the industry they belong to or the nature of the project they are working on, their rights to be paid promptly will be protected. Those already paying promptly will not be overly burdened by the implementation of a new standardized regime, and while existing internal systems may need to be adjusted, the downsides to transitioning to the new system will be greatly outweighed by the benefits felt across the industry, particularly among those who are more vulnerable to the impact of delayed payment.

6. *Prompt payment legislation addresses issues of incomplete or inaccurate invoicing which frequently leads to payment delays.*

Understanding how addressing issues of improper invoicing and incomplete applications for payment through prompt payment legislation may reduce the frequency of payment delay and disputes requires engagement with the following consideration:

Concerns among owners, payment certifiers and contractors: Payment delay is often caused by applications for payment that are incomplete, flawed, or inaccurate reflections of the work performed. Applications for payment often lack supporting documentation or are devoid of essential information.⁵²

Concerns among consultants: Prompt payment legislation must still allow for adequate time to evaluate payment applications to ensure that required due diligence is performed to meet their professional obligations when certifying that work on a project is complete.⁵³

Concerns among subcontractors: Without prompt payment, owners and consultants are free to draw out reviews of applications for progress payment unnecessarily, creating significant delays.⁵⁴

With respect to the concerns related to incomplete applications for payment, the receipt of a “proper invoice” has been adopted in other Canadian jurisdictions as the trigger mechanism which begins the payment clock for payers.⁵⁵

Proper invoice requirements are meant to improve the accuracy and quality of the documentation submitted to substantiate claims for progress and final payment by creating clear guidelines tied to payment entitlement, therefore also reducing the frequency of payment related disputes and delays.⁵⁶ Beyond this, the defined pay period of 28 days adopted in most other jurisdictions where prompt payment has been introduced provides sufficient time to enable payment certifiers to properly conduct due diligence, assess applications for payment, and review supporting documentation, while maintaining consistency across the industry in terms of the applicable

⁵² *Cross-jurisdictional Comparative Report*, *supra* note 1 at p. 8; *Striking the Balance*, *supra* note 7 at p.161.

⁵³ *Ibid*; *Striking the Balance*, *supra* note 7 at p.196.

⁵⁴ *Striking the Balance*, *supra* note 7 at p.194.

⁵⁵ *Cross-jurisdictional Comparative Report*, *supra* note 1 at p. 8; *Striking the Balance*, *supra* note 7 at p.195.

⁵⁶ *Ibid*.

payment period timelines.⁵⁷ Ultimately, such defined payment periods provide contractors and subcontractors with assurance that such reviews will be carried out as expeditiously as possible.

7. *Broad policy and industry goals cannot be achieved without prompt payment.*

The impacts of payment delays in the construction industry do not exist within a vacuum, but rather impede policy goals impacting BC residents directly and indirectly. The BC government has long accepted the frequent payment delays in construction as an inevitability despite the extreme cost each year which could be reallocated to industry members struggling with soaring costs of living and high interest rates.⁵⁸

Two key examples highlight the intimate connection between the lack of prompt payment and the Province's inability to tackle larger policy initiatives.

The BC Housing Crisis: In response to the extreme barriers faced by BC residents trying to access affordable housing in the province, the BC Government introduced the [BC Builds Program](#), delivered by BC Housing, to facilitate the development of new homes for middle-income people using low-cost land, low interest financing, and grants. However, such investment in new construction and efforts made to “speed-up” project timelines are seriously impaired by a lack of prompt payment legislation.

A review of the BC Build Program framework demonstrates a clear disconnect between the broad policy goal of delivering essential affordable middle-income housing, the action plan for this project, and the ability of the construction industry to facilitate such construction without prompt payment. While the province of BC has committed to delivering 114,000 new homes by 2028, they have not taken the appropriate steps to ensure that the essential policy regimes are intact to facilitate such growth.⁵⁹

The BC Labour Crisis: Despite the high demand for skilled labourers, it has proven difficult for businesses to attract workers to the industry, while struggling to mitigate the impact of delayed payment and meet payroll obligations in construction.⁶⁰ There is a strong correlation between payment delays and employment capacity, as significant overhead may be accumulated even before “shovels are in the ground”.⁶¹ It is often nearly impossible for businesses to navigate paying for labour, materials, supplies, and benefits with indefinite compensation timelines.⁶² Not only has it become difficult to attract young people to join

⁵⁷ *Striking the Balance*, *supra* note 7 at p.196.

