Ontario Construction Act
Trade Contractors Guide

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As with any new legislation, the information contained in this Guide is subject to judicial interpretation and clarification, and possible change.

Users are encouraged to obtain legal advice as necessary in connection with their specific requirements.

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1. Introduction

Construction Act replaces the former Construction Lien Act

Ontario's new *Construction Act* (the "**Act**") replaces the former *Construction Lien Act* (the "**CLA**") which has been in effect since 1983.

The Act contains the most sweeping set of reforms governing construction payment obligations that the industry has seen in more than a generation.

In addition to updates to the former CLA, the Act prescribes a mandatory prompt payment regime and a system for the fast-track adjudication of payment disputes. The objectives of the Act include ensuring that payments flow down the construction pyramid faster, and that disputes over payments are dealt with much more quickly and efficiently.

It is essential that all participants in construction become familiar with the Act, in order to take advantage of their new rights and to understand their new obligations.

The differing roles of the trade contractor

This Guide is primarily intended for trade contractors. Much of the time, trade contractors will be contracting with someone other than the owner, whether as subcontractors to the general contractor or as sub-subcontractors to other trade contractors. There are situations, however, where trade contractors will contract directly with an owner, for example in a multi-prime construction management project.

There will be situations where trade contractors are the ultimate payee, that is, the party at the bottom of the construction pyramid of payment flows with no downstream parties to whom they owe payments. However, there will also be times when trade contractors, like general contractors, will be intermediate payers with both payment obligations to others downstream and rights to receive the payments upon which they depend from upstream.

It is therefore **very important that on each project, the trade contractor is attuned to whether they are the contractor or subcontractor** as those terms are used in the legislation, and whether it is an ultimate payee or an intermediate payer. This Guide will necessarily cover these various contracting scenarios by which the trade contractor will carry on business.

How terms are used

The Act continues the practice under the CLA of defining frequently used terms and then using those terms precisely. This Guide will do the same. And so, for example, the term "**contractor**" as used in the Act always means the entity contracting with or employed directly by the owner. While this will typically be the general contractor, a trade contractor who contracts directly with an owner will also be a "contractor" under of the Act.

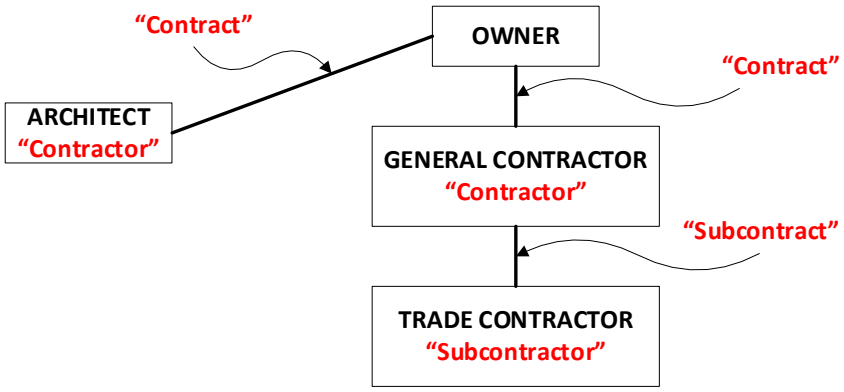
Likewise, this Guide will always use the term "contractor" to mean a party directly contracting with the owner. As a reminder and for the sake of clarity, the Guide will sometimes also use the terms "general contractor" and "prime contractor", and it should be understood that these will be synonymous with "contractor" as that term is used in the Act.

The term "**contract**" under the Act always means the contract to which the owner is a party. Again, as necessary for the sake of clarity, this Guide will sometimes use the equivalent terms "general contract" and "prime contract".

The Act uses the term "**subcontractor**" to cover anyone who does not contract directly with an owner but who supplies services or materials under an agreement with a contractor or with another subcontractor. The term "**subcontract**" has a corresponding meaning. A trade contractor hired by a general contractor, or a material or equipment supplier hired by a trade contractor, will always be a "subcontractor" within the meaning of the Act.

These concepts are illustrated in Figure 1 below:

Example 1



Example 2

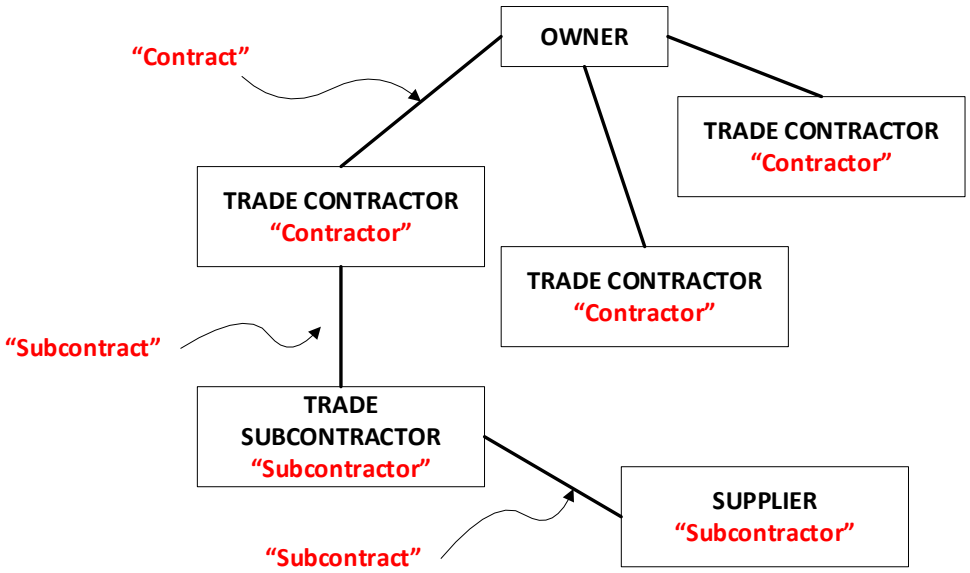


Figure 1: How the terms "contract", "contractor", subcontract" and "subcontractor" are used in the Act

2. When do we follow the new rules?

KEY POINTS

- The transition from the old CLA to the Act is two-stage process, tied to the date of the prime contract or the commencement of its procurement, whichever is earlier.
- The lien reform provisions are effective for all contracts dated or procured from July 1, 2018 onwards.
- The prompt payment and adjudication provisions are effective for all contracts dated or procured from October 1, 2019 onwards.
- The date of the subcontract is irrelevant.

The three broad categories of change

The changes introduced by the Act fall into three broad categories:

(a) reforms and updates to the lien remedy;

(b) introduction of a prompt payment regime; and

(c) introduction of an adjudication system to resolve valuation and payment disputes, as well as any other disputes which the parties agree to refer to adjudication.

The reforms and updates to the lien remedy are relatively straightforward. The new prompt payment regime and adjudication system, however, are more far-reaching in their scope and were considered to require a period of education and adjustment throughout the industry. Because of this, the Act prescribed a two-stepped transition period between the old CLA and the Act itself, the first of which (lien reform and update) commenced effective July 1, 2018 and the second of which (prompt payment and adjudication) became effective on October 1, 2019.

Transition rules tied to date of the contract

The transition rules are tied to the date of the contract or the commencement of procurement for the contract, whichever is earlier. For tendered work, the date procurement commenced will typically be the critical date, while for sole-sourced negotiated work, the date of the contract itself will likely be applicable.

