

Osler, Hoskin & Harcourt LLP

Prompt payment movement sweeps across Canada – is the energy industry ready to comply?

2021 CANADIAN ENERGY LAW FOUNDATION JASPER SEMINAR

Paula Olexiuk, Melanie Gaston, and Jagriti Singh (Osler)
Lesley Lee (TC Energy)

June 23, 2021

OSLER

ABOUT THE SPEAKERS

Melanie Gaston



Partner, Litigation
Osler, Hoskin & Harcourt LLP
megaston@osler.com

Melanie's practice focuses on complex commercial litigation and arbitration, with a particular emphasis on construction and energy disputes.

More recently, she has been lead counsel on a number of large construction and joint venture arbitrations involving construction and joint venture disputes, compliance audits and joint venture billing practices. She has worked with clients regarding various regulatory matters, including development board appeals and environmental/contaminated site investigations and issues.

Paula Olexiuk



Partner, Construction
Osler, Hoskin & Harcourt LLP
polexiuk@osler.com

Paula is a Partner in Osler's Corporate Department specializing in energy and construction law and is Co-Chair of the firm's Construction and Infrastructure practice group. Paula's practice focuses on the construction, development, acquisition and divestiture of energy and infrastructure projects in Canada and abroad. She has experience in oil, gas, oilsands, LNG and power transactions and project development and engineering, procurement and construction matters.

ABOUT THE SPEAKERS

Lesley Lee



Manager, Litigation

TC Energy

lesley_lee@tcenergy.com

Lesley joined TC Energy as Legal Counsel in July 2011 and is currently Manager, Litigation. In her 10 years with the company, Lesley has conducted and participated in numerous mediations, arbitrations and lawsuits on behalf of TC Energy throughout North America. Lesley advises a variety of internal clients in TC Energy's natural gas, oil and power business lines on matters ranging from complex commercial litigation and arbitration to construction claims, insurance disputes and employment matters.

Lesley obtained her law degree at the University of Victoria. Following a Clerkship with the Alberta Court of Queen's Bench, Lesley articulated and worked at a national law firm in Calgary for three years before joining TC Energy.

