Changes to Handling Construction Project Issues: Things to Know for 2019

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Changes to Handling Construction Project Issues:
Things to Know for 2019

- Two “big” changes to Canadian construction projects expected for 2019 and beyond:
  - Prompt Payment
  - Adjudication
- **Ontario**: Amendments coming into force October 1, 2019
- **Federal**: Expert recommendation for amendments to federal legislation consistent with Ontario
- **Other Provinces**: Under current review in Manitoba, New Brunswick, Saskatchewan, British Columbia and Quebec

Changes to Handling Construction Project Issues: Things to Know for 2019

PROMPT PAYMENT

Prompt Payment
Concept of Prompt Payment

- Timeliness of payment in the construction industry:
  - ensuring timely flow of funds on construction projects to keep projects going and avoiding “gridlock” over payment disputes
  - deadlines and time limits to process payment applications on projects and make payment

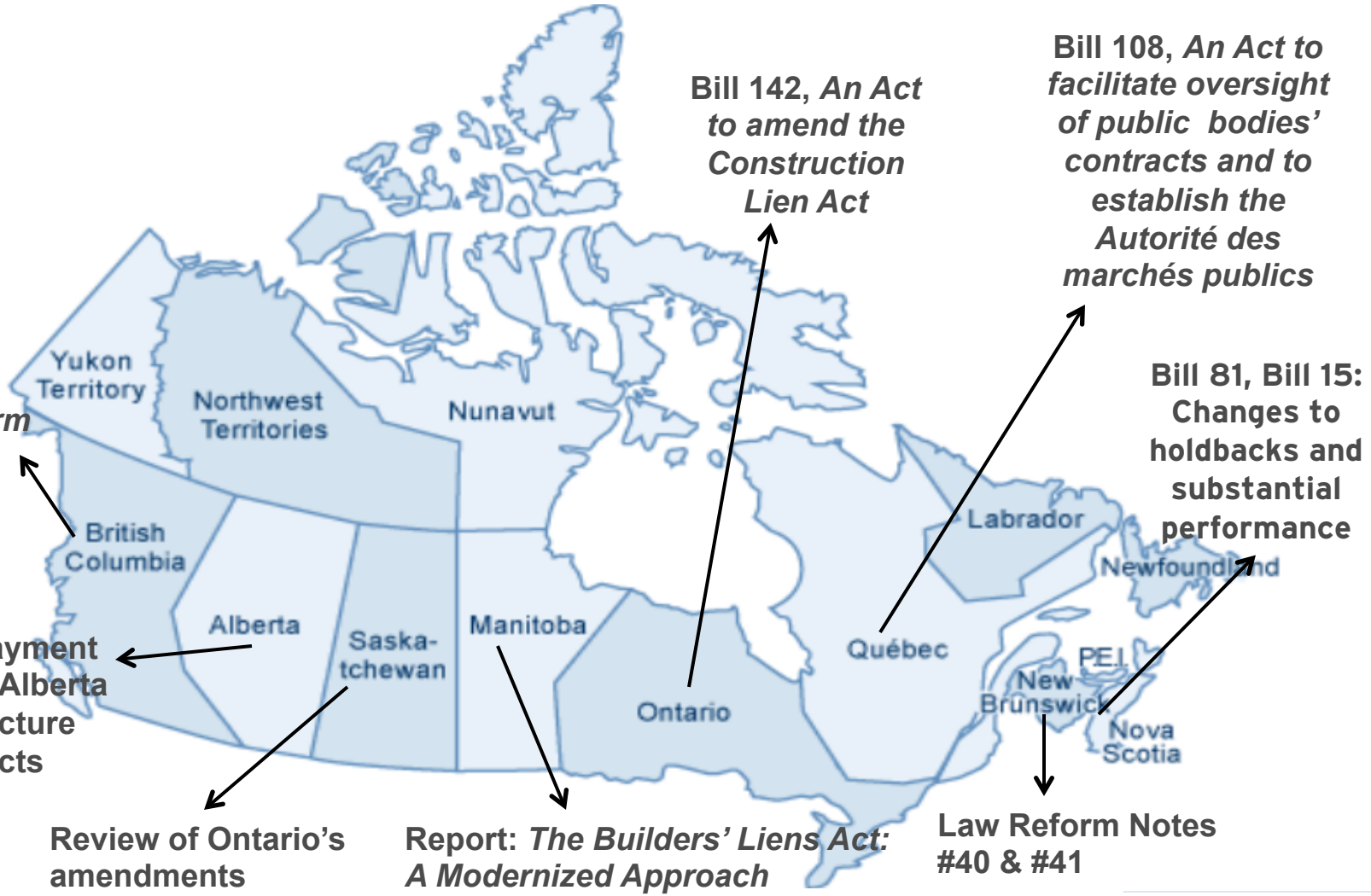


Prompt Payment
Concept of Prompt Payment

- Prompt payment originating in USA
- Existing prompt payment legislation in USA, UK, Ireland, Australia, New Zealand, Singapore, Malaysia
- Ontario:
  - Bill 69 – *Prompt Payment Act, 2013*
  - *Striking the Balance: Expert Review of Ontario's Construction Lien Act* (April 30, 2016)
  - Bill 142 – *Construction Lien Amendment Act, 2017*
- Federal:
  - *Building a Federal Framework for Prompt Payment and Adjudication* (June 8, 2018)

Prompt Payment

Coming soon to a province/territory near you ...



B.C. Law Institute *Builders Lien Reform Project*

Bill 142, *An Act to amend the Construction Lien Act*

Bill 108, *An Act to facilitate oversight of public bodies' contracts and to establish the Autorité des marchés publics*

Bill 81, Bill 15: Changes to holdbacks and substantial performance

Prompt payment clauses in Alberta Infrastructure contracts