Definition of procurement process

The Act defines the commencement of a procurement process as the earliest of the following:

(a) a request for qualifications;

(b) a request for quotation;

(c) a request for proposal; and

(d) a call for tenders.

The transition rules can be illustrated in Figure 2 below:

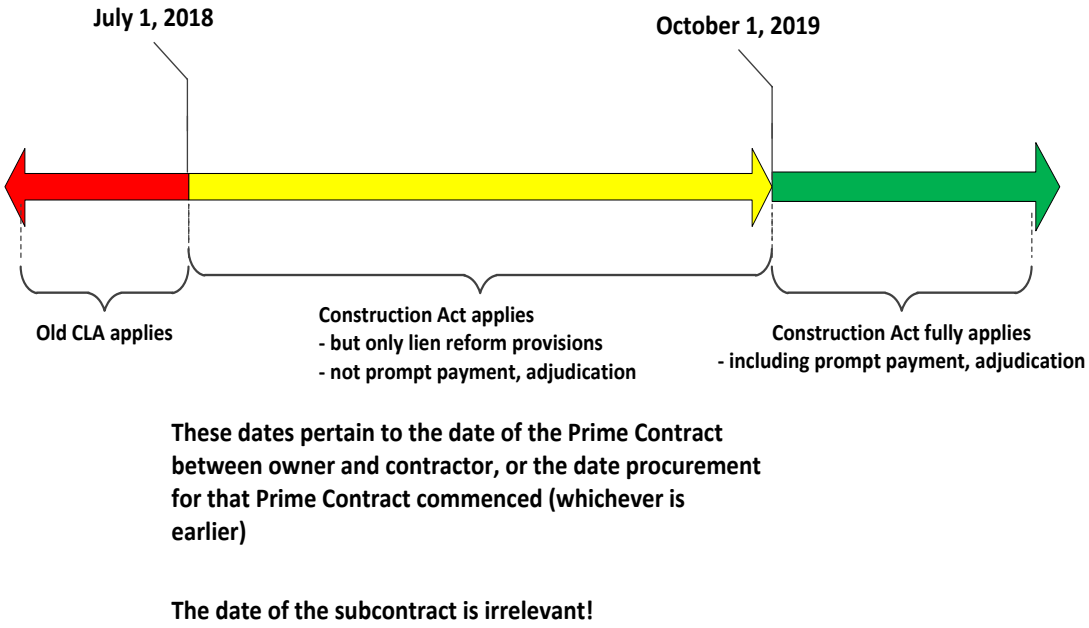


Figure 2: Transition Rules

Since the transition rules are tied to the date of the prime contract or its procurement, the date of the subcontract is irrelevant. To illustrate:

(a) A subcontract entered into in October, 2018 for an improvement which began with a request for qualifications issued in June, 2018 will be governed by the old CLA, and the Act will have no application whatsoever to that subcontract.

(b) A subcontract entered into in October, 2018 for an improvement where the procurement process commenced with a request for proposal issued in August, 2018 will be governed by the Act insofar as the lien reform provisions are concerned. For example, the lien period applicable to such a subcontract will be 60 days, not the 45 days prescribed under the CLA. However, the prompt payment and adjudication provisions will not apply.

(c) A subcontract entered into in December, 2019 for an improvement where the procurement process commenced with a request for proposal issued in November, 2019 will be governed by all of the provisions of the Act, including prompt payment and adjudication, and the old CLA will have no application whatsoever.

Tips for the trade contractor

1. Determine at the time of bid whether the prime contract is governed by the CLA or the Act. Do this by ascertaining the date of the prime contract, or the date on which the procurement of the prime contract commenced.

2. There are several possible ways to do this, including:

   (a) obtain a copy of any tender documentation issued by the owner for the improvement, and review this carefully to ascertain whether it contains information concerning which statute is considered by the owner to govern the project;

   (b) seek written confirmation from the contractor soliciting the subcontract bid as to the date of the contract or commencement of the procurement process for the contract; and

   (c) send a written request for information to the owner pursuant to s. 39 (1) of the Act, seeking confirmation of the date the contract was entered into and the date on which any applicable procurement process was commenced.

3. If there be any doubt about which statute governs, take the conservative approach and, for example, assume the lien period governing your subcontract is 45 days and plan collection efforts accordingly.

3. Reviewing tender documents

KEY POINT

- The prime contract assumes a new importance in the subcontract relationship, and **a prudent trade contractor entering into a subcontract should pay special attention to that prime contract.**

There are a number of features of the Act which impact trade contractors and suppliers and which must be set out in the prime contract. The prime contract therefore assumes a new importance to the subcontractor, particularly during the bid phase.

The following should be added as items to any checklist used as part of the normal review of the tender documents undertaken prior to deciding to bid and setting the price:

1. Is the owner a "municipality", as that term is broadly defined in the Act? (See Section 5.3 of the Guide) ***Municipality owner***

2. Are invoices to be delivered monthly, on a milestone basis, or with some other frequency? (See Section 6 of the Guide) ***Timing of invoices***

3. Are there any additional project-specific requirements for a proper invoice? (See Section 6.1 of the Guide) ***Proper invoice***

4. Are there provisions providing for annual or phased holdback release? If phased release, are the phases set out? (See Sections 5.4 and 5.5 of the Guide) ***Holdback release***

5. If multiple projects are contemplated under a single contract on lands which are not contiguous, is each project deemed to be separate contract for purposes of determining substantial performance (and therefore, holdback release)? ***Multiple improvements, single contract***

4. What are my rights to information?

KEY POINTS

- The rights to information that parties enjoyed under section 39 of the old CLA have been continued in the Act and expanded.
- Information which parties may now obtain includes:
  - the date the prime contract was entered into and the date when the procurement process for that prime contract commenced;
  - whether the prime contract provides for payment on a phased or other milestone basis; and
  - where tenant improvement work is being done, the names of parties to any lease, the amount of any tenant inducement being provided by the landlord and the state of accounts between the landlord and tenant concerning that tenant inducement.
- A subcontractor may also obtain information from the prime contractor concerning the date any proper invoice was given to the owner.

The increased need for information

The Act places an increased emphasis upon information which the parties need in order to use the lien, prompt payment and adjudication remedies effectively.

Information needed by a trade contractor

Particularly when acting as a subcontractor, a trade contractor needs access to various pieces of information, for various purposes, from both parties with whom it intends to contract and from others. For example, a trade contractor will need to know:

(a) whether the old CLA or the Act applies to its subcontract, or in other words, the date of the prime contract or the date of commencement of the procurement process for that prime contract;

(b) the size of the holdback fund which it might access;

(c) whether or not there is a labour and material payment bond which might be available to protect its account;

(d) whether the prime contract provides for payment on phases or at milestones; and

(e) the date when proper invoices are given to the owner.

Some of this information will be available in the prime contract under which the trade contractor will subcontract and/or the tender documents made available to the trade contractor. **It is important to review this documentation!**

Apart from this, the Act provides for certain rights to information which both preserve and expand rights which were available in the old CLA. These are set out in the sections which follow.