⁵⁸ *Report on the Budget 2023 Consultation*, *supra* note 5 at p.55.

⁵⁹ Government of British Columbia “[Homes for People: An Action Plan to Meet the Challenges of Today and Deliver More Homes for People, Faster](#)” at p.2.

⁶⁰ *Prism Report* *supra* note 15 and Independent Contractors and Business Association (2023/2024) “[ICBA Wage and Benefits Survey](#)”. [“*ICBA Wage Benefits Survey*”] Note that this survey provides further that while immigration to BC is at an all time high, only 2% of permanent immigrants entering Canada are pursuing jobs in construction. Again, attracting new residents to an industry defined by payment uncertainty is undeniably difficult.

⁶¹ Saunders, E., (10, 2023) “[“A dereliction of duty”: Atchison reiterates call for prompt payment legislation](#)” [“*Call for Prompt Payment*”].

⁶² *Ibid.*

the construction industry due to perceived payment and job insecurity,⁶³ it has become even harder for businesses to take on the fixed pay-roll costs associated with hiring new employees and apprentices.⁶⁴ For these reasons, vulnerable businesses have reduced their workforce by hiring independent sub-contractors in place of full-time hourly employees, complicating workers' compensation coverage, income tax deductions, and the application of labour legislation.⁶⁵ Ultimately, there is a concern that the lack of payment certainty will push tradespeople in BC to “take their skills and companies east”.⁶⁶ This is a massive issue as approximately 83,000 new jobs will open in the trades with the expected retirement of a large portion of the current workforce.⁶⁷ Currently, contractors in interior BC, northern BC, Vancouver Island, and in the lower mainland *all* report that while more work is expected in 2024 compared to previous years, they do not have sufficient numbers of skilled workers to complete it.⁶⁸

What these examples demonstrate is that broad policy goals in BC cannot be meaningfully addressed without a robust policy framework to ensure promptness of payment and protection against payment risk. A lack of prompt payment and adjudication legislation creates significant burden not only for the people working within the industry, but the industry itself.⁶⁹

8. *There is a strong ‘business case’ for the adoption of prompt payment.*

The lack of prompt payment legislation in BC has an undeniable impact on economic growth as businesses must manage their risk in ways that impede investment. For example:

Restricted growth at the individual business level: Faced with payment uncertainty, many businesses have taken out significant lines of credit and assumed debt to stay afloat. As a result, many have had to refrain from individual investment in equipment and machinery which directly impacts productivity at micro and macro levels.⁷⁰

Impediment to the competitive bidding process: Without adequate legislative measures to reduce the extreme financial risks of late or non-payment, seizing opportunities for new work has become a “Catch-22” situation.⁷¹ High financial risk means contractors and subcontractors must bid restrictively, limiting the number of projects they take on to below their capacity, resulting in reduced bidding pools. Thus, without prompt payment, barriers to development and healthy competition within the industry will remain unchecked.⁷²

⁶³ *ICBA Wage Benefits Survey, supra* note 60.

⁶⁴ *Prism Report supra* note 15 at p. 4. As alluded to in the SkilledTradesBC (2023) “[2022/2023 Annual Service Plan Report](#)” [“*SkilledTradesBC Report*”], the lack of interest in apprenticeship programs from both individuals and businesses in BC is a critical problem as apprenticeships account for approximately 10% of the industry.

⁶⁵ *Prism Report supra* note 15 at p.24.

⁶⁶ *Call for Prompt Payment, supra* note 61.

⁶⁷ *SkilledTradesBC Report, supra* note 64 at p.8

⁶⁸ *ICBA Wage Benefits Survey, supra* note 60.

⁶⁹ *Call for Prompt Payment, supra* note 61.

⁷⁰ *Prism Report supra* note 15 at p.4.

⁷¹ *Call for Prompt Payment, supra* note 61.

⁷² *Industry Letter to Attorney General Niki Sharma, supra* note 4.

Increased construction costs: Construction costs have increased due to the prevalence of payment delay, disputes, and inefficiency. The financial risk experienced by contractors and subcontractors is reflected in their pricing, increasing construction costs across the board and deterring investment in construction. Without prompt payment, compensation timelines are extremely uncertain and with limited ability to negotiate payment terms, subcontractors often increase their price to account for their high-risk exposure or choose not to bid. Further, overall investment in development is deterred as contractors must inflate their bid prices to reflect the financial cost and risk associated with late payment experience by their trades, meaning that owners in all sectors must pay premium prices for the completion of work. If owners do not get prices they are looking for, they may decide to pull the plug on the project without any obligation to compensate bidders for the time and cost of preparing the bid package or proposal.