Review of Ontario's amendments

Report: *The Builders' Liens Act: A Modernized Approach*

Law Reform Notes #40 & #41

Prompt Payment
Mandatory Payment of Proper Invoice

- Mandatory timelines for payment by:
  - owners to contractors
  - contractors to subcontractors
  - and so on…
- In Ontario, no “contracting-out”:
  s.5(1) of the *Construction Act* (Ontario)



Prompt Payment
What is a “proper invoice”?

- Ontario model tied to delivery of a “proper invoice”
- Contractor’s “**proper invoice**”
  - no specified form under the *Construction Act* (Ontario)
  - per Section 6.1, “proper invoice” **must** contain:
    - contractor’s name and address
    - date of the invoice
    - period during which services/materials were supplied
    - description of services/materials supplied
    - amount payable for the described services/materials
    - payment terms
    - name, title, telephone number, and mailing address of payee

Prompt Payment
What is a “proper invoice”?

- Parties to a contract are entitled to specify other requirements for a “proper invoice” under their contract
- **However**, additional requirements for a “proper invoice” **cannot include** making the “giving of a proper invoice” conditional on:
  (1) prior certification of a payment certifier, or
  (2) the owner’s prior approval
- Other “traditional” invoicing requirements should still be okay:
  - Statutory declarations
  - Workplace safety clearance certificate

Prompt Payment
Process of Prompt Payment

- Stages of Prompt Payment:
  - In Ontario model:
    - a “proper invoice” is given to an Owner each month (unless the contract provides otherwise)
    - owner pays contractor within 28 days of receipt of “proper invoice”
    - contractor pays subcontractors within 7 days of receipt of payment from the owner
    - subcontractors pay sub-subcontractors within 7 days of receipt of payment from the contractor