4.1. General rights to information

Under s. 39 of the Act, a subcontractor may request the following information, from the following parties:

From the owner or the contractor

1. The names of the parties to the contract

   - *This will be useful in confirming the identity of the parties upstream of the subcontractor for purposes of any lien.*

2. The date on which the contract was entered into and the date on which any applicable procurement process was commenced

   - *This will allow the subcontractor to confirm which legislation applies under the transition rules, whether the CLA or the Act.*

3. The contract price

   - *This will allow the subcontractor to ascertain the amount of holdback available for distribution.*

4. The state of accounts between owner and contractor

   - *This will allow the subcontractor to know whether there are payables owing by the owner to the contractor in addition to holdback, which funds might potentially be also available to the subcontractor.*

1.	The names of the parties to a subcontract and the date the subcontract was entered into ▪ *This will be useful in determining the identities of other subcontractors upstream in the contractual chain through which payments flow, as well as other purposes, such as coordinating collection efforts among several subcontractors where appropriate.*	***From the contractor or a subcontractor***
2.	The state of accounts between the contractor and a subcontractor, or between one subcontractor and another subcontractor ▪ *This will assist a subcontractor in determining the amount of holdback available within its particular chain of contracts.*	
3.	A statement of whether the subcontract contains a provision requiring certification of the subcontract ▪ *Certification of a subcontract, while infrequent in practice, is one of the potential trigger dates starting the lien period of that subcontractor.*	
4.	A statement of whether a subcontract has been certified complete ▪ *See comment above*.	
5.	A copy of any labour and material payment bond posted by the contractor *This is an extremely useful right, entitling the subcontractor access to a bond under which it may have a right to recover payment.*	

1.	The name and address of the purchaser, the selling price, the amount paid prior to closing, the scheduled closing date, the legal description of the premises	***From the owner selling the owner's interest in a home***
2.	The date of issuance of an occupancy permit or the certificate of completion and possession issued under the *Ontario New Home Warranties Plan Act* ▪ *This information will be useful for trade contractors doing residential construction, particularly for purposes of determining the timing of their lien rights where sales of homes are pending.*	

1.	The names of the parties to the lease	***From the landlord***
2.	The amount of any payment for all or part of the improvement made or to be made by the landlord to the tenant, whether accounted for under the terms of the lease or any renewal, or under any other agreement connected to the lease	
3.	The state of accounts between landlord and tenant concerning those tenant inducements for which the landlord is responsible. ▪ *This information will be useful to a trade contractor doing tenant improvement work, particularly for purposes of determining the landlord's new liability under the Act for payment of up to 10% of the amount of that tenant inducement given by landlord to tenant.*	

1.	Sufficient details concerning a mortgage to be able to determine if the mortgage was taken for the purpose of financing the improvement	***From mortgagee or unpaid vendor***
2.	A statement showing the amounts advanced under the mortgage, the dates of advances, and any arrears in payment	
3.	A statement showing the amount secured under any agreement of purchase and sale, and any arrears in payment ▪ *This information will be useful in determining whether or not there is a priority by the trade lien claimant over any mortgage on the property, as well as the extent of that priority.*	

1.	The trustee of a workers trust fund may inspect the payroll records of any contractor or subcontractor respecting workers who are beneficiaries of the fund ▪ *This right to information assists trade unions in the enforcement of their rights to secure payment of trust fund contributions.*	***From trustee of workers trust fund***

1. A contractor must within a reasonable time provide, to any person requesting it, confirmation of the date and location of publication of any CSP

Respecting publication of a certificate of substantial performance

- *This assists the trade contractor in determining one of the potential trigger dates for its lien period. In practice, most trade contractors will simply search the applicable data base: see Section 8 of this Guide.*

When information to be provided

The obligation to provide this information, in most cases, is within a reasonable time not to exceed 21 days.

Liability

If the information provided is misstated, there is potential liability to the person requesting it, for the damages suffered as a result. If there is a failure or refusal to provide information, the court can order it to be given, together with costs.

4.2. Right to information regarding date when proper invoice is given

A new and very important right to information is contained in s. 6.6 (10) of the prompt payment provisions in the Act.

Date proper invoice given

By that section, a subcontractor may request that a contractor provide the subcontractor with confirmation of **the date on which the contractor gave a proper invoice to the owner.** The contractor's obligation under that section is to provide this information "as soon as possible".

Tips for the trade contractor

1. The information rights provided under the Act can be a very useful tool in acquiring information in connection with a project and the various entities participating in it.

2. As necessary, you should **always** inquire to obtain information concerning at least whether the prime contract provides for phased or other milestone payments, and to obtain a copy of any labour and material payment bond under which you might be able to claim.

3. To exercise the right, send a simple letter or email to the recipient. Then follow up in 21 days if necessary, reminding the recipient of their obligation to respond. If appropriate, remind the recipient of your right to obtain a court order to compel a response, together with costs.

4. Always inquire concerning the **date proper invoices are given by the contractor to the owner**. That date will be essential in determining the timing of your right to timely payment. The obligation is to provide this information "as soon as possible", and the 21 day rule mentioned above does not apply.

5. There is no requirement for how this inquiry can be made. One method of inquiry would be to do this with each invoice submitted to the contractor. Better still: **establish a procedure with the contractor at the outset for the provision of this information automatically throughout the life of the project**.

5. Changes to the lien process

The Act contains a number of changes and updates to the lien remedy, some of which are of a technical nature, others being more substantive.

This Guide will focus on those substantive changes which will be of direct interest to trade contractors.

5.1. Time period to lien

KEY POINTS

- The time to preserve a lien is now 60 days, not 45 days.
- Lien period can be extended beyond 60 days where an adjudication has been commenced for the same matter that is the subject matter of a lien.
- The time to perfect a lien is also now extended to 90 days following the last day on which the lien could have been preserved.

When liens arise and expire

The basic scheme in the CLA remains unchanged in the Act, namely that liens are deemed to arise upon the first supply of labour, services or materials, and those liens are deemed to expire unless they are preserved and perfected within the strict time limits which the legislation prescribes.

Preservation of liens

A lien is preserved in one of two ways:

1. where the lien attaches to the premises, by registering a claim for lien in the proper land registry office where title to the improved lands is recorded; or
2. where the lien does not attach to the premises (in the case of liens on public streets or highways, premises owned by the Crown, a Crown agency or a municipality, or a railway right-of-way), by giving a copy of the claim for lien to the appropriate representative of the owner.

Perfection of liens

After preservation, a lien must be perfected by commencing a legal action to enforce the lien and, unless the lien has already been vacated from title, by registering a certificate of action on title. The time period to perfect has also been increased to 90 days next following the last day on which the lien could have been preserved.

Now 60 days to lien

The CLA prescribed a 45 day period for preserving a lien. The Act now increases this to 60 days. This extended time was considered necessary to

better align the lien remedy with the timing provisions in the prompt payment and adjudication schemes in the Act. As an added benefit, this extended time allows the parties more opportunity to resolve any payment issues before being forced into a decision to either lien or forego that remedy.

Trigger date for commencement of lien period

A subcontractor is "any other person", as that phrase is used in the Act's provisions governing timing of lien rights. Under s. 31 (3) of the Act, the trigger date for the start of the 60 day lien period for any other person is the earliest of:

(a) the date of publication of a certificate or declaration of substantial performance of the prime contract;

(b) the date of last supply of services or materials by the subcontractor;

(c) the date the prime contract is completed, abandoned or terminated; and

(d) the date the subcontract is certified completed under s. 33.

