

OGCA PRESENTATION TO ATTORNEY GENERAL YASIR NAQVI (OCTOBER 26, 2017)

INTRODUCTORY REMARKS:

1. **SUPPORT:** Strongly support the Report and the proposed changes ... provided the final legislation and regulations are consistent with the recommendations and the spirit of the report. The final report must address all three of the mandates:
 - a. Modernizing the Act
 - b. Prompt Payment
 - c. Adjudication
2. **CONSULTATION:** Support a second round of industry consultation after first reading. The legislation is technical and its application must coordinate with commercial realities in diverse subsectors of the construction, development, design, finance, surety and insurance markets to name only a few. Consultation with industry experts is crucial to develop legislation that effectively serves the province.
3. **REYNOLDS & VOGEL:** OGCA supports the Minister's intention of extending Reynolds and Vogel's retainer to continue to participate in the process and assist in drafting the legislation. They have a deep understanding of the issues and the perspective of various industry participants. They have credibility and can be very helpful in building consensus. (Now confirmed that they and the advisory group will be kept on.)
4. While we are very supportive of the initiatives contemplated in the report, we are concerned that a deadline to pass the legislation which is too aggressive may compromise the quality of the result or the process to build consensus. We support a spring 2017 target to pass legislation, provided there is a willingness to review the target date based on the progress achieved.
5. **ADVISORY COMMITTEE:** We agree that the advisory committee has been a very valuable resource to Reynolds and Vogel and should continue to provide input. However, we note that there is no direct representation from the general contracting industry. We feel strongly that such representation would provide very valuable input on the legislation, particularly as it relates to commercial practices and other practical matters. We suggest that Reynolds and Vogel be given the mandate to expand the Advisory Committee to include direct representation of general contractors and subcontractors by adding one seat for each, with the representative for each to be selected entirely at the discretion of Reynolds and Vogel (as was the case for the original Advisory Committee member selection).

DETAILED COMMENTARY

No.	REC #	RECOMMENDATION	COMMENTARY
1	43	<p>Recommendation 43: Project Trust Accounts</p> <p>We recommend that the Act should be amended to require that a trustee must follow specific statutory requirements in relation to trust fund bookkeeping similar to that applied in the New York Lien Law, including the following (p 148): The trustee is not required to keep the funds of separate trusts in separate bank accounts or deposits provided that his books and records of account clearly show the allocation to each trust of the funds deposited in the general account; The trustee must keep separate books for each trust for which it is trustee (and if funds of separate trusts are in the same bank account, the trustee is to keep a record of such account showing the allocation to each trust of deposits and withdrawals); and The books and records of each trust must show specifically articulated particulars with respect to assets receivable, assets payable, trust funds received, trust payments made with trust assets and any transfers made for the purpose of the trust.</p>	<p>Project Owners should be required to fund holdback accounts in sync with the progress of the work. In order for the proposed book keeping regime to be effective in ensuring holdback funds are available for the beneficiaries, the funds need to be deposited into the account progressively.</p>
2	44	<p>Recommendation 44: Pilot Trust Accounts</p> <p>We recommend the identification of a pilot project for project trust accounts utilizing a representative number of projects in the public sector. Over a period of two years, the selected pilot projects should be evaluated based on appropriate metrics in relation to their effectiveness and cost. After two years, the performance of project trust accounts on the pilot projects should be published and industry consultation conducted regarding their general adoption in the private and public sectors (p 149).</p>	<p>We support the piloting of project trust accounts. We do not support the use of project bank accounts.</p>
3	48	<p>Recommendation 48: Prompt Payment</p> <p>We recommend that the prompt payment regime should apply at the level of the owner- general contractor, general</p>	<p>To access deferment of payment obligations a payer is required to “undertake to commence or continue proceedings necessary to enforce payment”. The actions to be taken should not be</p>

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		<p>contractor-subcontractor, and downwards, and that the legislation provide a mechanism for general contractors to notify subcontractors of non-payment by owners, with reasonable particulars, and to undertake to commence or continue proceedings necessary to enforce payment so as to defer their payment obligations (p 194).</p>	<p>prescribed in the legislation and should permit an escalation of the issues further to the terms of the contract between the payer and the upstream payer.</p> <p>We also recommend that the legislation permit a sharing of credit risk between general contractors and subcontractors by permitting pay if paid clauses in the event of an owner insolvency. Spreading owner risk is the most efficient approach for the market, otherwise the general contractor, faced with 100% of owner insolvency risk on its own, will be forced to increase its capitalization (decreasing its ability to grow, thus lessening competition in the market), add a risk premium to its bid (making it less competitive relative to less responsible contractors and/or increasing cost across the industry), or simply take the risk of insolvency (which would yield the same result for subcontractors as pay if paid).</p>
4	52	<p>Recommendation 52: Intention To Withhold We recommend that payers be permitted to deliver a notice of intention to withhold payment within 7 days following receipt of a purported proper invoice and that the notice of intention to withhold must set out the quantum of the amount withheld and adequate particulars as to why that amount is being held back. Undisputed amounts should be paid. Also, the right to withhold should relate only to the contract at issue (p 199).</p>	<p>A carve out to the requirement to provide 7 days notice of intention to withhold must apply in the circumstance where certification of the invoice in question is required by a party upstream of the Payer.</p>
5	53	<p>Recommendation 53: Set off We recommend that a payer continue to be able to set off all outstanding debts, claims or damages but that the right of set off not extend to set-offs for debts, claims and damages in relation to other contracts (p 199).</p>	<p>Provided that notice of intention to withhold is provided per recommendation #52, a payer should be permitted to set off against any debts, claims and damages in relation to other contracts. Clarification of the rationale for this is needed.</p>
6	55	<p>Recommendation 55: Suspension Right A right of suspension should arise after an adjudication determination has been rendered and a payer has refused or failed to comply with the adjudicator's determination (p 200).</p>	<p>A payee should have the right to suspend performance if the payer commits an act of insolvency. Is this the right term? A payee should not be required to continue to expend funds for the duration of the adjudication period if there is little prospect for collection.</p>