Prompt Payment
Consequence of Non-Payment

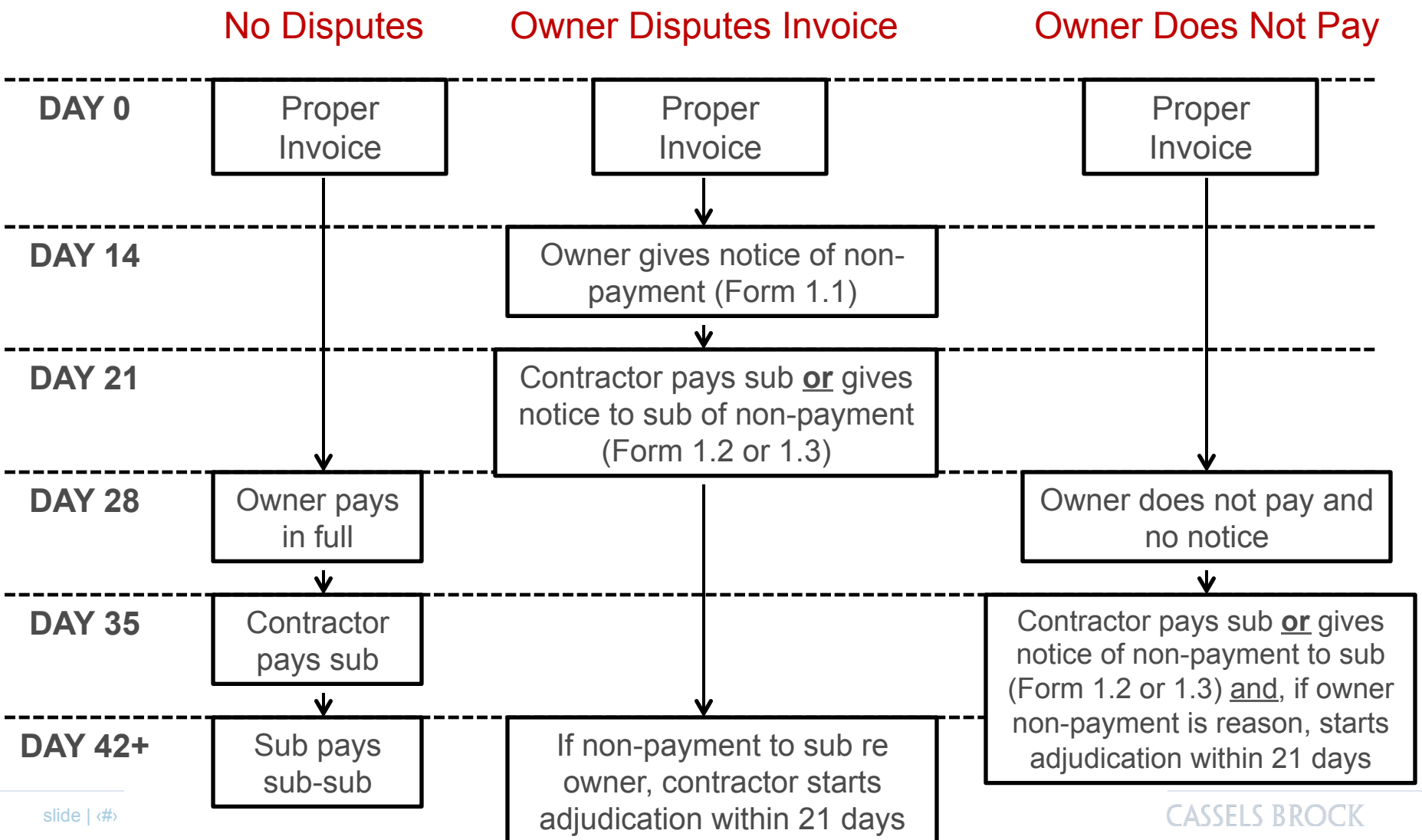
- Failure to make payment according to statutory timelines will result in interest accruing at specified rate:
  - (a) pursuant to the *Courts of Justice Act* (Ontario), or
  - (b) as specified in the contract
    - some trade standard terms are 18% *per annum*, compounded monthly



Prompt Payment
Notice of Non-Payment

- In Ontario model, once a proper invoice is delivered, owner may only stop payment if it **delivers a notice of non-payment** (Form 1.1) within **14 days** after receipt of the proper invoice
  - Contractor can issue notice of non-payment to its subcontrator(s) following notice from owner
- No limit to reasons for non-payment, including set-off
- Non-payment of a proper invoice can also be adjudicated
  - If a contractor issues a notice of non-payment to its subcontractor(s) for owner non-payment, must include an undertaking to refer the matter to adjudication

Prompt Payment
Timeline Examples (Ontario)



Prompt Payment
Impacts of Insolvency



- Federal paramountcy
- Confirm whether or not there is a court-ordered procedure for prompt payment
- Where there is no court-ordered procedure:
  - pay undisputed portion to trustee, receiver or debtor
  - withhold payment of disputed portion

