

Kennaley Construction Law

Client Seminars:

The Construction Act

Simcoe ♦ Toronto ♦ Barrie

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The Construction Act

◆ Substantive change came into force on July 1, 2018

◆ longer lien timeframes;	◆ re: the written notice of lien;
◆ new contract termination provisions	◆ bonding on "public contracts";
◆ changes in holdback procedures;	◆ changes to what is lienable;
◆ new DCN publication requirements	◆ enhanced trust obligations;
◆ an expanded scope of the s.39 request	◆ re: the leasehold lien

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The Construction Act

◆ Two more **extremely significant** changes came into force Oct 1, 2019:

- ◆ prompt payment, which will make the payment of funds mandatory on strict timelines unless notices of non-payment provisions are given;
- ◆ adjudication which will allow for the resolution of disputes in as quickly as 46 days

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The Construction Act

See our Tool Kit available on our Website

**Ontario's New Construction Act:
Preparing for a New World**

Guides to the July 1, 2018 Changes
- and to -
Prompt Payment and Adjudication

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The July 1, 2019 Changes

Transition Provisions

The July 1, 2018 Threshold

The lien timeline changes apply under contracts procured or entered into after July 1, 2018 (with the exception, due to a legislative quirk, of those procured or entered into before December 8, 2018 where a lease was registered against the Premises). A contract is deemed to have been "procured" when the procurement process commences. Examples of a "procurement" process includes a call for tenders, an RFI, an RFQ or a "request for qualifications". The date a subcontract was procured or entered into is irrelevant; it is the date the contract was procured or entered into that governs.

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The Expiry of the Lien Claim:

❖ **under the prior Construction Lien Act:**

For a Contractor:

❖ **45 days** following the completion or abandonment of the Contract, or from the publication of a Certificate of Substantial Performance

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The Expiry of the Lien Claim:

❖ **under the new *Construction Act*:**

For a Contractor:

- ❖ **60 days** following the completion or abandonment **or termination** of the Contract, or from the publication of a Certificate of Substantial Performance, which ever is earlier

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The Expiry of the Lien Claim:

❖ **under the prior *Construction Lien Act*:**

For a subcontractor:

- ❖ **45 days** following last day of supply; or
- ❖ **45 days** from deemed subcontract completion; or
- ❖ **45 days** following the publication of a certificate of substantial performance, which ever is earlier

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The Expiry of the Lien Claim:

❖ **under the prior *Construction Lien Act*:**

For a subcontractor:

- ❖ **60 days** following last day of supply; or
- ❖ **60 days** from deemed subcontract completion; or
- ❖ **60 days** following the publication of a certificate of substantial performance, which ever is earlier

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The Expiry of the Lien Claim:

Lien Timeframes: Contractor

- under the **prior provisions**, the lien of a **Contractor** expires if not preserved **45 days** following the completion or abandonment of the Contract, or (as regards the lien against the basic holdback) the publication of a certificate of substantial performance;
- under the **new provisions**, the lien of a **Contractor** expires if not preserved **60 days** following the completion, abandonment **or termination** of the Contract, or (as regards the basic holdback) the publication of a certificate of substantial performance. Termination occurs when any person whose lien is subject to expiry publishes a notice of termination in (currently) the *Daily Commercial News*. There is (currently) no requirement under the Act for the notice to be sent to any other party (although there may, and should, be such a requirement set out in the contract and subcontracts). The 60 day timeframe for lien expiry on termination is from the date of termination set out in the published notice, and **not from the date of publication**. This makes timely notice of the termination even more important. The validity of the termination can be contested where it was improper (for example where there were insufficient grounds for termination or where a contractual notice provision was not followed).

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The Expiry of the Lien Claim:

FORM B
NOTICE OF TERMINATION UNDER SUBSECTION 14(6) OF THE ACT
03/2018/018

Description of the premises:

The Act & Subcontractor's approval:

A. I am the contractor for the premises of the _____

B. I am a subcontractor for the premises of the _____

Termination is caused by:

The contractor is subcontracted: _____

Termination by: _____ Date: _____

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The Expiry of the Lien Claim:

Lien Timeframes: SubContractor

- under the **prior provisions**, the lien of a **Subcontractor** expired **45 days** following the subcontractor's final completion, the Subcontractor's last supply of services or materials or the publication of a certificate of substantial performance (as regards the lien against the basic holdback). Under the new Act, the timeframe is **60 days**.

