

Ontario prompt payment and adjudication: The final countdown

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Overview

Recall that the recent amendments to the newly renamed *Construction Act* focused on three major reforms: modernization of lien provisions, introduction of prompt payment, and a new interim binding dispute resolution mechanism known as adjudication. On October 1, 2019, prompt payment and adjudication under the *Construction Act* will come into force and all eyes are on Ontario as it will be the first jurisdiction to have legislation that combines prompt payment and adjudication alongside traditional lien legislation.

While the construction industry in Ontario will be grappling with the inevitable growing pains of new legislation, [a number of other jurisdictions](#) in Canada, including the federal government, have followed Ontario's lead in introducing a prompt payment and adjudication regime to alleviate delayed payments to contractors and subcontractors down the construction pyramid.

Tracking dates and watching the prompt payment clock

The prompt payment clock starts ticking once the owner receives a "proper invoice" from the contractor, on a monthly basis unless agreed to otherwise in the contract.

Simplified snapshots of the payment and non-payment notice timelines are provided below, with the numbers in the graphic representing the maximum number of elapsed days after the proper invoice is received by the owner.

Figure 1 envisages a scenario where everything goes well, and none of the parties dispute the entitlement of the party submitting the invoice and pay the submitting party in full.

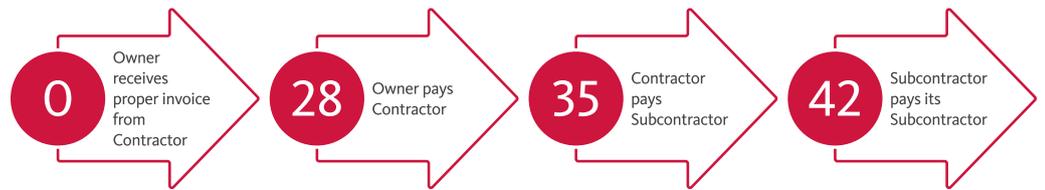


Figure 1: Payment Timelines

It is also critical to remember that all references to days are calendar days, not business days. We have also developed a [Date Calculator](#) to assist owners in calculating the key dates for making a payment to the contractor (or, as described below, sending a notice of non-payment to the contractor).

A party who wishes to dispute the entitlement of the other party to receive payment, in whole or in part, must issue a notice of non-payment in the prescribed form within the required timelines. Figure 2 provides timelines for issuance of notice of non-payment, in a scenario where a contractor receives a notice of non-payment from the owner, and where the contractor and subcontractor choose similarly to dispute payment down the construction pyramid.



Figure 2: Timelines for Notice of Non-Payment

Therefore, an owner disputing a proper invoice must give a notice of non-payment to the contractor detailing the reasons for non-payment within 14 days after receiving the proper invoice from the contractor. To do this, owners must align their internal processes to consult, complete and articulate the results of their invoice review within 14 days, because any failure to issue a notice of non-payment to the contractor within this time period will result in the owner being obliged to pay the contractor the full amount of that proper invoice within the required 28-day timeframe, despite its objections. In order to avoid this situation, owners should also have their external consultants shorten their invoice review periods, and negotiate appropriate amendments to any credit or funding agreements to minimize any impediments to funding within these timeframes.

Alternatively, if the contractor receives full payment of a proper invoice from the owner, but disputes in whole or in part the entitlement of a subcontractor to payment, the contractor must give the subcontractor a notice of non-payment within 35 days after giving the proper invoice to the owner. Similarly, if the subcontractor receives full payment from the contractor but disputes the entitlement of its subcontractor, it must give a notice of non-payment within 42 days after proper invoice was given to the owner.

Adjudication and construction liens

The *Construction Act* introduced adjudication as a quick, inquisitorial dispute resolution mechanism for payment-related disputes and any other disputes agreed to by the parties. An adjudication must begin prior to completion of the contract or subcontract, unless the parties agree otherwise.

Any party to a contract or subcontract may refer a dispute to adjudication by giving a written notice of adjudication. The notice of adjudication must be crafted with significant caution as it is the key to determining the jurisdiction of an adjudicator for the purposes of the particular matter. The referring party must give an electronic copy of the notice to the Authorized Nominating Authority (Authority) on the same day.