For these reasons, there is a strong ‘business case’ for the implementation of prompt payment legislation in BC as a lack of prompt payment has made it difficult for stakeholders to seize opportunity given the risks of delay and non-payment. This is critically important because although the construction industry is responsible for generating nearly 10% of BC’s GDP, investment into the industry decreased by 11% in recent years.⁷³ While other provinces have taken great strides in addressing clear gaps in their provincial legislative schemes governing construction, problems related to payment delay identified nearly a decade ago persist in BC.⁷⁴ In short, addressing a lack of investment into construction is therefore essential to ensuring that the economy of BC remains resilient in current uncertain economic times.

9. *Parties may reserve the right to withhold payment in some circumstances.*

Without prompt payment, payers who delay payment without justification or penalization are essentially rewarded for forcing those lower in the construction pyramid to simply accept late payment.⁷⁵ In short, “the opportunistic behaviour of the minority drives up costs across the board.”⁷⁶ However, stakeholders from owner and general contractor groups have expressed valid concern that if prompt payment legislation is introduced, they will need to maintain the ability to withhold payment in certain situations.⁷⁷

It is useful to consider various perspectives held by industry members in this respect:

Owner and Contractor Concerns: Owners and contractors have advocated for the right to withhold payment where there is disagreement with respect to: i) payment amounts; 2) the quantity or quality of goods and services performed or delivered; iii) compliance with contractual obligations by the contractor or subcontractor.⁷⁸ These parties have argued

⁷³ *Industry Letter to Attorney General Niki Sharma, supra* note 4.

⁷⁴ *Prism Report supra* note 15 at p.3.

⁷⁵ *Ibid.*

⁷⁶ *Ibid* at p.4.

⁷⁷ *Prism Report supra* note 15 at p.11.

⁷⁸ *Striking the Balance, supra* note 7 at p.198.

further that the right to set-off against amounts owed to contractors and subcontractors should be preserved where deficiencies become known.

Subcontractor and Supplier Concerns: Unsubstantiated claims for set-off frequently choke flows of funds entirely on construction projects, impacting suppliers and subcontractors greatly, even in instances where they are not involved or responsible in anyway for the dispute. In some instances, contractors and owners have been known to set-off under one construction contract for alleged deficiencies completed under an entirely different contract.

As noted in the *Cross-jurisdictional Comparative Report*, prompt payment regimes in Canada have preserved the right of payers to withhold payment and set-off against amounts owed to contractors and subcontractors with respect to deficiencies in work performed.

A critical function of prompt payment is to address situations where *unsubstantiated* instances of non-payment or set-off cause payment to dry up for prolonged periods.⁷⁹ The right to withhold payment is significant and may have serious business and practical consequences. For this reason, prompt payment legislation imposes strict notice requirements on payers who withhold payment, including the obligation to provide particulars as to the amount and factual circumstances justifying the exercise of this right.⁸⁰

In circumstances where there is a dispute over the payment due to the contractor or subcontractor, it is critical that there be a companion regime to the prompt payment regime to resolve such disputes promptly. That regime is adjudication.

3. THE CENTRAL OBJECTIVES AND BENEFITS OF ADJUDICATION

3.1 Overview: Essential Features of Adjudication

Adjudication is designed to be a fast-tracked, confidential, and comparatively low-cost avenue for resolving disputes over payment in the construction industry. Like prompt payment, adjudication as a dispute resolution process is not new. The adjudication model has been tested in the construction context internationally for nearly two decades, and in Ontario for nearly 5 years.⁸¹ Thus, BC has the benefit not only of looking to the experiences of international systems of adjudication, but the experience of other Canadian provinces as well.⁸²

Generally, in Canada, adjudication regimes provide that this process may be used to address the following types of disputes:

1. The valuation of services or materials provided under a contract;

⁷⁹ *Prism Report supra* note 15 at p.18; *Striking the Balance, supra* note 7 at p.198.

⁸⁰ *Ibid.*

⁸¹ Glaholt, D. W., and Rotterdam, M., (2017) "["Made in Ontario" Statutory Adjudication](#)" at p.B-42. ["'Made in Ontario' Statutory Adjudication"].

⁸² *Cross-jurisdictional Comparative Report, supra* note 1 at p. 15.