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The Expiry of the Lien Claim:

Lien Timeframes: When an Adjudication has been Commenced

- notwithstanding the above, if a lien has not expired and the subject of the lien is before an adjudicator under the Act, the lien expiry will be extended until 45 days after the adjudicator receives the claimant's documents under s. 13.11 of the Act.

Other Considerations: re Lien Expiry

- the time to **perfect** a lien has been extended from 45 to **90 days** under the new Act;
- Contractors and Subcontractors may be asked to sign a binding declaration of last supply. Anyone signing such a declaration should be sure their work is complete and insist that any new work be formally done under a new contract or subcontract;
- claimants should be aware that they may effectively lose their lien rights against the land on new home and condominiums improvements on a unit by unit basis as the sale of units close or if the contract provides that liens arise on a lot by lot basis. Claimants should also be aware, at the bid stage, that if the sole 'Owner' of an improvement is a mere tenant of the Premises, their liens will most likely not attach to the actual land.

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The "lot-by-lot" problem

❖ Contracts can provide that liens will arise on a lot-by-lot basis

In this case, the completion of services or materials provided to a lot starts the clock ticking on the expiry of the lien on that lot, for value provided **to that lot**

Also, lien claimants will have to preserve a lien against lots individually – not as against multiple lots under a single lien

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The "lot-by-lot" problem

❖ This creates problems and confusion:

For subcontractors who may not know what the contract says;

For suppliers who will not be on-site to track when and where their supply goes to particular lots

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The “lot-by-lot” problem

- ❖ This creates problems and confusion:
 - for trades who are not used to tracking supply to individual lots; and
 - for anyone if the “lots” have not actually come into existence at the time of their supply

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The “lot-by-lot” problem

- ❖ on subdivision or other multi-lot improvements, subcontractors can (and should) request that the owner or contractor advise, under s.39, whether or not the contract provides that liens will arise on a lot-by-lot basis

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Changes Re: The Holdback:

- ❖ Payment of holdback is mandatory, *unless notice of non-payment is published in the Daily Commercial News* (or as prescribed)...
- ❖ Holdback *may* also be released annually or on a phased basis (on contracts of \$10,000,000.00 or more)

Both of these changes are important for contractors and subcontractors

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The Construction Act

Holdback Provisions under the July 1, 2018 Changes

Retention and Mandatory Payment of Basic Holdback

- The holdback may now be retained through a letter of credit, bond or prescribed form.
- In addition, the payment of the basic holdback is **now mandatory** once all liens that may be claimed against it have expired or been paid, discharged or vacated, **unless** the person having the holdback obligation publishes a **notice of non-payment of holdback** in (currently) the *Daily Commercial News* no later than **20 days** before the basic holdback is due to be released and **provides a notice** in that regard to the person they don't intend to pay within the next **3 days**. The notice can be provided in electronic or paper format and need not be "given" by service or registered mail (as is the case with many other documents).

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Holdback Provisions under the July 1, 2018 Changes

Retention and Mandatory Payment of Basic Holdback

- Since October 1, 2019 and where the adjudication provisions of the new Act apply, the person providing a notice of non-payment of holdback must also refer the non-payment of the holdback by the person above it to Adjudication.
- On the one hand, the "holdback payment is mandatory unless notice is given" requirement will assist contractors and subcontractors in better assess whether or not to preserve a claim for lien. On the other hand, the provisions effectively eliminate pay-when-paid provisions when it comes to holdback: if you don't give a notice of non-payment of holdback, 20 days before it is due, you will have to pay it even if you don't get it and even if the person above you did not give you a notice of non-payment. Searching the Daily Commercial News to see if the Owner has published a Notice of Non-Payment of holdback is therefore a good practice to follow.