Changes to Handling Construction Project Issues: Things to Know for 2019

ADJUDICATION

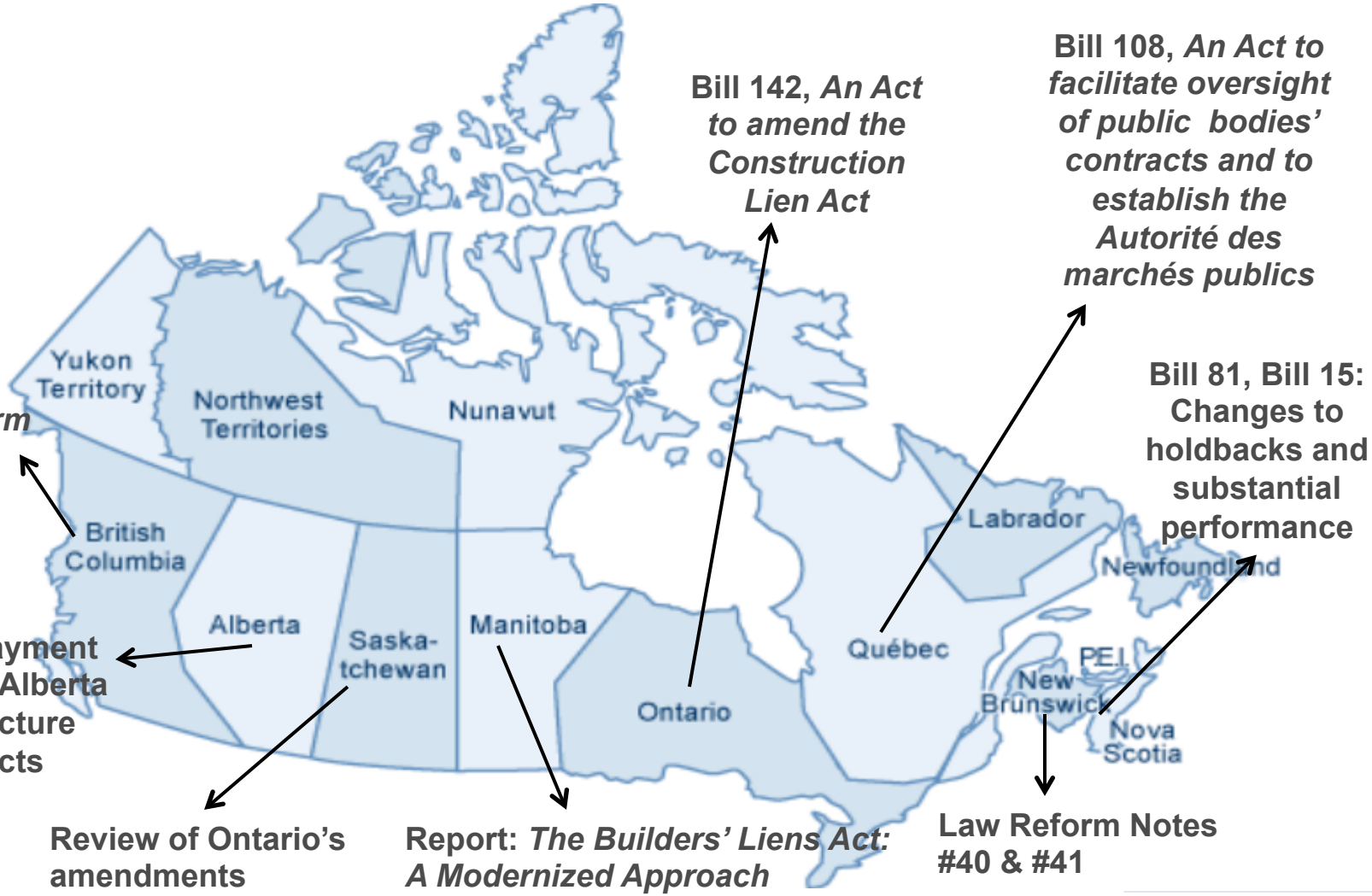
Adjudication
What is adjudication?

- General features of adjudication:
  - Speedy dispute resolution process
  - Single issue (unless otherwise agreed)
  - Intended to protect cash-flow during construction projects
  - Determination by a third party (not necessarily a legal professional)
  - Binding determination, but only on an interim basis
  - Limited procedural requirements
  - Interim rough justice

Adjudication under Ontario's *Construction Act*
What is Adjudication?