Jagriti Singh



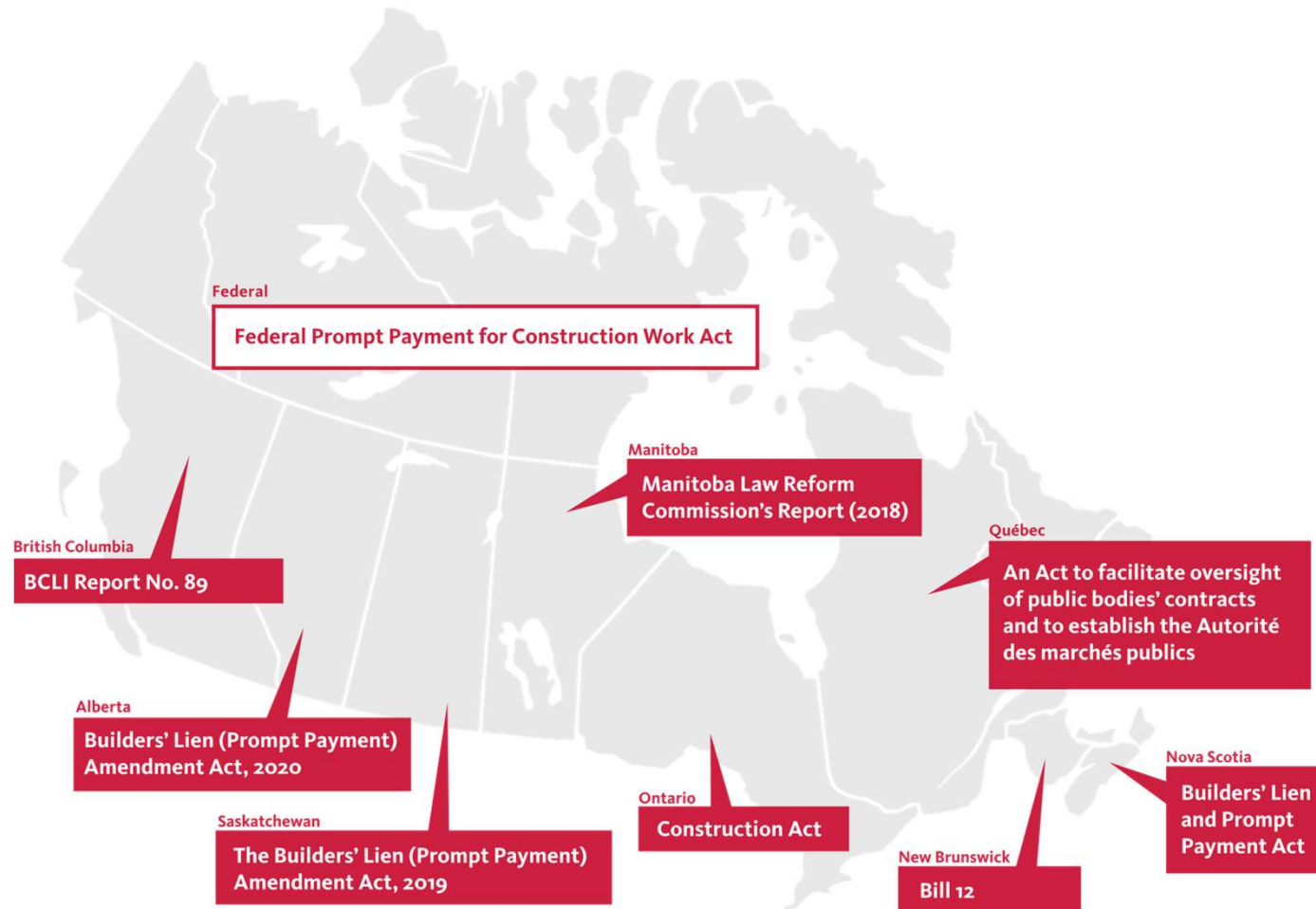
Associate, Commercial

Osler, Hoskin & Harcourt LLP

jsingh@osler.com

Jagriti maintains a general corporate and commercial practice, with focus on construction, infrastructure and energy. She advises clients on various aspects of project development including procurement, drafting construction contracts, compliance with recent legislative changes regarding prompt payment and adjudication, and managing force majeure claims.

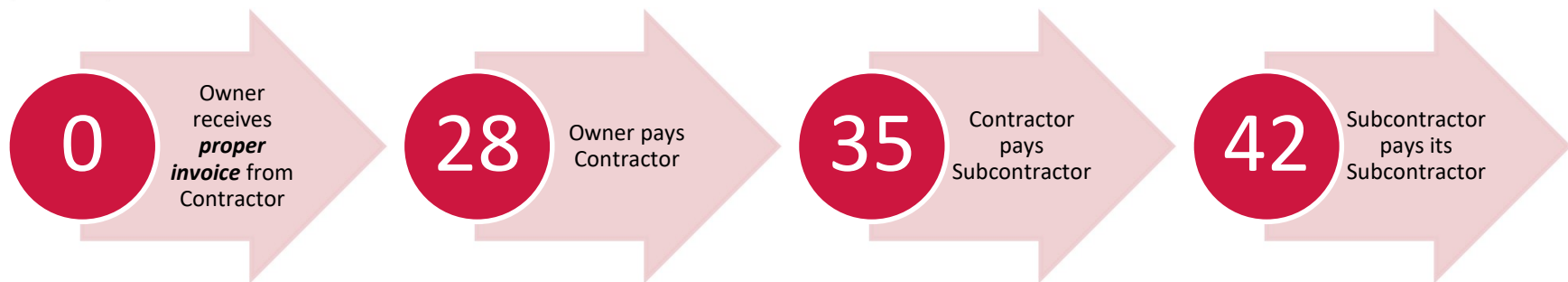
Prompt payment movement sweeps across Canada