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The Construction Act

Holdback Provisions under the July 1, 2018 Changes

Payment of Basic Holdback on an Annual or Phased Basis

- so long as statutory conditions are met, the Act now allows the basic holdback to be released on an annual or phased basis where the contract calls for the such release and is worth \$10,000,000.00 or more. The conditions provided in early release are:
 - that the contract provides for the annual or phased holdback release and includes either a schedule that is longer than a year or phases identified for the payment of accrued holdback; and
 - there are no preserved or perfected liens in respect of the contract; or
 - all liens in respect of the contract have been satisfied, discharged or otherwise provided for under the Act.
- there is no requirement that the Owner (or anyone) publish or give a Notice that accrued basic holdback is due for early, phased release. Subcontractors may accordingly wish to ask if the contract provides for phased or annual release of holdback pursuant to a s. 39 request under the Act.

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The Construction Act

FORM 6
NOTICE OF NON-PAYMENT OF HOLDBACK UNDER SECTION 27.1 OF THE ACT

Name:

Address:

Address for notices:

Message:

Address:

Project description:

*The following information is required for all projects where the following amount exceeds to be held under section 27.1 of the Construction Act:

Job No. or reference number:

A. The full amount of the holdback being:

B. A portion of the amount of the holdback being:

(If applicable) Copy of a check or other payment of holdback from the holdback account (if one exists) is attached.

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The Construction Act

New Bonding Requirements

- ❖ Performance and L&M Performance Bonds are now mandatory on most “public contracts” worth \$500,000.00 or more
- ❖ Architectural and Engineering contracts appear to be exempt;
- ❖ The contractor is obliged to provide these, except on P3 Projects, where it the “Project Co.” entity has the obligation

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The Construction Act

The “Public Contract” and the Bonding Requirement

a public contract is a contract where the owner is the Crown, a municipality or a “broader public sector organization”. If the project is being funded with public tax dollars, it is most likely the definition will be met. Every hospital, school board, university and college receiving public funds, along with every corporation controlled by such an entity that exists solely or primarily to purchase goods or services on its behalf is caught by the definition. Also included is every authority, board, commissioner, committee, corporation, council, foundation or organization that received public funds of \$10 million dollars or more in the previous fiscal year.

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The Construction Act

The "Public Contract" and the Bonding Requirement

the Act does not require owners to request or require the mandatory bonding. Accordingly, if the tender documents or terms of a public contract are silent on the issue, the obligation to provide the bond will still fall to the contractor if its price exceeds \$500,000.00. To avoid confusion, owners should consider indicating that such bonding will be required if they meet statutory requirements, should the \$500,000.00 threshold be met. The Act does not address what happens if the contract price increases beyond \$500,000.00 through changes.

both the performance and labour and material payment bonds must have a minimum coverage limit of at least 50% of the contract price, except that on alternative financing and procurement or P3 Projects the maximum coverage will be \$50,000,000.00;

the mandatory performance bond will not respond to liquidated damages under the contract, to damages for delay or for indirect or consequential damages;

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New Bonding Requirements

- ❖ the Act calls for all subcontractors and suppliers of services and materials to be covered, but the form of bond approved by the AG provides protection to only 1st and 2nd tier subcontractors;
- ❖ to this, the Bond introduces the concept of the "sub-subcontractor", which is a concept not contemplated by the Act itself;
- ❖ further, under the form, recovery by a "sub-subcontractor" is limited (essentially) to the holdback.

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The Terms and Conditions of the Bonds

the terms and conditions of the mandatory bonds are very different from those traditionally used. Care should accordingly be taken to review them in the event of a possible claim. The bonds contain claims processes which involve additional steps and tight timeframes which should be understood. A copy of the standard forms are available on our website.

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Section 39 Requests

- ❖ Section 39 Requests are an important and useful tool contractors and subcontractors can use to obtain information about:
 - ❖ the status of accounts above you in the pyramid;
 - ❖ information about the type of mortgages on title as well as the amount and timing of advances made under the mortgage
 - ❖ whether a Labour and Material Payment Bond has been posted

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Section 39 Requests

- ❖ Section 39 Requests are an important and useful tool contractors and subcontractors can use to obtain information about:
 - ❖ whether a contract has been substantial performed;
 - ❖ whether liens arise on a lot-by-lot basis

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Section 39 Requests

- ❖ *Under the Construction Act*, the scope of the information that can be requested has been expanded to include:
 - ❖ a much more detailed status of accounts from those above you in the pyramid;
 - ❖ information about the sale of a *home* (given the protection *home buyers* have against liens);

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Section 39 Requests

- ❖ Under the **Construction Act**, the scope of the information that can be requested has been expanded to include:
 - ❖ information about deemed subcontract completion
 - ❖ information on leases and the extent to which a landlord is paying for the improvement
 - ❖ information about the phased release of holdback

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Publication Obligations

Under the **Construction Act**, the scope of what an Owner or Contractor may need to publish in the Daily Commercial News has also been expanded.