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7	79	<p>Recommendation 79: Public Project Bonding</p> <p>The Act should be amended to require broad form surety bonds to be issued for all public sector projects, the form of such surety bonds should be developed in consultation with the Surety Association of Canada, and once finalized they should become Forms under the Act (p 258).</p>	<p>AFP projects should be excluded from the requirement to bond public projects. AFP projects are consistently highly securitized as required by the project lenders. Further, the lenders often take an unfavourable view of bonds as security instruments and will typically assign very little value to them. Accordingly, a mandatory requirement to use bonds on AFP projects will add costs to projects with little reduction in other security instruments and little benefit to the public.</p>

ADDITIONAL ISSUES TO CONSIDER

No.	REC #	RECOMMENDATION	COMMENTARY
1	28	<p>Recommendation 28: Partial HB Release We recommend that the Act should be amended to permit partial release of holdback on either a phased or annual basis, if provided for in the construction contract entered into by the parties, subject to a significant monetary and time-based threshold in the case of annual release (p 85).</p>	<p>We recommend that partial release of holdback be mandated on an annual basis but apply only to projects in excess of \$25 million in value and two years in duration.</p>
2	51	<p>Recommendation 51: Monthly Payment Terms We recommend that parties be free to contract in respect of payment terms, but that if they fail to do so, monthly payments should be implied (i.e. every 28 days) (p 197).</p>	<p>We have a feeling that the act will allow owners to negotiate 60 day payment terms with GCs, but the GC will be required to pay within X days of receiving payment. Should we argue that we can negotiate payment terms with subs that could be different than the payment terms in the prime contract?</p>
3	60 61	<p>Recommendation 60: Parties to Adjudication Any party to a construction contract or subcontract should be given the right to adjudicate disputes arising under that contract or subcontract (p 232).</p> <p>Recommendation 61. Back to Back Adjudication: Back-to-back adjudications should be permitted at the owner-general contractor and general contractor-subcontractor levels (p 232).</p>	<ol style="list-style-type: none"> 1. What happens if a claim is potentially insured...would the insurance company be permitted to engage in defending the claim? Would the insurer be obliged to pay up if the adjudication went against the GC and the matter was covered? 2. If a bonded GC is found to be in default in an adjudication, is the bond triggered? 3. If an issue is too complex can the adjudicator make a decision to extend the deadlines or can this only be done with the consent of both parties?
4	70	<p>Recommendation 70. Subject of Adjudication We recommend that parties to a construction contract or subcontract be entitled to refer a dispute to adjudication that flows from a proper invoice under a construction contract or subcontract (being a claim for payment under a contract or a</p>	<ol style="list-style-type: none"> 1. Can the GC in a design build project or the Owner go after a designer for E&O under adjudication? The GC renders an invoice to the Architect for damages further to a term in the designer's contract. When they don't

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		<p>subcontract in relation to an improvement) including (p 238): The valuation of work, services, materials and equipment supplied to an improvement and claimed as part of a proper invoice; Other monetary claims made in accordance with the provisions of the construction contract (that had been claimed in a proper invoice), including the change orders and proposed change orders; A claim in relation to any security held by a party under the construction contract; Set offs and deductions (i.e. for deficiencies) against amounts due under a proper invoice as set out in the notice of intention to withhold or otherwise; and Delay issues as they relate to claims for payment.</p>	<p>pay, you go to adjudication for an interim settlement?</p> <p>2. How would E&O insurance work in this circumstance?</p>
5	76	<p>Recommendation 76: Recourse to Courts We recommend that the decision of an adjudicator should be binding on the parties and they should comply with the decision until either: a) the dispute is finally determined by legal proceedings (including lien proceedings) or arbitration (if provided for under the contract or the parties agree to arbitrate); or b) by agreement by the parties that the decision of the adjudicator is finally binding (p 243).</p>	<p>[Are adjudication decisions subsequently admissible in court?] [YF: Do we have a position? It would make parties less inclined to challenge the adjudication decision if it was admissible. Not yet clear if on balance generals will want to challenge decisions or uphold them. Based on what little we know now, reasonable to expect we'd net benefit from having more teeth in an adjudication decision as we are the ones most likely to have big claims up to owners, and in theory sub claims should all arise from owner issues, too.]</p>
6	78	<p>Recommendation 78: Lien Rights We recommend that parties maintain their lien rights such that, if a party wants to have a dispute finally determined through a lien proceeding, they can proceed to preserve and perfect a lien and proceed with a lien action (p 244).</p>	<p>[Can the loser to an adjudication go to court immediately on the matter....or do they have to wait until the conclusion of the project?] [YF: My understanding is we'd have to wait til end of project but should clarify that, and further clarify that end of project means substantial performance; but that the legislation should allow for parties to contract around that provision and go directly to arbitration or court if they'd like.]</p>