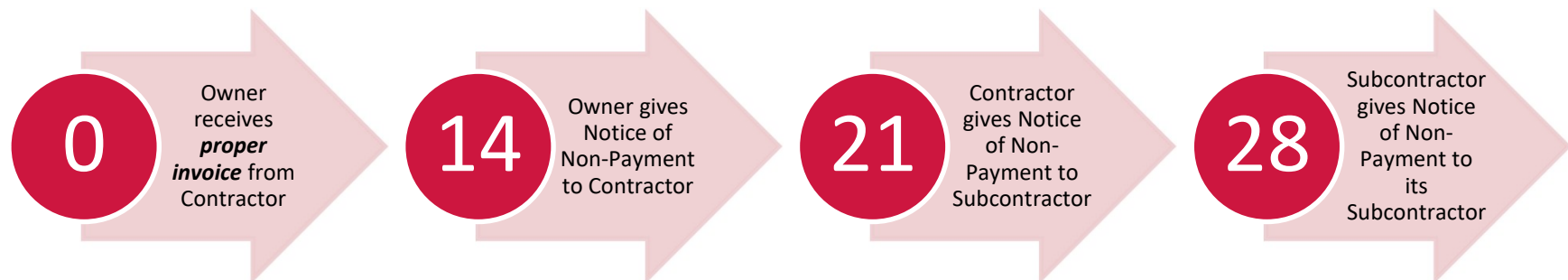
Prompt Payment in Ontario and Alberta



Payment Timeline



Notice of Non-Payment



Ontario's Swift Adjudication Process

- Notice of Adjudication (contains name of proposed Adjudicator)
- **4 days** for Adjudicator to consent – if no consent then the claimant shall request appointment by ODACC, which is to appoint within **7 days** of receiving the request
- Within **5 days** of Adjudicator appointment, the claimant must provide to Adjudicator and other party: Notice of Adjudication, copy of contract or subcontract, and any documents the claimant intends to rely upon
- Adjudication conducted in the manner determined by the Adjudicator (including timelines)
- Adjudicator to make a determination within **30 days** after receiving claimant's documents

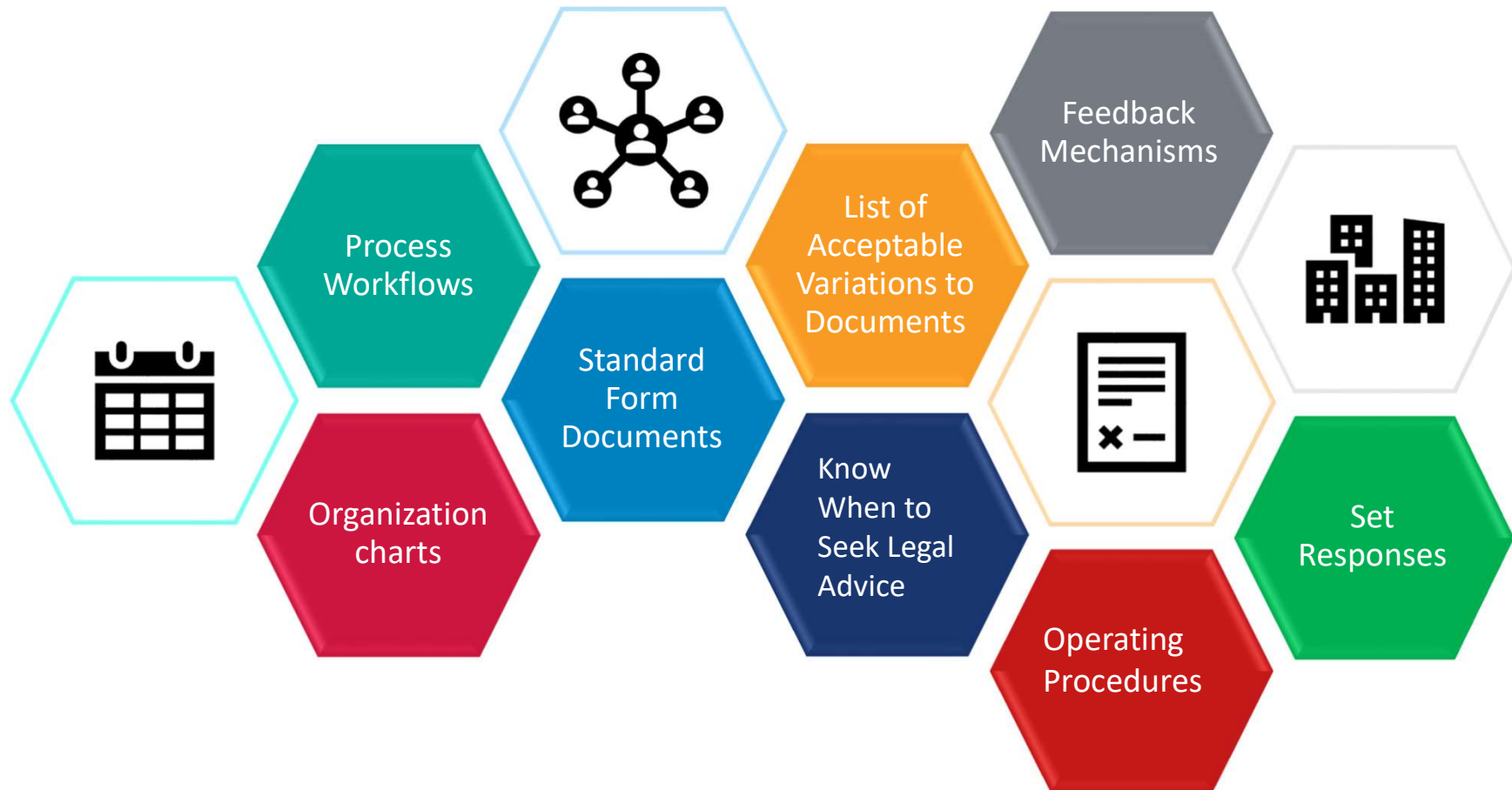


How can the energy industry prepare?

