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SHERRARD KUZ LLP
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**COVID-19 and CONSTRUCTION:
IDENTIFYING ISSUES and MANAGING RISK**



Rob Kennaley

Kennaley Construction Law

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The *Construction Act*

- ❖ Substantive changes already came into force* on July 1, 2018:
 - ❖ longer lien timeframes;
 - ❖ new contract termination provisions;
 - ❖ changes in holdback procedures;
 - ❖ new publication requirements
 - ❖ an expanded scope of the s.39 request
 - ❖ bonding on “public contracts”;
 - ❖ changes to what is lienable;
 - ❖ enhanced trust obligations;
 - ❖ re: the leasehold lien

* In relation to contracts procured or entered into after that date

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The *Construction Act*

- ❖ Substantive changes already came into force* on July 1, 2018:
- ❖ **areas** which can, will and should be addressed in contracts and subcontracts

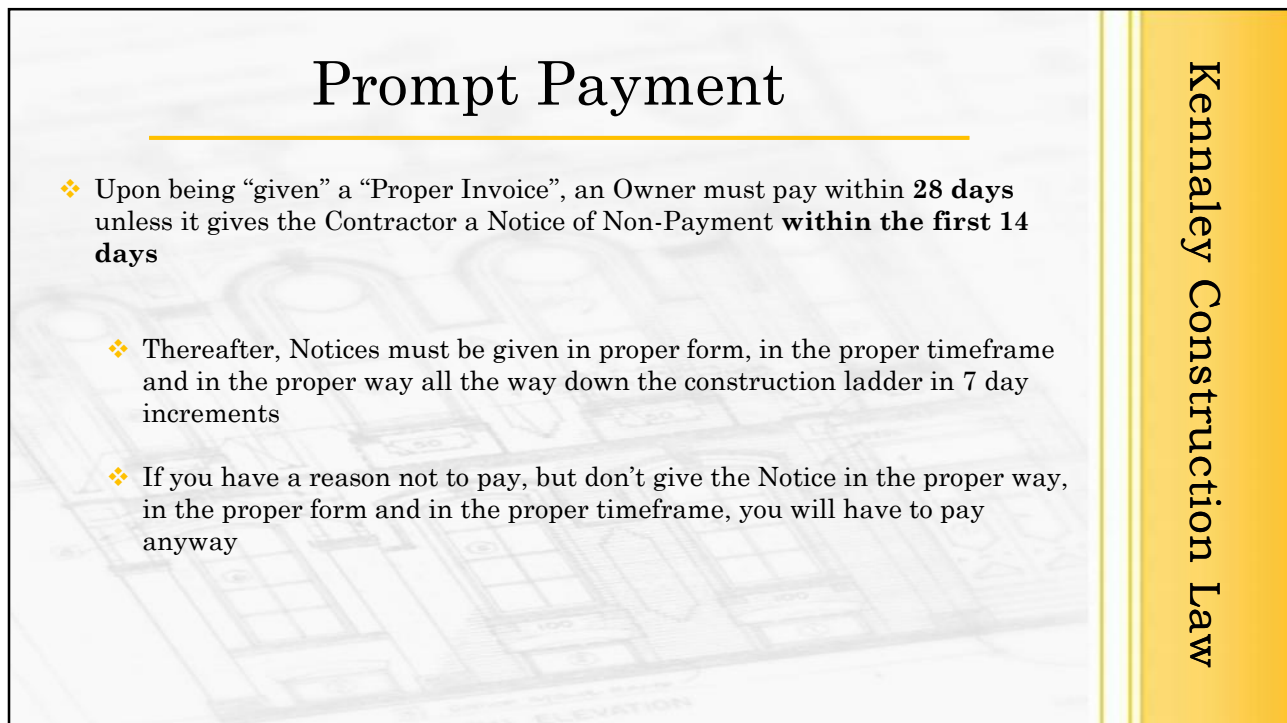
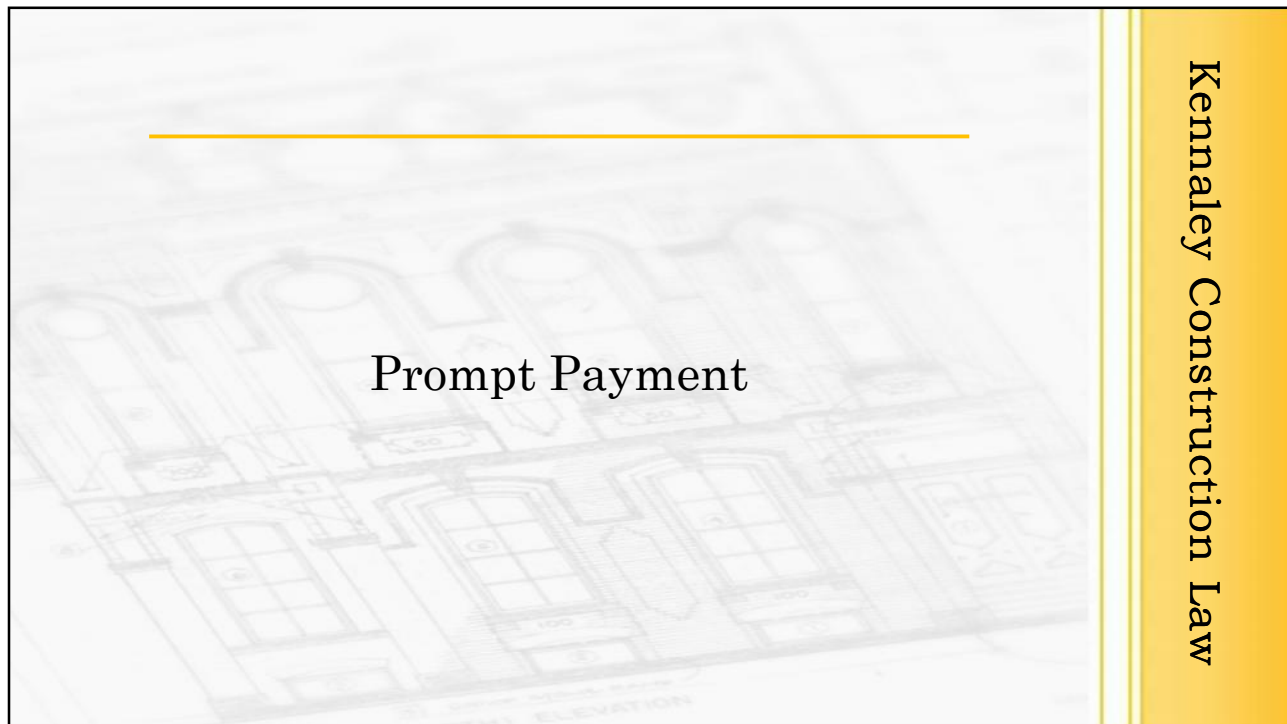
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- ❖ **new contract termination provisions**;
- ❖ **changes in holdback procedures**;
- ❖ **new publication requirements**
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- ❖ **bonding on “public contracts”**;
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The *Construction Act*