- Ontario's *Construction Act* is leading the way in Canada for statutory adjudication
- PART II.1: "Construction Dispute Interim Adjudication"
  - *i.e.* pay now, fight later
  - scheduled to come into force October 1, 2019
- Interim dispute resolution process
- Designed to quickly resolve single issue disputes during construction projects, without usurping the jurisdiction of the courts or arbitration
  - Determination rendered within 35 days of an adjudicator's appointment

Status of Adjudication implementation in Canada
A Survey



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Law Reform Notes #40 & #41

Adjudication under Ontario's *Construction Act*
Based on the UK Model

- UK introduced statutory adjudication in 1998:
  - *Housing Grants, Construction and Regeneration Act 1996* (Construction Act 1996)
  - Created a statutory right to refer a dispute on a "construction contract" to adjudication
- Followed by the *Scheme for Construction Contracts (England and Wales) Regulations 1998 (SI 1998/649)*
  - Made the right to adjudication an implied term to all construction contracts in the UK

Statutory Construction Adjudication in Canada
UK Experience: Advantages/Disadvantages

- **Advantages** from the UK experience:
  - Fast resolution
  - Inexpensive alternative to liening and/or litigating
  - Access to justice for smaller contractors and trades
  - Interim determination allows for full examination of issues (if necessary)
  - Flexibility to retain a “specialist” adjudicator



Statutory Construction Adjudication in Canada
UK Experience: Advantages/Disadvantages

- **Disadvantages** from the UK experience:
  - Timing often too short for proper investigation
  - Disparity in quality of adjudicator determinations
  - Claimant can ambush respondent
  - Claimant insolvency
  - Potentially expensive where dispute is complicated (due to the strict timelines)



Adjudication under the Ontario *Construction Act*
Who are the Adjudicators?

- Ontario Ministry of the Attorney General to create a single "Authorized Nominating Authority"
- Charged with:
  - establishing roster of adjudicators
  - training and certifying adjudicators
  - creating a code of conduct
  - setting standard fees
  - resolving fee disputes
  - appointing adjudicator where parties do not
- Only "listed" adjudicators can conduct adjudications

Adjudication under the Ontario *Construction Act*
Who are the Adjudicators?

- Minimum requirements for the code of conduct:
  - No legal conflicts of interest
  - Principles of proportionality (*i.e.* avoid excess expense)
  - Principles of civility, procedural fairness, competence and integrity in the conduct of an adjudication
  - Confidentiality
- Minimum years of relevant working experience
- Not restricted to lawyers
- Completed standardized training program with certificate

Adjudication under the Ontario *Construction Act*
What can be adjudicated?

- "In project" dispute resolution of any of the following:
  - Valuation of services or materials
  - Payment (incl. disputes about change orders)
  - Disputes over "Notices of Non-Payment"
  - Amounts retained as set-off
  - Payment and non-payment of holdback
  - "any other matter that the parties to the adjudication agree…"
- Intent to focus on resolving short-term mid-project payment disputes

Adjudication under the Ontario *Construction Act*
Timing of Adjudication

- Procedure:
  - Initiated by a **Notice of Adjudication**, containing:

    (a) Name and addresses of the parties

    (b) Description of the dispute

    (c) Nature of the redress sought

    - critical that relief be correctly stated

    (d) Name of the proposed adjudicator*

    *Adjudicator selected by claimant. An adjudicator cannot be named in advance as a term of the contract/subcontract

  - Where an adjudicator does not agree to the appointment, the Authority appoints an alternate adjudicator within 7 day of a request. Request is mandatory.

Adjudication under the Ontario *Construction Act*
Minimal structure

- Procedure:
  - Within 5 days of an adjudicator being appointed, the party serving the notice of adjudication must give the adjudicator:

    (a) a copy of the notice

    (b) a copy of the applicable contract

    (c) any documents that party intends to rely upon

  - After that, the adjudicator has broad discretion for process of conducting the adjudication

Adjudication under the Ontario *Construction Act*
Adjudicator controls her/his own process

- Adjudicator sets and executes his/her process, including:
  - Submissions (responses and replies)
  - Use of experts and expert reports
  - Inspection of the work (site visit)
  - Drawing inferences based on the conduct of the parties
- Adjudicator may enlist the services of:
  - accountant
  - building contractor
  - architect
  - engineer
  - merchant
  - any other person the adjudicator sees fit