Identify key personnel within your organization



Develop a playbook for your organization



Contract Drafting Strategies

- Prompt Payment
 - Template for proper invoice
 - Draft invoice procedure
 - Review notice and payment provisions
- Adjudication
 - Align with existing dispute resolution clauses
 - Contractually agree to restrict time periods for adjudication

Consider a Standard Form of Proper Invoice

Contractor Company Logo

INVOICE

BILL TO:

Company: *Owner*
Division: *Engineering & Construction Services*
Project Lead: *John Doe*
Tel. #: *416-XXX-XXXX*
Email: *John.Doe@owner.ca*
Street Address: *234 Toronto Street, 5th Floor*
City: *Toronto, Ontario*
Postal Code: *XXX XXX*

RFx #: *911X-XX-XXXX*
Contract #: *Contract Number (If Available)*
Description: *Project Description*
Billing Period: *(Start) to (End)*
Progress #: *PR-XX*
PO #: *XXXXXXXX*

Contractor Name: *Contractor*
Contractor Number: *123456789*
Project Lead: *John Doe*
Tel. #: *416-XXX-XXXX*
Email: *John.Doe@contractor.ca*
Street Address: *123 Toronto Street, Unit 12*
City: *Toronto, Ontario*
Postal Code: *XXX XXX*
HST Registration #: *XXXXXX*

INVOICE DATE: *November 28, 2019*
INVOICE #: *12345*

Item	Base Contract	Change Orders	Adjusted Contract Value	Progress To Date		Previous Draw	Current Draw
				%	\$		
Item 1			\$0.00	0.00%	\$0.00		
Item 2			\$0.00	0.00%	\$0.00		
Item 3			\$0.00	0.00%	\$0.00		
Gross Amount	\$0.00	\$0.00	\$0.00	0.00%	\$0.00	\$0.00	\$0.00
Holdback (10%)							\$0.00
Contractual Holdback							\$0.00
Net Amount							\$0.00
13% HST							\$0.00
Total Amount Due							\$0.00

Name:

Title:

Signature:

Date:

Attach Backup Documents as Required by the Contract

- Consider a standard form of proper invoice.
 - Decide in advance about the acceptable variations to information required with proper invoice.
- Alternatively, a robust list of what constitutes a proper invoice in the contract
 - If you are using other party's format it may take longer to process invoices in different formats

Manage Adjudication – Respondent’s Playbook

- Determine whether contract templates should provide for adjudication for types of disputes other than those mandated in the legislation
- Provide for appropriate internal timelines taking into account statutory deadlines
- Create an account and subscribe to the online system (if any)
- Identify person(s) to manage your online system account
- If you have retained legal counsel, invite him/her to create an account in the online system to access the submissions

Adjudicator renders a determination – what next?

- Compliance Payment
 - Source of compliance payment – Contingency? Lenders?
 - Method for processing the payment – Invoice? Change order?
- Non-Compliance
 - Set out procedures for shaping contractor's suspension right if a determination is not paid
 - Notice to the owner
 - Account for safety and protection of personnel and public
 - Protection of materials and machinery

Adjudicator renders a determination – what next?

- Binding, until:
 - Matter determined by court or arbitration; or
 - Written agreement between the parties
- Seek legal advice to assess the options following receipt of a determination:
 - Option 1: Commence or continue court proceeding or arbitration
 - Option 2: Setting aside on judicial review
- Note that lien rights are still available and may be exercised in the meantime

Views expressed in the presentation are views of the speakers and do not reflect the views of their organization.

The content in this presentation is provided for general information purposes only and does not constitute legal or other advice or an opinion of any kind and does not establish a lawyer-client relationship. Attendees are advised to seek specific legal advice by contacting members of Osler (or your own legal counsel) regarding any specific legal issues.

Osler, Hoskin & Harcourt LLP

Toronto Montréal Calgary Ottawa Vancouver New York | [osler.com](https://www.osler.com)

OSLER