See our Guide on Section 39 Requests and Publication Obligations

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Publication of Notices

- ❖ Other notices which must be published in the *Daily Commercial News* (or as prescribed) include:
 - ❖ Notice of an intention to register a condominium
 - ❖ Notice of a lien against the common elements of a condominium (under the new provisions)

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The Construction Act

A Change Re: The Written Notice of Lien

- ❖ Previously any written form would do so long as it included the statutory requirements (liberally interpreted)
- ❖ Previously, it could be given in any way any other document could be given

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The Construction Act

Another Change Re: The Written Notice of Lien

- ❖ Now both the Written Notice of Lien and the Withdrawal of a Written Notice of Lien must be set out and given in a prescribed statutory form;
- ❖ Now, both the Written Notice of Lien and the Withdrawal of a Written Notice of Lien must be served as would an “originating process” under the Rules of Court.

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The Construction Act

FORM 1
WRITTEN NOTICE OF LIEN UNDER SUBSECTION 1(1) OF THE ACT
Date: _____

Notice given to: _____
Contract Reference

Notice given by: _____
Name

Notice given to: _____
Name

Notice given by: _____
Name

State of: _____
Province or Territory

Notice given to: _____
Name

Notice given by: _____
Name

State of: _____
Province or Territory

Contract Reference: _____
Number of the contract or other document to which this notice relates

Date: _____
Signature of the person giving notice

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The Construction Act

FORM 18
WITHDRAWAL OF WRITTEN NOTICE OF LIEN
UNDER SUBSECTION 41(2) OF THE ACT
(Construction Act)

Name of person having a lien: _____
 Address for service: _____
 Postal place if possible: _____

The person having a lien withdraws the written notice of lien dated the _____ day of _____, 20____
 in respect of an improvement to the premises owned by _____

Date: _____ www.kennaley.com

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BREACH OF TRUST

❖ The Onus to Account for Trust Funds:

The issue is clarified under the new *Construction Act*, which requires that a separate accounting ledger be kept to track all payments in and payments out in relation to a contract or subcontract.

This will have significant importance in the event of bankruptcy or insolvency

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The Construction Act

A Change Re: Liening the Leasehold interest

- ❖ Even where the landlord does not meet the definition of Owner, the Act now provides lien claimants with potential lien rights against the landlord:
 - ❖ if the lease contains a leasehold improvement clause that requires the landlord to pay a certain amount towards the improvement, the landlord is liable to the lien claimants for 10% of that amount
 - ❖ a s. 39 request is available to determine if there is such a leasehold improvement clause

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The Construction Act

A Change Re: Liening the Leasehold interest

- ❖ if the "Owner" of an Improvement is a mere tenant, with no more than a leasehold interest in the Premises, the lien will not attach to the land itself unless the landlord/owner on title also meets the definition of the "Owner" of the Improvement for the purposes of the Act;
- ❖ understanding who the "Owner(s)" of the Improvement are for the purposes of the Act is therefore important;

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The Construction Act

A Change Re: What is Lienable?

- ❖ The changes confirm that delay impacts are lienable:
 - Reasonable costs of the supply of additional services or materials (including equipment rentals), insurance and surety bond premiums, and costs resulting from seasonal conditions, that, but for the extension, would not have been incurred;
 - but not indirect damages, such as loss of profit, productivity or opportunity, or any head office overhead costs

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The Construction Act

A Change Re: What is Lienable?