2. Payment under a contract;
3. Disputes that are the subject of a notice of non-payment;
4. Amounts retained as set-off by a trustee or as lien set-off;
5. Payment or non-payment of a holdback;
6. Any other matter to which the parties to the adjudication agree, or that may be prescribed.⁸³

Internationally, it has been recognized that adjudication is operating as intended, with courts consistently upholding determinations made by adjudicators.⁸⁴ It is expected that the use and prevalence of adjudication will continue to expand in jurisdictions like Ontario, where there has been substantial growth in the number of adjudications and efforts made to continually improve the process.⁸⁵

3.2 Key Benefits Achieved Through the Implementation of Adjudication in BC

The following sections will consider some of the key benefits of adjudication which policy makers ought to consider. Again, this discussion will draw upon a variety of perspectives within the industry to facilitate continued analysis and action by policy makers.

1. Adjudication is available to parties to a construction contract as of right and may proceed in parallel with the completion of work on a project.

Unresolved payment disputes have become the norm in BC, creating a serious drain on both economic and human resources. It is a known fact that in instances where disputes arise on construction projects, payments and work may, and often do, stop. Owners may discontinue payment to preserve their right to set-off, while contractors or subcontractors may cease work if cash-flow required to complete the project dries up. In general, across jurisdictions where adjudication has been implemented, increased cashflow has been subsequently improved.⁸⁶

In other Canadian jurisdictions, adjudication is available to parties to a construction contract as of right without the consent of the other party.⁸⁷ Disputes may be referred to an adjudicator by *any party*, not just an *unpaid party* with the required notice.⁸⁸ A central purpose of adjudication is to keep funds moving where disputes arise by providing a minimally disruptive dispute resolution

⁸³ See for example CA Section 13.5 (1). *Cross-jurisdictional Comparative Report*, *supra* note 1 at p. 16.

⁸⁴ “[Construction Adjudication Takes Root in Canada](#)”, Andrea Lee, *Canadian Journal of Comm. Arb.*, 2022 (2022 CanLIIDocs 4068) at p.30 citing J. Lim (2016) “Enforcing payment for construction work in Singapore under the Building and Construction Industry Security of Payment Act”. See also Adjudication Society & Chartered Institute of Arbitrators (2016) “[Construction Adjudication Practice Guideline: Jurisdiction of the UK Construction Adjudicator](#)”.

⁸⁵ ODACC, 2023 Annual Report, “[Table 5 Number of Adjudications completed in the 2023 Fiscal Year By Geographical Area and Industry Sector](#)” at p.21 [“*ODACC 2023 Annual Report*”]; ODACC, 2022 Annual Report, “[Table 5 Number of Adjudications completed in the 2022 Fiscal Year By Geographical Area and Industry Sector](#)” at p. 22 [“*ODACC 2022 Annual Report*”].

⁸⁶ *Made in Ontario’ Statutory Adjudication*, *supra* note 79 at p. B-40.

⁸⁷ *Cross-jurisdictional Comparative Report*, *supra* note 1 at p. 16.

⁸⁸ *Cross-jurisdictional Comparative Report*, *supra* note 1 at p. 16; *Striking the Balance*, *supra* note 7 at p.231.

process that is enforceable. Adjudication is meant to occur “in real time” during project completion, to prevent small disputes from growing “to unmanageable proportions.”⁸⁹

An important benefit of adjudication is that this process can proceed in parallel to the work being completed on the project. The rationale behind the interim nature of adjudication is to provide access to a neutral decision maker during the lifetime of the project, to reduce instances of work stoppages and preserve working relationships on the project. Further, by enabling back-to-back adjudication, contractors, subcontractors, and suppliers may participate in the adjudication process to resolve issues as the project progresses.⁹⁰

2. Adjudication provides a more expeditious alternative to lengthy court litigation.

Adjudication as an expeditious form of dispute resolution is meant to support the primary policy goals of prompt payment.⁹¹ Namely, underpinning the need for adjudication is the fact that current litigation processes are not practically accessible in most instances to secure payment within a reasonable time period.⁹² Thus, adjudication allows parties to construction contracts to avoid lengthy processes of litigation in the Courts.⁹³ Authors who have considered the value in adopting a system of adjudication in Canada have looked to the UK model for decades.⁹⁴ The UK began developing their adjudication regime in the mid-90’s in response to extreme litigation costs and delays permeating throughout the construction industry, detrimentally impacting the country’s economy as a whole.⁹⁵

In the past three decades, adjudication has evolved in the UK to the point where few determinations proceed further than adjudication, demonstrating that with time, the process of adjudication can become a viable access to justice tool in Canada as well.⁹⁶ As demonstrated in Ontario, growing pains during the initial period of transition are inevitable; however, the benefits of this legislation seem to surpass potential challenges.⁹⁷ Written determinations made by adjudicators generally must be delivered by an adjudicator within 30 calendar days of the adjudicator receiving the claimant’s documents and payments ordered must generally be made within 10 days.⁹⁸ In contrast, scheduling a court hearing can often take months or even years.