In practice, the most common triggers will be the date of last supply by the subcontractor or the date of publication of the certificate of substantial performance ("CSP") of the prime contract. Subcontractors engaged throughout the project or those coming on near the end should be particularly conscious that their 60 day lien period may commence with the publication of the CSP, which may occur before they complete their last work.

Extended lien period where adjudication commenced

The Act allows for an extension to this time in cases where the payment issue, which is the subject matter of a lien, is also the subject of an adjudication. In those cases, and provided that an adjudication is commenced before the lien expires, the time period to preserve a lien is deemed to be effectively extended to the later of (a) the day on which the lien would otherwise have expired under the 60 day time limit mentioned above, and (b) 45 days following the receipt by the adjudicator of the documents required from the claimant under s. 13.11.

Those documents which are required to be provided under s. 13.11 are a copy of the notice of adjudication, the contract or subcontract, and any documents which the claimant intends to rely upon in the adjudication. The deadline to provide these is no later than 5 days after the adjudicator consents to act or is appointed.

Need for caution!

The purpose of the extension of lien rights under these circumstances is to allow the claimant the possibility of resolving the problem through adjudication without incurring the additional expense of preserving a lien which may become unnecessary if the adjudicator rules in its favour and

payment is made. But claimant subcontractors should be cautious about this.

As an illustrative example, consider the excavating subcontractor who performs its last work on May 1st. Since the certification of substantial performance of the project is long into the future, it is this date of last work (May 1st) that starts the excavator's 60 day lien period. If there is a payment issue and the excavator does not pursue adjudication, its lien will expire on June 30, being 60 days after its date of last supply.

If, however, the excavator commences an adjudication by notice to adjudicate delivered on, say, June 28th, its lien period will be deemed extended to 45 days after the adjudicator receives the excavator's documents required under s. 13.11.

Assuming the adjudicator nominated by the excavator immediately accepts the appointment, the excavator will have 5 days to deliver the documents required by s. 13.11, i.e. until July 3rd. If the excavator gives its documents on July 3rd, its lien rights will expire 45 days thereafter, on August 17th.

The adjudicator will have until August 3rd to render a determination, being 30 days after receiving the excavator's documents. Assuming the excavator wins at adjudication, and its payer complies with the 10 day time limit to pay the amount found owing upon the adjudicator's determination, there would be no need for the excavator to lien since it would receive its money before its extended lien rights expired on August 17th.

However, there are circumstances in which the excavator might unwittingly lose its lien rights even allowing for the 45 day extension. For example, the 30 day time limit for the adjudicator's determination might be extended by agreement of the parties and the adjudicator. Or the payer might not pay within the required 10 days after determination. Or the payer might initiate an application seeking leave for judicial review of the adjudicator's determination. Any of these could extend the date by which the excavator receives its money, and if the excavator did not preserve a lien in the meantime, it may find itself having given up perhaps the only remedy by which it might ultimately recover payment.

The key point for the trade contractor in these circumstances is to remain vigilant about timing, and if there be any doubt, to consult legal counsel to assist.

Tips for the trade contractor

1. As always, be cognizant of lien rights and the time limit for preserving any lien which may be necessary.

2. Remember that if you are a subcontractor, your lien period begins on the earliest of (1) your date of last supply; (2) the date of publication of a certificate or declaration of substantial performance of the prime contract; (3) the date the prime contract is completed, abandoned or terminated; and (4) the date your subcontract is certified completed under s. 33.

3. While court declarations of substantial performance are rare, the issuance and publication of CSPs remains very common. See Section 8 of this Guide, Expanded publication requirements, for important information concerning how published CSPs should now be searched.

4. If pursuing an adjudication to get paid, consider whether a lien might also be necessary to secure payment. Keep in mind the extended deadline to lien in those circumstances but remember that an adjudication must be commenced before your lien period would otherwise expire. Also keep a close eye on that extended deadline. Payment upon any successful adjudication should be received before your extended lien rights expire.

5.2. When do we get substantial performance?

KEY POINT

- Substantial performance may now be achieved earlier, with the result that holdback release may also occur earlier.

Substantial performance remains a key concept in the Act, but the monetary threshold has been updated to account for inflation in contract values since the CLA was enacted. While the CLA calculated that threshold using $500,000 increments, the Act uses $1,000,000.

Substantial performance is reached when the improvement is capable of completion or correction of known defects at a cost of not more than:

The new "3/2/1" formula

- 3 per cent of the first $1,000,000 of the contract price;
- 2 per cent of the next $1,000,000 of the contract price; and
- 1 per cent of the balance of the contract price.

Second part of the test remains unchanged

The second part of the two-part test for substantial performance remains unchanged: the improvement to be made under the contract must be ready for use or being used for its intended purpose.

The effect of the change in the monetary threshold is that substantial performance will be achieved earlier. To illustrate: assuming a $5 million contract price, substantial performance under the old CLA will be achieved when the price of completion or correction was $65,000 or less. Under the Act, substantial performance will be achieved when the price of completion or correction is $80,000 or less. As always, the improvement or a substantial part of it must also be ready for use or being used for its intended purpose.

5.3 Liening a municipality

KEY POINTS

- The definition of "municipality" in the Act is very broad, including not only the obvious municipal entities but also local boards of various kinds.
- It is important for subcontractors to know whether or not the owners of their projects are "municipalities", because the procedure for preserving any lien upon such projects is unique and must be followed.
- If there is any doubt about this, a prudent subcontractor should get legal advice early.

Municipal lands are perfectly capable of being liened, but trade contractors should be cognizant of two important matters:

(a) the broad definition of "municipality" and the many entities that fall within that definition; and

(b) the special procedure for liening municipal lands contained in the Act.

Broad definition of "municipality"

A "municipality" as defined in the Act is a municipality within the meaning of the *Municipal Act, 2001* and a local board within the meaning of the *Municipal Act, 2001* or the *City of Toronto Act, 2006*. There are 444 municipalities in Ontario which fall within the purview of that legislation.

The *Municipal Act, 2001* defines "local board" as "a municipal service board, transportation commission, public library board, board of health, police services board, planning board, or any other board, commission, committee, body or local authority established or exercising any power under any Act with respect to the affairs or purposes of one or more municipalities, excluding a school board and a conservation authority".

The *City of Toronto Act, 2006* defines a "local board" as "a city board, transportation commission, public library board, board of health, police services board, planning board, or any other board, commission, committee, body or local authority established or exercising any power under any Act with respect to the affairs or purposes of one or more municipalities, excluding a school board and a conservation authority."

A very wide range of bodies can fall within these definitions. Trade contractors should be conscious of this when performing work on a project where the owner may qualify as a "municipality", and should make inquiries and seek legal advice as necessary to confirm whether or not that owner entity is indeed a "municipality" within the definition in the Act.

Special procedures for liening "municipalities"

This is important because the procedure for liening municipal lands is different than usual, and must be followed. A lien on municipal lands is not preserved by registering a claim for lien on title. Instead, a copy of the claim for lien is given to the clerk of the municipality. This is because a lien does not attach to the interest of a municipality in the property, but instead constitutes a charge upon the holdbacks which the municipality is required to retain (as well as any additional amounts owed by the municipality to the contractor in relation to the improvement after taking into account set-offs that the owner may claim against the contractor on account of claims related to the improvement). Liening the land itself is therefore inappropriate.