- ❖ The changes now include a definition of "Capital Repair" which provide that any services or materials that increase the "productivity" of the land are now lienable in some circumstances

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PROMPT PAYMENT
and
ADJUDICATION

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Prompt Payment and Adjudication

Effective in relation to all contracts procured or entered into after October 1, 2019

All days set out in the *Act* are calendar days.

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Prompt Payment and Adjudication

The Problems Being Addressed by Prompt Payment and Adjudication

- ❖ funds being withheld for no, groundless or unsupportable reasons;
- ❖ changes that aren't reviewed or approved in a timely fashion;
- ❖ disproportionate deficiency holdbacks;
- ❖ disputes that get combined and need expensive litigation to resolve;
- ❖ contractors and subcontractors that end up financing projects;
- ❖ owners that feel they are at the mercy of the system

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Prompt Payment and Adjudication

- ❖ funds to be paid on strict timeframes unless a "notice of non-payment" is given;
- ❖ a complicated and strict series of notice requirements;
- ❖ the "interim" resolution of disputes in as early as 46 days or less.

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Prompt Payment

A "Proper Invoice" triggers the prompt payment obligations

- ❖ to be given monthly to the Owner unless the Contract provides otherwise
- ❖ what comprises a "proper invoice" can be set out in the Contract so long as it complies with the statutory requirements
- ❖ See our Guide for what must be included in a Proper Invoice and for issues surrounding the "giving" of the Proper Invoice

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Prompt Payment

A "Proper Invoice" triggers the prompt payment obligations

- ❖ Upon being given a Proper Invoice, an Owner must pay within **28 days** unless it gives the Contractor a Notice of Non-Payment **within the first 14 days**
 - ❖ **This is not a lot of time. The world is going to change for Owners and their Consultants. No-one can contract out of the requirement.**
 - ❖ The Payment Provisions of every CCDC and CCA contract will be invalid.
 - ❖ The Payment Provisions of virtually every form of contract or subcontract will be invalid unless it has been changed to comply with the *Act*.
 - ❖ **If there was ever a time to redo your form of contract or subcontract, that time is now.**

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Prompt Payment

A "Proper Invoice" triggers the prompt payment obligations

- ❖ Upon being given a Proper Invoice, an Owner must pay within **28 days** unless it gives the Contractor a Notice of Non-Payment **within the first 14 days**
- ❖ **This is not a lot of time. The world is going to change for Owners and their Consultants. No-one can contract out of the requirement.**
- ❖ Owners, Contractors and Consultants need to figure out a way to put the Owner in the best possible position to review and approve Proper Invoices in a timely fashion.
- ❖ Options include: a more engaged Consultant or Owner's Rep, more detailed backup requirements, the interim submission of backup and shared resources (including real-time software access).

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Prompt Payment

A "Proper Invoice" triggers the prompt payment obligations

- ❖ Upon being given a Proper Invoice, an Owner must pay within **28 days** unless it gives the Contractor a Notice of Non-Payment **within the first 14 days**
- ❖ **The Notice of Non-Payment has to be in a statutory form and be "given" in accordance with the Act.**
- ❖ the Notice of Non-Payment must set out the basis for the non-payment

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Prompt Payment

FORM 1.1
OWNER NOTICE OF NON-PAYMENT (SUBSECTION 6.4(2) OF THE ACT)
(Provincial Act)

Name of owner
NO2966

Description of project:

Name of contractor
N29236

Address for service of process:

The owner agrees to pay the proper invoice dated 20 submitted to the owner by the contractor if received at the above address. The owner will not pay the following amount (specify in the amount):

(Note: A or B, whichever is applicable)

A. The full amount of the proper invoice, being \$

B. A portion of the amount of the proper invoice, being \$

This notice is to be signed and dated by M.

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Prompt Payment

The Payment Obligations Repeat Down the Construction Pyramid

- ❖ each Payor must Pay within 7 days of the day it did, or should have, received payment unless it gives a Notice of Non-Payment to the person below
- ❖ again, the Notice of Non-Payment will set out the basis for the non-payment
- ❖ there are rules to deal with the distribution of partial payments
- ❖ if your reason for not paying the person below is that the person above did not pay you, you must undertake to take the person above to adjudication within 21 days.
- ❖ If your reason for not paying the person below you is for some other reason, you do not have to undertake to commence an adjudication.