Some stakeholders have raised concern with the strict timelines associated with adjudication given that parties must move quickly in selecting an adjudicator and preparing their submissions.⁹⁹ However, efficiency and timeliness are core tenets of the prompt payment regime, which prompt

⁸⁹ *Made in Ontario’ Statutory Adjudication, supra note 79 at p. B-41.*

⁹⁰ *Made in Ontario’ Statutory Adjudication, supra note 79 at p. B-42.*

⁹¹ The flow of payment as throughout construction project has been referred to as “the lifeblood of the industry”. Dr. Mastrandrea, Franco (2023) “[Implementing Alberta’s Prompt Payment Act – Lessons Learned from decades of adjudication.](#)”

⁹² *Striking the Balance, supra note 7 at para 153.*

⁹³ “ARCANA (AB) Construction Prompt Payment Adjudication” [ARCANA \(AB\) Construction Prompt Payment Adjudication - ADR Institute of Alberta \(adrAlberta.com\).](#)

⁹⁴ *Made in Ontario’ Statutory Adjudication, supra note 79 at p. B-40.*

⁹⁵ *Ibid.*

⁹⁶ *Ibid* at p.B-41.

⁹⁷ *Ibid* at p. B-42.

⁹⁸ *Cross-jurisdictional Comparative Report, supra note 1 at p. 19.*

⁹⁹ Wilson, C., (2023) “[What Prompt Payment Legislation Will Mean for Contracts and Projects in B.C.](#)”.

dispute resolution through adjudication is intended to support. Adjudication must therefore also be efficient and timely. Efficiency is not created by a lack of due process, but the streamlining of procedure so that parties can resolve disputes in real time without being burdened by unnecessary or overly extensive requirements.

The need for adjudication is not limited to a particular industry but will be an important means of achieving more efficient and cost-effective dispute resolution in a wide range of industry sectors, including Residential, Industrial, Public Buildings, Transportation and Infrastructure.¹⁰⁰

It is true that parties will need to be proactive in ensuring that essential deadlines are not missed; however, this again is a reason why a universally applicable regime free from carve-outs is so important. With one system applicable to all projects, parties will become quickly familiar with and adapt to a new uniform adjudication process as a means of resolving chronic issues of delayed payment.

3. Adjudication as a tailored process provides a more cost-effective means of resolving payment and other construction disputes.

One reason payment delays have become so problematic in BC is because parties cannot afford to pursue their rights to payment within a reasonable timeframe through traditional court litigation. Lien proceedings for example have been heavily criticized for the excessive cost associated and the long period it takes to achieve resolution. In contrast, adjudication is meant to be simple, and tailored to the needs of the parties.¹⁰¹

Adjudicators acting as neutral third-party decision makers who review the submission of the parties to determine the dispute at issue are not judges who must deal with a wide variety of disputes. Instead, adjudicators are individuals with extensive experience and understanding of the construction industry, thus can be a major asset when executing fair and efficient determinations.¹⁰² Adjudicators are selected only when a specific dispute arises, allowing parties to consider the context of the dispute when appointing their decision maker. Appointing the adjudicator during the project means that parties with less bargaining power have equal say in the selection, which would not likely be the case if the adjudicator was selected during the initial contract negotiation phase.¹⁰³

Adjudicators may tailor the process to suit the needs of the parties and the nature of the dispute while still ensuring that efficiency remains a priority. For example, adjudicators may impose page limits on submissions and restrict the documentary evidence provided to that which is required to

¹⁰⁰ Note the reported growth in the number of adjudications conducted in Ontario in 2023 compared to 2022 across industry sectors at p. 22 and 26 of the *ODACC 2023 Annual Report*, *supra* note 84; See also *ODACC 2022 Annual Report*, *supra* note 84 and *Cross-jurisdictional Comparative Report*, *supra* note 1 at p.7.

¹⁰¹ *Striking the Balance*, *supra* note 7 at p.238.