Regulation 304/18 under the Act sets out the specific manner in which the claim for lien is "given". Under section 11.1 of that Regulation, a municipality may publish on a website the details for the giving of a copy of a claim for lien to the clerk, which may involve one or both of the following methods:

1. sending a copy of the claim for lien by email to a specified email address; and

2. completing and submitting a claim for lien through a specified web portal.

If the municipality prescribes a method for giving a claim for lien, that method must be followed. For example, the City of Toronto has prescribed the following web-based method of preserving liens against properties in which the City or its agencies has an interest: https://www.toronto.ca/business-economy/doing-business-with-the-city/claim-for-lien.

Need for special care when working on muncipal projects

Trade contractors working on municipal projects should therefore exercise special care – both in determining whether the owner upon such projects is indeed a "municipality" within the broad definition in the Act, and in preserving their liens properly. The consequences of failing to do so can mean the loss of lien rights. A prudent trade contractor should consult legal counsel as necessary, preferably well before any lien may become necessary.

Tips for the trade contractor

1. Remember that the definition of "municipality" is very broad, and includes local boards of various kinds.

2. When subcontracting on a project in which the owner is, or may be, a "municipality" as defined under the Act, obtain a copy of the prime contract to confirm the specific identity of the owner entity.

3. If the prime contract is not available, send a request for information under s. 39 of the Act to the contractor, requesting confirmation of the names of the parties to the prime contract.

4. At an early point in the project, determine the correct procedure to preserve any claim for lien that may become necessary. It is possible that this information may be posted on a website. Do this well before it may become necessary to consider the need to preserve any lien. As necessary, get legal assistance.

5.4. Annual holdback release

KEY POINTS

- Accrued holdback release on an annual basis is now available under the Act upon prime contracts which meet the preconditions for release.
- The right is available to both contractors and subcontractors.

In an effort to accelerate the flow of cash down the construction pyramid, the Act prescribes **two new methods of earlier holdback release on qualifying projects**: annual release and phased release. This section deals with annual holdback release. Phased holdback release is covered in the next section.

Preconditions to annual holdback release

The following preconditions to annual holdback release must be met:

(a) the prime contract provides for a completion schedule longer than one year;

(b) the prime contract provides for payment of accrued holdback on an annual basis;

(c) the prime contract price at the time it is executed is greater than the prescribed amount, which is presently $10 million; and

(d) as at the payment date, title is clear of any preserved or perfected liens.

Since the Act provides that a "payer" may pay holdback on an annual basis, this right is available to both contractors and subcontractors.

Tips for the trade contractor

1. If contracting directly with the owner in a contract longer than one year in duration and having a value of $10 million or more, consider negotiating for a provision in the contract expressly allowing for annual release of accrued holdback.

2. If contracting as a subcontractor, obtain a copy of the prime contract to determine whether or not it expressly includes a provision allowing for annual release of accrued holdback by the owner to the contractor. If so, negotiate a similar provision in your subcontract.

5.5. Phased holdback release

KEY POINTS

- Accrued holdback release on a phased basis is now available under the Act upon prime contracts which meet the prescribed preconditions for release.
- The right to receive holdback release on a phased basis is available to both contractors and subcontractors.

The Act also allows for release of accrued holdback on a phased basis.

Preconditions to phased holdback release

The following preconditions to phased holdback release must be met:

(a) the prime contract provides for payment of accrued holdback on a phased basis and identifies each phase;

(b) the prime contract price at the time it is executed is greater than the prescribed amount, which is presently $10 million; and

(c) as at the payment date, title is clear of any preserved or perfected liens.

As with annual holdback release, the right is available to both contractors and subcontractors.

Exception for design professionals

There is an exception to the $10 million precondition, intended to benefit design professionals who contract directly with the owner. The $10 million limit does not apply if the contract provides for payment of accrued holdback on a phased basis but only with respect to a specified design phase. This assists design professionals whose scope includes both design and contract administration services, allowing for holdback release for the design portion of their scope at the completion of design, irrespective of the value of their contracts.

Tips for the trade contractor

1. If contracting directly with the owner in a contract having a value of $10 million or more, consider negotiating for a provision in the contract expressly allowing for release of holdback on a phased basis. Ensure that the contract identifies each phase.

2. If contracting as a subcontractor, obtain a copy of the prime contract to determine whether or not it expressly includes a provision allowing for phased release of accrued holdback by the owner to the contractor. If so, negotiate a corresponding provision in your subcontract.

5.6. Landlord liability for tenant improvement work

KEY POINTS

- Landlords who provide tenant inducements to assist in funding tenant construction work upon leased premises are now subject to lien liability equal to 10 per cent of the amount of that tenant inducement.
- This replaces the previous scheme which involved delivery of advance notice by the contractor to the landlord, with a corresponding right of landlord to deliver a notice disclaiming responsibility.

The former scheme

Under the old CLA, contractors performing tenant improvement work had the option of delivering a notice to the landlord prior to the contract which informed the landlord of the pending work and sought to make the landlord's interest in the property also subject to the contractor's lien. The landlord, however, had the right to deliver its own notice disclaiming responsibility for the improvement. In practice, these contractor notices were often never given, or if given, landlords typically disclaimed. The result in both instances was that the contractor's lien, except in rare cases, was restricted to a claim against the tenancy interest only, which was frequently ineffective in realizing payment.

The new scheme

The Act has eliminated this scheme entirely, and replaced it a scheme by which landlords are subject to lien liability in circumstances in which they provide a tenant inducement to help fund the construction. The landlord's interest in the property is now subject to liens in an amount equal to 10 per cent of the amount of any tenant inducement given by the landlord to the tenant. That tenant inducement can be found in any lease, any lease renewal, or any other agreement to which the landlord is a party which is connected to the lease.

This liability is now automatic, and no prior notices need be given to the landlord.

Landlord's liability is 10% of the tenant improvement amount

It is important not to confuse this landlord liability with the tenant's holdback obligation under the Act. The landlord's liability is 10 per cent of the amount of the tenant inducement, not 10 per cent of the amount of the construction contract between the tenant and the contractor.

Tips for the trade contractor

1. When contracting with a tenant for tenant improvements on leased premises, be cognizant of your right to assert a lien against the landlord to secure the landlord's obligation for 10% of the value of its tenant inducement.

2. In all such cases, always send a section 39 request for information to the landlord to obtain information which may become necessary in the event a lien must be preserved.

5.7. Written notice of a lien

KEY POINTS

- A written notice of a lien remains available under the Act for the purpose of establishing the notice holdback, and as a mechanism which may resolve a payment issue early.
- Form 1 under the Act is the prescribed form for a written notice of a lien, and must be used.
- The written notice of a lien in Form 1 must be served either personally or by a permitted alternative to personal service.

- A claim for lien must still be used to preserve lien rights, even if a written notice of a lien is used.

Why a written notice of a lien is useful

A "written notice of a lien" is intended to provide contractors and subcontractors with an expeditious and inexpensive method of alerting those above them in the construction pyramid to a payment problem. It is effective because it establishes the so-called "notice holdback": a party receiving a written notice of a lien, such as an owner or a construction lender, must retain the amount claimed in that notice from further payments downstream in addition to the 10% statutory holdback until the payment issue is resolved.