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Prompt Payment

The Payment Obligations Repeat Down the Construction Pyramid

- ❖ In essence each payer, from the Contractor on down must:
- ❖ pay within 7 days of getting paid, or give a Notice of Non-Payment
- ❖ if not paid and no Notice of Non-Payment received, Pay within 7 days of the day he or she should have been paid, or give a Notice of Non-Payment;
- ❖ if not paid and a Notice of Non-Payment received, pay within 7 days of getting that Notice, or give a Notice of Non-Payment;
- ❖ if partially paid, distribute in accordance with the Act's pro-rata rules, unless you give a Notice of Non-Payment; and
- ❖ if your reason for giving a Notice of Non-Payment is that you were not paid by the person above you, bring the person above you to Adjudication in 21 days.

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Prompt Payment

The Payment Obligations Repeat Down the Construction Pyramid

- ❖ The prompt payment requirement *only applies to amounts included by the Contractor in its Proper Invoice to the Owner.*
- ❖ *There is no such thing as a "Proper Invoice" from a subcontractor, for the purposes of the Act.*
- ❖ *The timing or giving of a subcontractor's invoice does not trigger any payment obligations under the Act.*

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Prompt Payment

The Payment Obligations Repeat Down the Construction Pyramid

- ❖ We have Created Practical Cheat Sheets for Owners, Contractors and Subcontractors in relation to Prompt Payment.
- ❖ These reference not only your rights and obligations but, also, things you may want to consider vis-à-vis strategy and risk management.
- ❖ We have also included copies of the Notice of Non-Payment forms.z

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Prompt Payment

**FORM 1.2
CONTRACTOR NOTICE OF NON-PAYMENT WHERE OWNER DOES NOT PAY
(SUBSECTION 0.9.5 OF THE ACT)**

Contractor

Name of Contractor:

Address:

City:

Name of Subcontractor:

Name of the Owner:

Address of the Owner:

City:

Name of the Project:

Address of the Project:

City:

Name of the Project:

Address of the Project:

City:

Name of the Project:

Address of the Project:

City:

Name of the Project:

Address of the Project:

City:

Name of the Project:

Address of the Project:

City:

Name of the Project:

Address of the Project:

City:

Name of the Project:

Address of the Project:

City:

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Prompt Payment

**FORM 1.3
CONTRACTOR NOTICE OF NON-PAYMENT IF DISPUTE (SUBSECTION 8.5(1) OF THE ACT)**

Contractor

Name of Contractor:

Address:

City:

Name of Subcontractor:

Name of the Owner:

Address of the Owner:

City:

Name of the Project:

Address of the Project:

City:

Name of the Project:

Address of the Project:

City:

Name of the Project:

Address of the Project:

City:

Name of the Project:

Address of the Project:

City:

Name of the Project:

Address of the Project:

City:

Name of the Project:

Address of the Project:

City:

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Prompt Payment

FORM 1.4
SUBCONTRACTOR NOTICE OF NON-PAYMENT WHERE CONTRACTOR DOES NOT PAY (SUBSECTION 6(1) OF THE ACT)

Name of subcontractor: _____
Address: _____
Description of the premises: _____

Name of contractor: _____
Address: _____
(Complete for the subcontractor who supplied services or materials to an improvement to, addition to, or repair project)

Name of subcontractor: _____
Address: _____
Address for service of process: _____

The contractor submitted a proper invoice for payment in respect of the improvement on _____ 20____.

(Check if all applicable to applicable)

A. The subcontractor has not received payment for the materials or work supplied by subcontractor to the contractor as per the contract within the period specified in the contract or as per the contract or as per the contract.

B. The subcontractor is a subcontractor who is entitled to payment for the materials or work supplied by subcontractor to the contractor as per the contract within the period specified in the contract or as per the contract or as per the contract.

Amount of the claim: _____

(Check if all applicable to applicable)

A. The full amount of the services or materials supplied by the subcontractor, being \$ _____.

B. A portion of the amount of the services or materials supplied by the subcontractor, being \$ _____.

Reason for non-payment as follows:

The subcontractor understands that the contractor is obligated under Part 3.1 of the Construction Act, unless stated otherwise, to pay the subcontractor for the subcontractor.

