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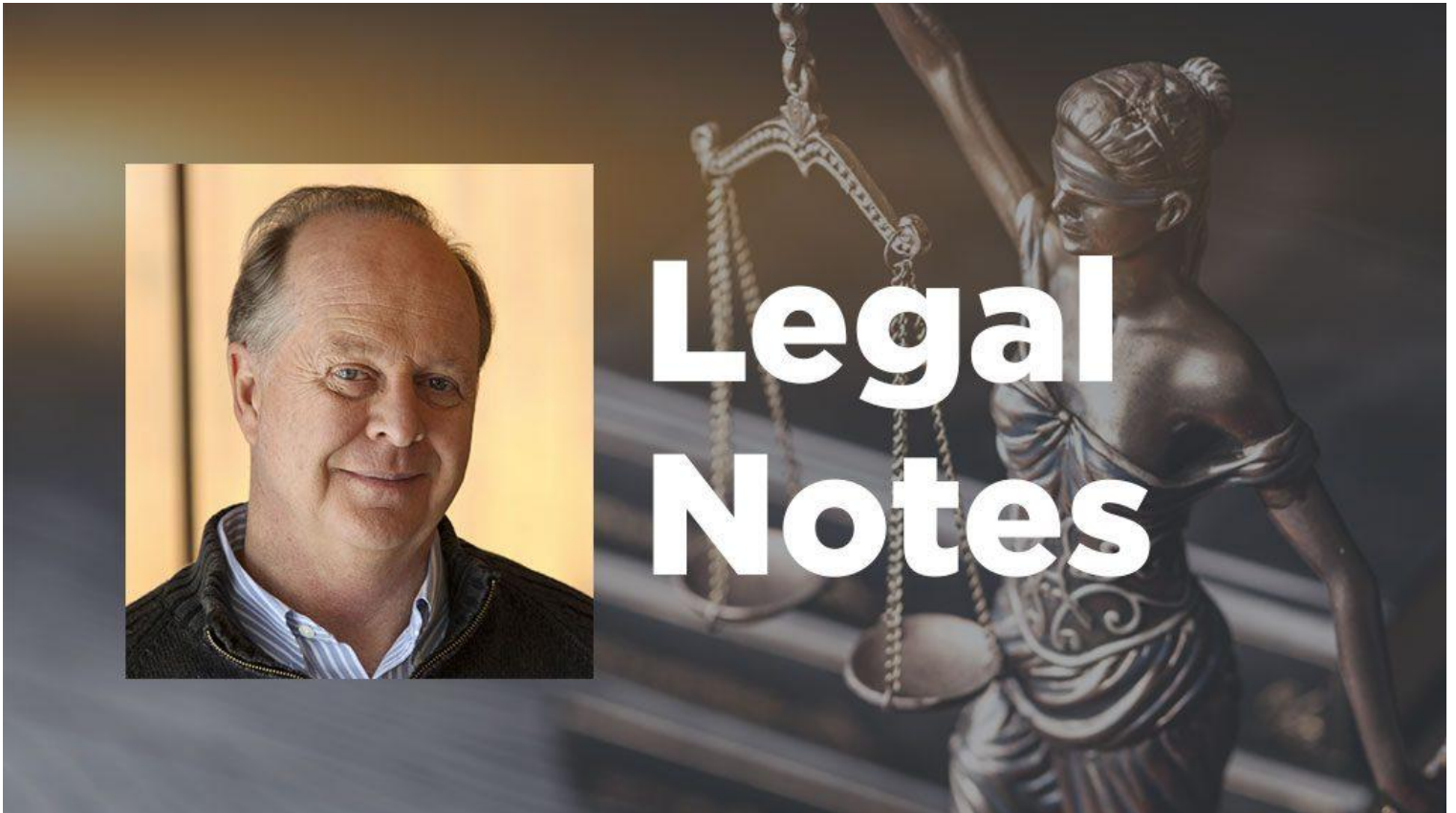
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▶ Legal Notes: Blending ‘pay when paid’ clauses with prompt payment regimes

GOVERNMENT

## Legal Notes: Blending ‘pay when paid’ clauses with prompt payment regimes

John Bleasby December 8, 2022



**O**ne might have assumed prompt payment and adjudication processes introduced by many provinces across the country might have been the death knell of “pay when paid” contractual provisions. Such is not the case. Pay when paid still has purpose and legal standing.

Typically, pay when paid clauses stipulate subcontractors cannot expect payment from the contractor until a specified number of days have passed after the contractor has been paid by the owner.

“Absent such a clause, if an owner fails to pay the contractor for the work performed by the subcontractor, due to privity of contract, the contractor will be responsible for making any contractual payments due to the subcontractor,” Edward Lynde, partner with Faskens LLP in Toronto, told the Daily Commercial News.

Looking west to Alberta’s prompt payment regime (PPCLA), Preet Saini, Michael Briggs and Jamieson Virgin of McMillan LLP, write while Alberta originally did away with such clauses and deemed them as having “no force or effect,” that prohibition was removed prior to enactment.

Pay when paid clauses can still be used, they say, if they comply with prompt payment and adjudication legislation where such legislation has been introduced.

The McMillan authors offer examples when pay when paid clauses protecting contractors can mesh with prompt payment regimes. These include cases of insolvency of an owner, or determinations regarding any disputes and resultant settlements between owner and contractor that could limit payments to a subcontractor.

“The laws in Ontario and Alberta appear to be somewhat similar with respect to this issue,” says Lynde. “While pay when paid clauses are technically valid and enforceable in Ontario, such clauses will need to be drafted to comply with the Construction Act, and as set out in the case law, must be clear and unambiguous if a contractor wishes to rely upon it as a true condition precedent in support of non-payment to the subcontractor.”

Lynde cites two cases that set out situations under which a pay when paid provision can be effective.

First is the Ontario case of Timbro Development Ltd. vs. Grimsby Diesel Motor. Lynde explains the court held, “if a clause indicates that the subcontractor will be paid when the contractor is paid — a clear indication that unless or until the contractor is paid — the subcontractor has no right to be paid, and the risk is borne by the subcontractor.”

The second case from Nova Scotia confirmed how the pay when paid clause “informed the timing of the payment, but was not conclusive as to the right to be paid. Thus, the clause was considered a timing mechanism only, and did not operate to preclude claims by a subcontractor with respect to payment.”

Both Lynde and the McMillan authors agree that, in Lynde’s words, “the courts have focused on the wording and language included in the specific clause in question and the specific terms employed therein for their meaning, intention, and effect.”

However, Lynde points out although the Ontario’s Construction Act does not explicitly address the issue of pay when paid clauses, the act does attempt to balance the contracted parties’ ability to set out payment arrangements within the confines of the act.

In that way, when it comes to adjudication and the issuance of non-payment notices, Lynde says the act is more procedural than substantive in nature.

“The new amendments to the Construction Act implements rights with respect to the timing of the payment pursuant to the prompt payment regime, but not substantive rights with respect to payment,” he says. “Therefore, the issuance of notices of non-payment would be subject to the outcome of the

adjudication, where the expressed contractual provision would be a central issue and any pay when paid clause analyzed and interpreted by the court.”

In conclusion, Lynde says, “Parties must remain cognizant of what they have expressly bargained for, as memorialized in their agreements. Consequently, clarity is paramount and ambiguity will be problematic, particularly for the contractor.”

John Bleasby is a Coldwater, Ont.-based freelance writer. Send comments and Legal Notes column ideas to [editor@dailycommercialnews.com](mailto:editor@dailycommercialnews.com).



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