This can be an effective method of getting attention, and can often result in a payment issue being resolved early, before it escalates.

Under the old CLA, a written notice of a lien could take the form of any communication which met the statutory requirements (identifying the payer and the premises; stating the amount that has not been paid and is owing). In some cases, this resulted in uncertainty, where it was not clear that some letter or email from an unpaid subcontractor qualified as a written notice of a lien. Because of the legal significance to a written notice of a lien, the drafters of the Act tightened the requirements for both the form of this notice and the manner in which the notice is to be given.

The price for the enhanced certainty about written notices of a lien which the Act prescribes will be that trade contractors will need to be more vigilant and intentional when deciding to use them.

Definition

A "written notice of a lien" is defined as a written notice "in the prescribed form". That prescribed form is Form 1 under the Act (see the Forms section in this Guide). This form is mandatory and must be used in order to be legally effective.

Must use prescribed form, and must serve properly

A written notice of a lien in the prescribed form must be served "in a manner permitted under the rules of court for service of an originating process". Under the rules of court, an originating process must be served personally, or by one of the permitted alternatives to personal service, most of which involve some form of mailing, with service having been deemed to have been made some days after mailing. In most situations, a party sending a written notice of a lien will wish the notice to come to the attention of the recipient immediately, and therefore personal service of the notice be used.

Not a substitute for a preserved lien

It is important to remember that a written notice of a lien is no substitute for a preserved lien. A lien must still be preserved and perfected within time in order to maintain lien rights, even if a written notice was delivered previously.

Tips for the trade contractor

1. Consider using a written notice of a lien as an early step in resolving a payment problem.

2. Remember that in order to be legally effective, a written notice of a lien must now follow the prescribed form, Form 1, and must be served in the prescribed manner.

6. Prompt payment

Why prompt payment

The purpose of the prompt payment regime in the Act is to mandate, by law, the timely payment of accounts throughout the construction pyramid. It seeks to correct a problem of late payments which pervades the industry and which has caused significant economic hardship to those supplying construction labour, services and materials, particularly those trade contractors further down the pyramid who are several steps removed from the ultimate payer, the owner.

Parties remain free to stipulate invoicing cycle

While the Act contemplates a monthly invoicing cycle as a default, it does not interfere with the rights of parties to stipulate other invoicing cycles by contract. And so, for example, there is nothing in the Act prohibiting invoices upon milestones rather than on a monthly basis – but these invoicing terms must set out in the contract between owner and contractor. Once invoiced, however, the Act stipulates that payment must flow within tight timelines which cannot be varied by contract. In this way, the Act balances the freedom of parties to contract for whatever invoicing period they wish with an obligation on payers to pay those invoices in timely fashion once they are rendered.

Payment timing mandatory

The prompt payment scheme is mandatory, and parties are not free to contract out of it.

Trigger date

The trigger date underlying the prompt payment scheme is the date of delivery of a "proper invoice" by the contractor to the owner. The next portions of this Guide will describe what a "proper invoice" is, the time limits governing payment, and the process for disputing invoices.

6.1. Invoicing procedures and the concept of a "proper invoice"

KEY POINTS

- A proper invoice is a key concept under the Act.
- The requirements for a proper invoice are set out in the Act, and are straightforward.
- The Act permits the contract to specify any other requirements which an invoice must meet in order to be a proper invoice.
- A proper invoice cannot be conditional upon certification of payment or owner approval.

- Proper invoices apply only to contracts. They do not apply to subcontracts. However, subcontractors should expect contractors to stipulate similar requirements in subcontract agreements, particularly any project-specific requirements with which the contractor must comply in order to meet the proper invoice requirements in its contract with the owner.

A "**proper invoice**" is key to the operation of the prompt payment scheme. All of the timelines for both making and disputing payment run from the date a proper invoice is received by the owner.

Contents of a proper invoice

A proper invoice is defined as "a written bill or other request for payment for services or materials in respect of an improvement under a contract" which meets the requirements of the Act. Those requirements are the following:

(a) the contractor's name and address;

(b) the date of the proper invoice and the period during which the services or materials were supplied;

(c) information identifying the authority under which the services or materials were supplied, whether in the contract or otherwise;

(d) a description of the services or materials supplied, including the quantity where appropriate;

(e) the amount payable and the payment terms;

(f) the name, title, telephone number and mailing address of the person to whom payment is to be sent;

(g) any other requirements specified in the contract; and

(h) any other requirements that may be prescribed (there are none as of the date of this Guide).

As is clear from this list, complying with the statutory requirements for a proper invoice is not onerous, and most forms of invoices in common use will likely already meet them. To the extent a contractor needs to modify its usual form to comply, this should be simple and straightforward.

Whether or not an invoice is "proper" depends upon whether or not it meets the formalities set out above. A "proper invoice" is not necessarily a "payable" invoice - the owner may have good reason to dispute its obligation to pay an invoice that is otherwise a proper invoice within the meaning of the Act. Whether an invoice is "proper" - whether it is sufficient to start the time periods for payment and/or disputing payment - depends solely upon whether or not it meets the formal requirements (contains the information) prescribed in the Act.

A"proper invoice" is not necessarily a payable invoice

The Act permits the contract to specify any other requirements of a proper invoice. For example, it is common that owners require WSIB clearance certificates, statutory declarations verifying payment of subcontractor accounts, and similar documentation with progress invoice submissions, as well as the submission of record drawings, manuals and similar documentation with invoices delivered near the end of the project. All of these are permitted under the Act - but again, these requirements must be set out in the contract.

Other requirements for a"proper invoice"

The Act contains this important qualification: any provision in a contract that makes the giving of a proper invoice conditional upon the prior certification of a payment certifier or on the owner's approval is of no force and effect.

No certification or owner approval

There is nothing in the Act prohibiting payment certification and/or owner approval, and that will certainly continue in practice. However, payment certification or owner approval cannot be a condition determining whether or not an invoice qualifies as a proper invoice. If an owner requires payment certification or its own approval prior to payment, it is the owner's responsibility to ensure that such certification and/or approval occurs within the 14-day timeline set out in the Act, triggered by the date of submission of a proper invoice to the owner.

A proper invoice is an invoice rendered under the prime contract. The concept of a proper invoice does not apply to subcontracts, although subcontractors can expect contractors to stipulate requirements in their subcontract agreements which require subcontractors to submit documentation at time of invoicing which allows the contractor to comply with its own requirements for a proper invoice to the owner. Examples of this may include statutory declarations verifying payment of downstream accounts, manuals, record drawings and the like.

"Proper invoice" not applicable to subcontracts

Tips for the trade contractor

1. Review your usual form of invoice to confirm that it meets the formal requirements for a proper invoice under the Act. If necessary, revise your form to comply.

2. If contracting as a prime contractor, review the terms of the proposed contract to identify any further requirements for a proper invoice which may be stipulated in it. Confirm that those additional requirements, if any, are reasonable and can be met.