The parties may agree to an adjudicator or request the Authority to appoint an adjudicator. If the adjudicator selected by the parties does not consent to adjudicate the matter within four days after notice of adjudication is given, it is mandatory for the referring party to request the Authority to appoint an adjudicator. However, neither the *Construction Act* nor the regulations prescribe timelines for making such a request, though we would assume that the referring party has an interest in doing so as quickly as possible.

On receiving a request for appointment from the referring party, the Authority must appoint an adjudicator within seven days. Note that the Authority can appoint a person as adjudicator only upon his or her prior consent, and that nothing in the *Construction Act* or regulations requires an adjudicator to agree to or accept an appointment by the Authority.

After the adjudicator's appointment, the referring party must provide documents for adjudication along with a copy of the notice to the adjudicator (and to the responding party) within five days. The responding party, if it submits a response, must submit such response to the adjudicator, referring party and every other party on the same day within the timelines prescribed by the adjudicator. The adjudicator must make the determination of the matter within 30 days after receiving the documents.

Interestingly, the *Construction Act* will allow an extension of time for preservation of a lien, if the matter that is subject of a valid lien is also subject of an adjudication. For the purposes of preserving the lien, the lien is deemed to have expired on the *later* of:

- (i) 60 days from the standard trigger date for preserving a lien; and
- (ii) 45 days from the day the adjudicator receives the documents for adjudication.

Stakeholders must consider the impact of this provision on construction lien deadlines, holdback release and adjudications down the construction pyramid, among other issues. It is not clear what would happen to the timeframes if an adjudicator were to fail to complete an adjudication and the referring party issues a fresh notice of adjudication on the same subject.

Industry participants should map out the interactions between construction lien remedies and adjudication remedies, in order to understand the interplay and, where there is ambiguity, to take the appropriate positions to preserve their rights.

What's happening elsewhere in Canada

There is a lot of activity at the federal and provincial levels, reflecting the broader fact that prompt payment and adjudication have gained significant momentum in Canada.

As described in our [Update](#), the *Federal Prompt Payment for Construction Work Act* (the Federal Act) was passed on June 21, 2019, and will come into force on a day to be set by the Federal Cabinet. Although this may take some time, we believe that there is considerable momentum for the federal government to move quickly. Once in effect, the Federal Act will *not* grandfather existing contracts; instead, it provides for a one-year deferral period before it applies to existing contracts.

As described in our [Canadian Prompt Payment and Construction Law Reforms page](#) (including a Canadian map graphic), other provinces, such as Nova Scotia and Saskatchewan, have just passed legislation of their own. Other provinces are either implementing pilot projects in relation to prompt payment, or considering what form prompt payment and adjudication could take in their provinces, including some interesting discussions on whether the "Ontario model" is right for them.

Drafting workshops and Osler Updates

Please [subscribe](#) to our Construction email list to receive future updates by email if you have not already. Interested readers should follow our website for the latest updates on [Canadian Prompt Payment and Construction Law Reforms](#) across Canada.

As stakeholders prepare to embrace the new regime this fall, both harsh consequences and fine nuances will continue to unfold. Osler's breadth and depth of [experience and expertise](#), together with its hands-on approach in understanding the new regime, will be of great value for those seeking to understand the application of the *Construction Act*, realign internal processes, organize training, create materials for their organization, and revise contract and procurement documents.

We are also developing a "toolkit," which currently comprises the prompt payment [Date Calculator](#), as mentioned above, and another tool named Transitions Deconstructed, which will assist the users to determine the applicable version of the *Construction Act* and enable them to download it.

One of our other initiatives is a workshop series; the first of which is the "[Construction Contract Drafting Workshop](#)." The workshop, led by Osler's front-end construction contract group, focuses on amending and live drafting clauses in procurement and contract documents which are affected by legislative amendments, specifically from an owner's perspective. Other workshops in the pipeline focus on [preparing for and handling adjudication](#), impact on P3 projects and developing a playbook for prompt payment, among others. Stay tuned to know more about our upcoming workshops.