A copy of this notice of non-payment is to be submitted to the contractor for a written response.

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Prompt Payment

FORM 1.5
SUBCONTRACTOR NOTICE OF NON-PAYMENT IF DISPUTE (SUBSECTION 6(1)) OF THE ACT)

Name of subcontractor: _____
Address: _____
Description of the premises: _____

Name of contractor: _____
Address: _____
(Complete for the subcontractor who supplied services or materials to an improvement or repair to the project premises)

Name of subcontractor: _____
Address: _____
Address for service of process: _____

The contractor submitted a proper invoice for payment in respect of the improvement on _____ 20____.

The subcontractor disputes the amount of another subcontractor in respect of an amount under the subcontract that was included in the proper invoice in accordance with subsection 6(1) of the Construction Act or subsection 6(1) of the Construction Act. The subcontractor will not pay the following amount:

(Check if all applicable to applicable)

A. The full amount of the services or materials supplied by the subcontractor, being \$ _____.

B. A portion of the amount of the services or materials supplied by the subcontractor, being \$ _____.

The reasons for non-payment are as follows:

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ADJUDICATION

FORM 1.6
SUBCONTRACTOR NOTICE OF NON-PAYMENT IF DISPUTE (SUBSECTION 6(1)) OF THE ACT)

Name of subcontractor: _____
Address: _____
Description of the premises: _____

Name of contractor: _____
Address: _____
(Complete for the subcontractor who supplied services or materials to an improvement or repair to the project premises)

Name of subcontractor: _____
Address: _____
Address for service of process: _____

The contractor submitted a proper invoice for payment in respect of the improvement on _____ 20____.

The subcontractor disputes the amount of another subcontractor in respect of an amount under the subcontract that was included in the proper invoice in accordance with subsection 6(1) of the Construction Act or subsection 6(1) of the Construction Act. The subcontractor will not pay the following amount:

(Check if all applicable to applicable)

A. The full amount of the services or materials supplied by the subcontractor, being \$ _____.

B. A portion of the amount of the services or materials supplied by the subcontractor, being \$ _____.

The reasons for non-payment are as follows:

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Adjudication

The following can be submitted to Adjudication:

- ❖ the valuation of services or materials provided;
- ❖ whether a payment is due, including under an unapproved or proposed change;
- ❖ the reasons for non-payment given under a notice of non-payment;
- ❖ Amounts retained by set-off under the *Act*;
- ❖ the payment or non-payment of holdback; and
- ❖ Any other issue agreed upon by the parties.

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Adjudication

The following can be submitted to Adjudication:

- ❖ **However, unless the parties agree otherwise**, an adjudication cannot be commenced after the contract or subcontract at issue has been completed!
- ❖ Parties should consider whether or not an agreement in this regard should be incorporated into a contract or subcontract.

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Adjudication

Giving a Notice of Adjudication:

There is no statutory form at this point.

The Act requires the following to be included:

- (a) the names and addresses of the parties;
- (b) the nature and a brief description of the dispute, including details respecting how and when it arose;
- (c) the nature of the redress sought; and
- (d) the name of a proposed adjudicator to conduct the adjudication.

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Adjudication

Giving a Notice of Adjudication:

There is no statutory form at this point.

The Notice of Adjudication will set the stage for the entire process, including the selection and approach of an adjudicator.

CARE NEEDS TO BE TAKEN IN DRAFTING THIS DOCUMENT:

to avoid jurisdictional issues and ensure the issues are set out so as to maximize the potential for a successful outcome.

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Adjudication

Adjudicators have substantial discretion and authority:

- ❖ to conduct the adjudication as he or she sees fit
 - this may mean a written hearing, only, with no examinations or argument
- ❖ to draw inferences and decide questions of law
- ❖ to retain third parties as required to assist in the analysis
- ❖ to perform a site visit in some circumstances

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Adjudication

Adjudicators have substantial discretion and authority:

- ❖ If the parties cannot agree on an adjudicator (who is on the list and who agrees to act) the Authority will appoint the next one on the list who is available and willing to do the work at the (often nominal) roster rates.
- ❖ If the Authority appoints the Adjudicator *no consideration will be given to the type or conduct of the matter or the particular expertise best suited to the dispute.*
- ❖ At present, 40-50% of an adjudicator's fee will be paid, by the adjudicator, to the Authority. Thus an adjudicator who is working for roster rates is actually working for 40-50% less than that (arguably) already low rate.