Adjudication under the Ontario *Construction Act*
Adjudicator Determinations

- Must be rendered:
  - in writing,
  - **within 30 days** of the adjudicator receiving the relevant documents from the party that served the notice of adjudication (*i.e.,* 35 days after appointment)



- Subject to an extension, any determination rendered after 30 days is “of no force and effect”

Adjudication under the Ontario *Construction Act*
Adjudicator Determinations

- Determinations are binding, on a interim basis
  (subject to judicial review)

- If an amount is payable, must be paid within 10 days of the determination, else the contractor/subcontractor payee **can stop work**

- Determination may be overturned at trial or arbitration



Adjudication under the Ontario *Construction Act*
Adjudicator Determinations

- UK courts hesitant to overturn adjudicator decisions
- *Carillion Construction Ltd v Devonport Royal Dockyard Ltd* *[2005] EWCA Civ 1358* (Court Of Appeal (Civil Division)

"…majority of Adjudicators are not chosen for their expertise as lawyers...skills are as likely (if not more likely) to lie in other disciplines…"

"The task of the Adjudicator is not to act as arbitrator or judge. The time constraints within which he is expected to operate are proof of that."

Adjudication under the Ontario *Construction Act*
Adjudicator Determinations

- UK courts hesitant to overturn adjudicator decisions
- *Carillion Construction Ltd v Devonport Royal Dockyard Ltd* *[2005] EWCA Civ 1358* (Court Of Appeal (Civil Division)

"The statutory scheme provides a means of meeting the legitimate cash-flow requirements of contractors and their sub-contractors."

"The need to have the 'right' answer has been subordinated to the need to have an answer quickly."

Adjudication under the Ontario *Construction Act*
Adjudicator's Fee

- The fee amount can be either:
  (a) set by the parties with the adjudicator; or
  (b) for an amount set by the Authority
- Payment of the fee is to be split equally, **unless** adjudicator finds that a party has acted in a manner that is frivolous, vexatious, an abuse of process or otherwise in bad faith
- Anticipated that costs will only be awarded in the rarest of circumstances

Adjudication under the Ontario *Construction Act*
Additional Issues

- The *Construction Act* and the regulations do not address how a party responds to a Notice of Adjudication
- Adjudicator sets timelines *(e.g.*, responding submissions, expert opinions, etc.), but because of deadline for determination, timelines will be short
  - Owners/contractors need to have books in order to respond effectively
- Intended to be "single issue" but adjudicator can deal with set-off claims / counterclaims
- Adjudicators are granted immunity in the performance of adjudications and cannot be compelled to testify

Adjudication under the Ontario *Construction Act*
Other Disadvantages of Adjudication

- Loss of judicial precedent:
  - Adjudications are private
  - Adjudications are not reported
- Parties lose ability to evaluate strength of claims
- Anticipated fewer judges appointed for construction trials