- ❖ Two ***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

* In relation to contracts procured or entered into after that date



Prompt Payment

- ❖ 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**
 - ❖ a Proper Invoice must be given by the Contractor to the Owner monthly 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
 - ❖ approval by the Owner or a Consultant cannot be a condition precedent to giving a Proper Invoice

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Prompt Payment

- ❖ 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

- ❖ 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

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.

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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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Prompt Payment

FORM 1.2
CONTRACTOR NOTICE OF NON-PAYMENT WHERE OWNER DOES NOT PAY
(SUBSECTION 6.5(5) OF THE ACT)
Construction Act

Name of contractor:

Address:

Description of the premises:

Name of subcontractor:

Address:

Address for service, if known:

The contractor submitted a proper invoice to the owner in respect of the improvement on 20.....

The contractor has not received payment from the owner and will not pay the subcontractor the amount under the subcontract that was included in the proper invoice within the time specified in subsection 6.5(1) of the Construction Act.

Amount that will not be paid:
(Use A or B, whichever is 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 contractor hereby undertakes to refer the matter to adjudication under Part II.1 of the Construction Act, no later than 21 days after giving this notice of non-payment to the subcontractor.

A copy of the Notice of Non-Payment under Subsection 6.4(2) of the Act is enclosed.

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Prompt Payment

FORM 1.3
CONTRACTOR NOTICE OF NON-PAYMENT IF DISPUTE (SUBSECTION 6.5(6) OF THE ACT)
Construction Act

Name of contractor:

Address:

Description of the premises:

Name of subcontractor:

Address:

Address for service, if known:

The contractor submitted a proper invoice to the owner in respect of the improvement on, 20

The contractor disputes the entitlement of the subcontractor to payment of an amount under the subcontract that was included in the proper invoice. The contractor will not pay the following amount:

(Use A or B, whichever is 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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Prompt Payment

FORM 1.4
SUBCONTRACTOR NOTICE OF NON-PAYMENT WHERE CONTRACTOR DOES NOT PAY (SUBSECTION 6.6(6) OF THE ACT)
Construction 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 in relation to the proper invoice)

Name of subcontractor:

Address:

Address for service, if known:

The contractor submitted a proper invoice to the owner in respect of the improvement on, 20

(Use A or B, whichever is applicable)

A. The subcontractor has not received payment from the contractor and will not pay the subcontractor the amount under the subcontract that was included in the proper invoice within the time specified in subsection 6.6(1) of the Construction Act.

B. *(Non-payment to a subcontractor who is entitled to payment from a subcontractor in accordance with subsection 6.6(1) of the Construction Act. The subcontractor has not received payment from the subcontractor and will not pay another subcontractor the amount payable under the subcontract that was included in the proper invoice within the time specified in subsection 6.6(1) of the Construction Act.)*

Amount that will not be paid:

(Use A or B, whichever is 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 \$

(Include the following where applicable)

The subcontractor hereby undertakes to refer the matter to adjudication under Part II.1 of the Construction Act, no later than 21 days after giving this notice of non-payment to the subcontractor.

A copy of any notice of non-payment received by the subcontractor is enclosed.

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Prompt Payment

FORM 1.5
SUBCONTRACTOR NOTICE OF NON-PAYMENT IF DISPUTE (SUBSECTION 6.6(7) OF THE ACT)
Construction 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 in relation to the proper invoice)

Name of subcontractor:

Address:

Address for service, if known:

The contractor submitted a proper invoice to the owner in respect of the improvement on , 20

The subcontractor disputes the entitlement of another subcontractor to payment of an amount under the subcontract that was included in the proper invoice in accordance with subsection 6.6(7) of the Construction Act or subsection 6.6(11) of the Construction Act. The subcontractor will not pay the following amount:

(Use A or B, whichever is 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

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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

- ❖ ***However, unless the parties agree otherwise***, an adjudication cannot be commenced after the contract or subcontract at issue has been completed!
- ❖ This makes Adjudication virtually unavailable on contracts or subcontracts that take less than 1 month to complete.
- ❖ **Parties should consider including an agreement in this regard in their contracts and subcontracts**

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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 to maximize the potential for a successful outcome.

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

Four Days to Agree on an Adjudicator

- ❖ Adjudicators come from various backgrounds and have differing expertise
- ❖ At present, 40-50% of an adjudicator's fee will be paid, by the adjudicator, to the 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 (often nominal) roster rates.
- ❖ ***Where the Authority chooses, no consideration will be given to the type or conduct of the matter or the particular expertise best suited to the dispute.***
- ❖ Where the parties chose the adjudicator, they can dovetail to the dispute to his or her expertise and agree to pay more than roster rates.

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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

- ❖ 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)

Adjudication Processes

- ❖ 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**.
 - Should you agree on what the Adjudicator must do?
 - Hear witnesses?
 - Allow for responding reports and evidence?
 - Allow cross-examinations?
 - Should you agree on what the Adjudicator must *not* do?
 - ex. meet parties independently? (not a good idea)

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

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!!!***

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 Reading Contracts and Subcontracts for the *Act*.
- ❖ Prepare Contracts and Subcontracts to manage the risk and the processes!

Keep Yourself Informed!

- ❖ under the new provisions, many of the *Act*'s processes and requirements are now included in the Regulations;
- ❖ this means changes to the *Act* will be done through changes in the Regulations, without the need for three readings in the Legislature, etc.
- ❖ Changes will be coming, at times with very little notice or fanfare.
- ❖ You need to have resources in place to keep yourself informed!!!

Be Prepared!

COVID-19. Prompt Payment. Adjudication.

Construction Risk Will Never be the Same.

To assist, we have fixed reasonably-priced packages available for contract and subcontract preparation. We are also offering a 15% discount to exiting clients and those who have attended our webinars!

Be Ready. The Need to Manage the New Risks Cannot be Overstated.

Please contact the lawyer you have been working with, or inquiries@kennaley.ca, for more information.

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