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Adjudication

The timelines are strict and tight:

- ❖ Parties have only **four calendar days** to agree on an Adjudicator who is on the list and who agrees to Act. If they do not, the party who gave the Notice of Adjudication must ask the Authority to appoint one.
- ❖ The Authority then has 7 days to appoint an Adjudicator from its list.

FOUR DAYS IS NOT A VERY LONG TIME!!

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Adjudication

Sophisticated parties should never, ever, let an adjudicator be appointed by the Authority

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Adjudication

Sophisticated parties should never, ever, let an adjudicator be appointed by the Authority

- ❖ Unfortunately, parties may not name the adjudicator in the contract or subcontract, (except in certain circumstances under a P3 Project).
- ❖ however, a list of adjudicators can (and often should) be agreed upon *after* the contract or subcontract is entered into.
- ❖ the contract or subcontract might also require the parties to agree on a list of adjudicators after the contract or subcontract is entered into.

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Adjudication

The timelines are strict and tight:

- ❖ Within *five days* of the appointment, the party who gave the notice must deliver the documents it intends to rely on. *This might be a difficult task.*
- ❖ The adjudicator will then decide what, and when, he or she wants by way of response.
- ❖ The adjudicator must then render a decision, in writing and with reasons, within the next *thirty days* (subject to an agreement that it be extended)
- ❖ the parties split the costs (subject to abuse of process or bad faith)

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Adjudication

Unless the parties agree otherwise:

- ❖ only one "matter" goes to adjudication at a time
- ❖ "matter", however, is not defined under the Act. Confusion may abound over whether or not a 75 item deficiency list raised in response to a Notice of Adjudication seeking payment on one disputed change will be considered more than one "matter".

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Adjudication

- ❖ Adjudication must follow the *Act's* procedures
 - the parties, however, may agree to the adjudication procedures in their contract or subcontract so long as these do not conflict with the provisions set out in the *Act*.

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Adjudication

The Adjudicator's Determination (or Decision)

- ❖ There is no right of appeal
 - (though applications for "judicial review" are possible, these will be rare)
- ❖ The decision is as enforceable as a monetary Judgment obtained from the Court
- ❖ A party who is owed money under a decision can stop work until it is paid
 - It is also entitled to interest and to any demobilization and other impact costs associated with the work stoppage, before remobilizing
 - If paid the above, it is entitled to its remobilization costs as well

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Adjudication

The Adjudicator's Decision is Interim

- ❖ The parties are always free to commence and pursue Court or Arbitration proceedings on the very same issues.
- ❖ An adjudicator's decision ceases to be enforceable if a Court or Arbitrator makes a final determination on the matter
- ❖ The adjudicator's decision can be used in evidence in a Court or Arbitration

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Adjudication

A Key To Remember:

- ❖ All adjudication does is truncate the time within which parties can get a (potentially interim) decision on an issue.
- ❖ Adjudication provides no security that a debt owed will actually be paid!
- ❖ If a claimant has any concern that the person who owes it money might not be able to pay, ***the claimant must not let its lien rights or other remedies expire!!!***

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Adjudication

Strategies in Preparing for Adjudication

- ❖ Putting the Consultant in the best possible position to decide whether or not to recommend that a Notice of Non-Payment be given;
- ❖ Using Contract and Subcontract terms to manage the process
- ❖ Ears to the ground for potential problems and disputes
- ❖ Better record keeping of time and material claims on a real time basis, if possible
- ❖ Better record keeping in relation to that causes and impacts of delay

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Adjudication

Strategies in Preparing for Adjudication

- ❖ See our Cheat Sheets for Commencing and Responding to an Adjudication
- ❖ See our Guide for Giving Documents under the Act.
- ❖ See our Guide to Readyng Contracts and Subcontracts for the Act.

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Client Seminars:

The Construction Act

Simcoe ❖ Toronto ❖ Barrie

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