¹⁰² *Cross-jurisdictional Comparative Report*, *supra* note 1 at p. 106; *Striking the Balance*, *supra* note 7. Drawing upon the UK experience suggests that jurisdictions are able to attract better adjudicators if some level of immunity from liability was provided to them, provided they act in good faith. An important feature of the adjudication regimes enacted in other provinces is that adjudicators enjoy a degree of immunity with respect to their acts or omissions within the context of the adjudication process.

¹⁰³ *Striking the Balance*, *supra* note 7 at p.233.

determine the narrow issues before them. Compared to court litigation, the reliance on witnesses is much more limited and determinations may be made without oral submissions. Consistent with the theme of efficiency, an adjudicator is only permitted by statute to make a determination with respect to a single matter unless the parties agree to have the same adjudicator deal with multiple matters.¹⁰⁴

The benefit to distilling the procedure parties must engage in to obtain faster, more cost-effective determinations means that there is more working capital available for investment into the growth of individual businesses, projects and the industry generally.¹⁰⁵

An important benefit of this system is that parties are responsible for their own costs, including legal costs, as well as an equal apportionment of the adjudicator's fees subject to situations where one party to the adjudication has acted in bad faith.¹⁰⁶ The purpose of this is to prevent smaller companies from being crippled by the high legal costs expended by a much larger party if they are unsuccessful at adjudication.¹⁰⁷ This too is one way that adjudication may be structured to enfranchise claimants with limited options for recourse in the event of delayed or non-payment.

4. Determinations made by adjudicators are binding on an interim basis.

Determinations by adjudicators are binding on parties until either a final determination is made by a court or arbitrator, or where parties agree that the determination is final. The enforceable nature of an adjudicator's decision on an interim basis ensures that money continues to flow through the construction project. By engaging in adjudication as an *interim*, confidential, dispute resolution process, parties do not give up their legal rights to proceed by way of court action if they refer a matter to adjudication.¹⁰⁸

There is a concern that if the decision of an adjudicator is only enforceable on an interim basis, that the process would be a waste of time and resources given that parties would be essentially forced to re-litigate.¹⁰⁹ However, adjudication actually provides parties with the ability to streamline potential arguments, assess weaknesses in particular legal positions and evaluate the strength of one's claims to make any future litigation more efficient.

4. CONCLUSION

In conclusion, embracing the shift to what can be described as “common place and common sense prompt payment legislation” will provide payees with new entitlements to due process in situations where a payer has defaulted on their payment obligations, including the right to receive proper

¹⁰⁴ See for example CA Section 13.5(2)

¹⁰⁵ *Made in Ontario' Statutory Adjudication*, *supra* note 79 at p. B-42. See also *Striking the Balance* at p.204 citing Duncan Glaholt, “[The Adjudication Option: The Case for Uniform Payment & Performance Legislation in Canada](#)”, (2006) 53 CLR (3d) 8.

¹⁰⁶ *Cross-jurisdictional Comparative Report*, *supra* note 1 at p. 20.

¹⁰⁷ *Striking the Balance*, *supra* note 7.

¹⁰⁸ Ontario Dispute Adjudication for Construction Constructs (ODACC) (2024) “[What are some of the Benefits of Adjudication](#)”.

¹⁰⁹ *Striking the Balance*, *supra* note 7 at p.242.

notice, the right to cease work, the right to pursue remedy, and entitlement to interest on late payments.

Beyond this, parties to a construction contract will have the ability to access adjudication as an efficient, tailored, interim binding process of dispute resolution as issues arise on a project in real time. The importance of such entitlement must not be understated given the broad impact of delayed payment on investment in the industry, competitive bidding processes, labour and employment trends, and broad policy and economic goals central to the future success of this province.

This discussion demonstrates that the proven success of prompt payment legislation is undeniable, as is the need to push past political roadblocks to ensure that industry members have access to essential payment enforcement mechanisms that foster sustainability and industry expansion. It is time for the government of BC to take action so that essential construction businesses are able to stay viable and build the infrastructure BC desperately requires.¹¹⁰ It is time for the government to take legislative action which will help businesses retain skilled workers in BC while attracting new workers to a more stable and growing industry.¹¹¹ Above all, it is time for BC's policy makers to establish a regime that helps businesses obtain the payment that they are due promptly so that they and the province of BC can continue to prosper.¹¹²

¹¹⁰ *Industry Letter to Attorney General Niki Sharma, supra* note 4.

¹¹¹ *Ibid.*

¹¹² *Ibid.*