Adjudication under the *Construction Act*
What can we expect: United Kingdom

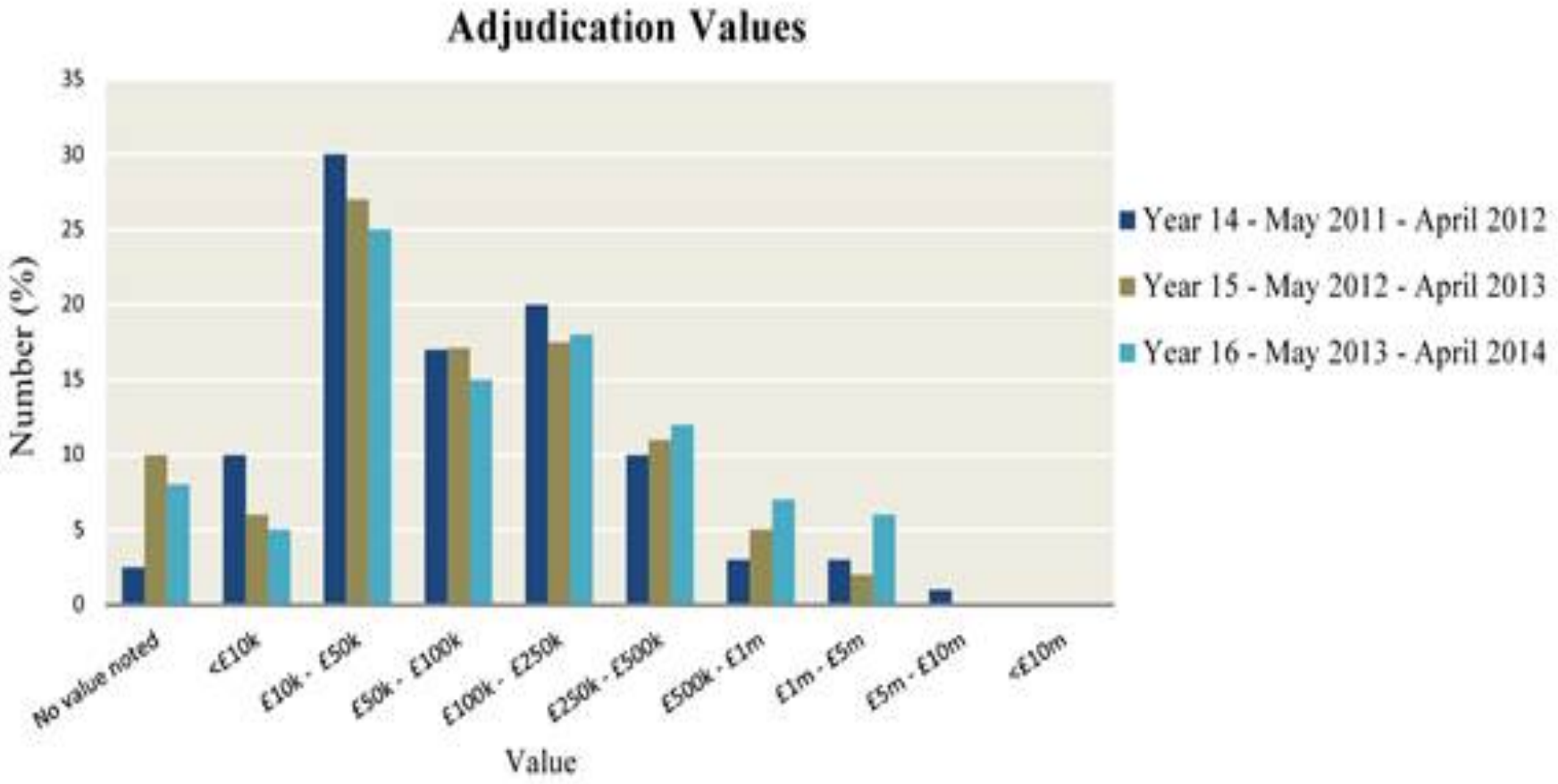
- United Kingdom
  - 1282 known referrals to adjudication between May 2013 to April 2014
  - Majority of adjudications smaller value disputes (majority in £10,000 to £50,000 range)

Source: *Striking the Balance: Expert Review of Ontario's Construction Lien Act 2016*



Adjudication under the *Construction Act*

What can we expect: United Kingdom



Adjudication under the Ontario *Construction Act*
Judicial Review

- Reasons for challenging adjudicator decision (UK):
  - No contract
  - Dispute not subject to adjudication
  - Adjudicator not properly appointed
  - No dispute as at the date of the reference
  - Dispute already determined
  - Infringement of natural justice:
    - Right to proper notice and real opportunity to make case prior to determination
    - Right to unbiased hearing (e.g., conflict of interest, adjudicator "secret" discussions with one party)
    - Fraud

Adjudication
Impacts of Insolvency

- Federal paramountcy
- *Companies' Creditors Arrangement Act*, s. 11.02(2):

"A court may ... make an order, on any terms that it may impose,

(b) restraining ... further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting ... commencement of any action, suit or proceeding against the company."



Adjudication
Impacts of Insolvency

- Federal paramountcy
- *Bankruptcy and Insolvency Act*, ss. 69-69.3

  "no creditor ... shall commence or continue any action ... or other proceedings, for the recovery of a claim provable in bankruptcy."



Adjudication
Impacts of Insolvency

- Federal paramountcy
- Receivership – Model Order:

  "no Proceeding against or in respect of the Debtor or the Property shall be commenced or continued except with the written consent of the Receiver or with leave of this Court and any and all Proceedings currently under way against or in respect of the Debtor or the Property are hereby stayed and suspended pending further Order of this Court."



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