3. If contracting as a subcontractor, review the terms of the proposed subcontract agreement concerning any invoicing requirements that it may contained. If there be any, confirm that they are reasonable and can be met. Also, obtain a copy of the prime contract to confirm that the invoicing cycle under your subcontract aligns with that to the owner

6.2. There's a clerical error in my invoice – can I correct it?

KEY POINTS

- Clerical errors in invoices can be corrected provided the owner agrees in advance to the revision.
- The date of the proper invoice remains unchanged following the revision.

How to correct clerical errors

The Act contemplates the possibility of clerical errors in proper invoices and provides a mechanism for dealing with these efficiently, without forcing parties to go through the process otherwise prescribed for dealing with disputed invoices.

A proper invoice may be revised by the contractor after the contractor has given it to the owner if:

(a) the owner agrees in advance to the revision;

(b) the date of the proper invoice is not changed; and

(c) the proper invoice continues to meet the prescribed requirements for a proper invoice after the revision.

The Act does not require that this agreement by the owner in advance be in writing, and presumably a simple oral agreement to receive a corrected invoice will suffice.

Timely correction

Where the required revision is simple and straightforward, it is anticipated that this agreement by the owner will not be difficult to obtain. If however, there are a multitude of revisions required in a lengthy and complex invoice, or if the errors requiring revision have been brought to the owner's attention late in the 14-day window allowed to the owner to review and certify or approve an invoice, a contractor can expect some resistance from the owner about agreeing to revision since the revised proper invoice remains dated as of the date it was originally delivered and the remaining time allowed to the owner to review a revised invoice may not be sufficient. In that event, a contractor may anticipate that an owner will simply deliver a notice of non-payment disputing at least that portion of the proper invoice which was in error, in anticipation of resolving the problem during the next billing cycle.

Tips for the trade contractor

1. When acting as a contractor, your proper invoice to the owner should be rechecked immediately after it is delivered. If any errors are discovered, immediately contact the owner, explain the error, and seek the owner's agreement to deliver a revised proper invoice.

2. Better still, when contracting directly with an owner, establish a process for delivering, reviewing and approving draft invoices in advance so as to minimize the likelihood of clerical errors in proper invoices as delivered.

3. When contracting as a subcontractor, recheck your invoices upstream immediately after delivery. If any errors are discovered, immediately contact your payer, explain the error, and assuming the error has found its way into the contractor's proper invoice to the owner, request the contractor to invoke the correction process set out in the Act.

6.3. Time limits governing payment generally

KEY POINTS

- The basic principles underlying the prompt payment scheme in the Act are quite simple:

  (i) Payments must flow from the owner to the contractor within 28 days, and then down the contractual chain in 7 day intervals.

  (ii) Anyone intending to dispute a payment obligation must do so quickly and do so correctly.

  (iii) Failing that in (ii), the payer must pay!

As mentioned earlier, owners and contractors are free to stipulate by contract whatever invoicing cycle they wish for the delivery of proper invoices. If their contract is silent about this, invoices must be delivered monthly. But once delivered by a contractor to an owner (whether monthly or at the times specified by the contract), a proper invoice must be paid within the time limits set out in the Act.

These time limits for payment are mandatory and parties cannot vary them by contract.

The rules governing those time limits for payment are set out in sections 6.4 to 6.6 of the Act, and are summarized in the next portions of this Guide with section references to assist the reader. For present purposes, the following guiding principles may be useful:

An owner receiving a proper invoice has 14 days to decide whether to pay it or dispute it.	***Guiding Principle #1***
If the owner does not dispute within 14 days, payment must be made 28 days after the proper invoice is received.	***Guiding Principle #2***
A contractor or subcontractor who receives payment has 7 days to either pay the invoice from its downstream subcontractor or dispute it.	***Guiding Principle #3***

A contractor or subcontractor who does not receive payment has 7 days from the date it should have received payment to decide whether to simply pay downstream despite not receiving payment, or to obtain "pay when paid" protection against its downstream subcontractors. For the contractor, that 7 day period expires either 7 days after it is paid (see Guiding Principle #3) or 35 days after it gave the proper invoice to the owner, whichever is earlier. For the subcontractor, that 7 days expires 42 days after the proper invoice is given to the owner.	***Guiding Principle #4***
A decision to dispute any invoice - whether it be a proper invoice from contractor to owner or an invoice from a subcontractor to a contractor or another subcontractor - must be made intentionally and must be carried out in the prescribed manner.	***Guiding Principle #5***
Failing compliance with Guiding Principle #5, the statutory obligation to pay remains in place, and that obligation is legally enforceable, by adjudication if necessary.	***Guiding Principle #6***

6.4 Time limits: undisputed payment

KEY POINTS

- The rule for undisputed payments is "28 – 7 – 7" and so on

An owner must pay the amount payable under a proper invoice no later than **28 days** after receiving the proper invoice from the contractor *[s. 6.4 (1)]*.	***Owner payment to contractor***
A contractor who receives full payment from the owner must pay each subcontractor whose supply of services or materials was included within that proper invoice within **7 days** of receiving payment *[s. 6.5 (1)]*.	***Contractor payment to subcontractor***
A subcontractor who receives full payment from the contractor must pay each of its own subcontractors no later than **7 days** after receiving payment *[s. 6.6 (1)]*.	***Subcontractor payment to subcontractor***

6.5 Time limits: disputed payment

KEY POINTS

- An owner intending to dispute a proper invoice must do so by notice of non-payment in the proper form and given in the proper manner within 14 days of receiving the proper invoice.
- Contractors and subcontractors who do not receive payment originating with the owner may opt to receive "pay when paid" protection, provided they follow the prescribed form and procedure.
- If "pay when paid" protection is not properly obtained, the contractor and/or subcontractor remains liable to pay the full amount of downstream invoices within the same time limits that the Act prescribes for undisputed payments.

Owner disputes entire amount of proper invoice

Owner intending to dispute the entire amount of a proper invoice must deliver notice of non-payment to the contractor in the prescribed form and manner within **14 days** after receiving proper invoice *[s. 6.4 (2)]*.

Provided the owner properly delivers a notice of non-payment to the contractor, owner may refuse payment. Its obligation to pay would then be determined by an adjudicator, upon settlement, or in subsequent litigation or arbitration *[s. 6.4 (2)].*

"Pay when paid" protection for the unpaid contractor or subcontractor

To get "pay when paid" protection, contractor receiving notice of non-payment from owner must deliver notice of non-payment to its subcontractors in the prescribed form and manner within **7 days** after receiving the owner's notice of non-payment *[s. 6.5 (5) and 6.5 (7) (a)]*.

Provided the contractor properly delivers a notice of non-payment to its subcontractors (including the undertaking to adjudicate), the unpaid contractor will get "pay when paid" protection due to non-payment by owner and thereby delay the obligation to pay its subcontractors *[s. 6.5 (5)]*.

To get its own "pay when paid" protection, subcontractor receiving notice of non-payment from contractor must deliver notice of non-payment to its own subcontractors in the prescribed form and manner within **7 days** after receiving the contractor's notice of non-payment *[s. 6.6 (6) and s. 6.6 .(8)]*.

Provided the subcontractor properly delivers a notice of non-payment to its own subcontractors, the unpaid subcontractor will also get "pay when paid" protection due to non-payment by contractor and thereby delay the obligation to pay its own subcontractors *[s. 6.6 (6)]*.

If "pay when paid" protection is not used

If the contractor does not properly deliver its own notice of non-payment to its subcontractors, the contractor must pay its subcontractors no later than **35 days** after giving the proper invoice to the owner, notwithstanding that the contractor did not receive payment from the owner *[s. 6.5 (4)]*.

If the subcontractor does not properly deliver its own notice of non-payment to its own subcontractors, the subcontractor must pay its subcontractors no later than **42 days** after the proper invoice was given to the owner notwithstanding that the subcontractor did not receive payment from the contractor *[s. 6.6 (4) and s. 6.6 (5) (b)]*. Should the subcontractor receive payment before the expiry of those 42 days, the subcontractor must pay its own subcontractors within **7 days** of receiving payment *[s. 6.6 (4) and s. 6.6 (5) (a)]*.

Owner disputes <u>only a portion</u> of proper invoice

Owner intending to dispute only a portion of a proper invoice must deliver notice of non-payment to the contractor in the prescribed form and manner within **14 days** after receiving a proper invoice *[s. 6.4 (2)]*.

Provided the owner properly delivers a notice of non-payment to the contractor, owner may refuse payment of the portion in dispute, with its obligation to pay that portion to be determined by an adjudicator, upon settlement, or in subsequent litigation or arbitration *[s. 6.4 (2)]*.

Owner must pay the undisputed portion within **28 days** of receipt of the proper invoice *[s. 6.4 (3)]*.

"Pay when paid" protection for the unpaid contractor or subcontractor

To get "pay when paid" protection, contractor receiving notice of non-payment from owner must deliver notice of non-payment to its subcontractors covering the disputed portion it did not receive from the owner, in the prescribed form and manner within **7 days** after receiving the owner's notice of non-payment *[s. 6.5 (5) and 6.5 (7) (a)]*.

Provided the contractor properly delivers a notice of non-payment (including the undertaking to adjudicate) to its subcontractors, the unpaid contractor will get "pay when paid" protection for that disputed portion the contractor did not receive from the owner and thereby delay the obligation to pay its subcontractors for that disputed portion *[s. 6.5 (5)]*.

Contractor's obligation to pay undisputed amounts

Contractor receiving the undisputed portion must rateably pay its subcontractors within **7 days** of receiving payment from the owner *[s. 6.5 (2) and s. 6.5 (3), item 2]* unless the amount unpaid by the owner was specific to a particular subcontractor, in which case the remaining subcontractors are entitled to be paid rateably *[s. 6.5 (3), item 1]*.

To get its own "pay when paid" protection, the subcontractor, after receiving notice of non-payment from contractor, must deliver notice of non-payment to its own subcontractors covering the disputed portion it did not receive from the contractor, in the prescribed form and manner within **7 days** after receiving the contractor's notice of non-payment *[s. 6.6 (6)]*.

Provided the subcontractor properly delivers a notice of non-payment to its own subcontractors, the unpaid subcontractor will get "pay when paid" protection for that disputed portion it did not receive and thereby delay the obligation to pay its own subcontractors for that disputed portion it did not receive *[s. 6.6 (6)]*.

Subcontractor receiving that undisputed portion from the contractor must rateably pay each of its own subcontractors whose supply of services or materials was included within that proper invoice within **7 days** of receiving payment *[s. 6.6 (2) and 6.6 (3), item 2]*, unless the amount unpaid by the contractor was specific to a particular subcontractor. In that case the remaining subcontractors are entitled to be paid rateably *[s. 6.6 (3), item 1]*.

If "pay when paid" protection is not used

If the contractor does not properly deliver its own notice of non-payment to its subcontractors, the contractor must pay its subcontractors no later than **35 days** after giving the proper invoice to the owner, notwithstanding that the contractor did not receive full payment from the owner *[s. 6.5 (4)]*.

If the subcontractor does not properly deliver its own notice of non-payment to its own subcontractors, the subcontractor must pay its subcontractors no later than **42 days** after the proper invoice was given to the owner notwithstanding that the subcontractor did not receive full payment from the contractor *[s. 6.6 (4) and s. 6.6 (5 (b))]*. Should the subcontractor receive payment before the expiry of those 42 days, the subcontractor must pay its own subcontractors within **7 days** of receiving payment *[s. 6.6 (4) and s. 6.6 (5) (a)]*.

Contractor or subcontractor have their own dispute with their payee

If contractor disputes the entitlement of a subcontractor to payment, in whole or in part, the contractor must deliver a notice of non-payment to the subcontractor within **7 days** of receiving a notice of non-payment from the owner (if there was one) or within **35 days** after giving the proper invoice to the owner, whichever is later *[s. 6.5 (6)]*.

If subcontractor disputes the entitlement of a subcontractor to payment, in whole or in part, the subcontractor must deliver a notice of non-payment to the subcontractor within **7 days** of receiving a notice of non-payment from the contractor (if there was one) or within **42 days** after the proper invoice was given to the owner, whichever is later *[s. 6.6 (7) and s. 6.6 (8))]*.

6.6. Non-payment by owner

KEY POINTS

- Simple non-payment by owner to contractor (without any notice of non-payment) can be remedied by adjudication.
- Contractors and subcontractors are entitled to "pay when paid" protection in these circumstances provided they follow the correct procedure.

Owner delivers no notice of non-payment, but simply does not pay contractor

If the owner gives no notice of non-payment but simply does not pay the contractor within time, the contractor should consider immediately issuing a notice of adjudication as against the owner, both to obtain payment and to protect its "pay when paid" right downstream.

"Pay when paid" protection to contractor

Contractor should consider delivering notice of non-payment to its subcontractors in the prescribed form and manner within **35 days** after giving proper invoice to the owner *[s. 6.5 (4); 6.5 (5); and 6.5 (7) (b)]*.

"Pay when paid protection" to subcontractor

Subcontractor should consider delivering notice of non-payment to its own subcontractors, in the prescribed form and manner within **7 days** after receiving notice of non-payment from contractor (if there is one) or within **42 days** after the proper invoice is given by contractor to owner (if there is no notice of non-payment from contractor) *[s. 6.6 (6); s. 6.6 (8]*.

If "pay when paid" protection is not used

If the contractor does not deliver its own notice of non-payment to its subcontractors, contractor must pay its subcontractors no later than **35 days** after giving the proper invoice to the owner notwithstanding that the contractor did not receive payment from the owner *[s. 6.5 (4)]*.

If the subcontractor does not deliver notice of non-payment to its own subcontractors, the subcontractor must pay its subcontractors no later than **42 days** after the proper invoice was given to the owner notwithstanding that the subcontractor may not have received payment from the contractor *[s. 6.6 (4) and s. 6.6 (5) (b)]*. Should the subcontractor receive payment before the expiry of those 42 days, the subcontractor must pay its own subcontractors within **7 days** of receiving payment *[s. 6.6 (4) and s. 6.6 (5) (a)]*.

6.7. Non-payment by contractor

KEY POINTS

- Simple non-payment by contractor to subcontractor (without any notice of non-payment) can be remedied by adjudication.
- Subcontractors are entitled to "pay when paid" protection in these circumstances provided they follow the correct procedure.

Contractor delivers no notice of non-payment, but simply does not pay subcontractor

If the contractor gives no notice of non-payment but simply does not make timely payment to its subcontractor, the subcontractor should consider immediate adjudication as against the contractor, both to obtain payment and to protect its "pay when paid" right downstream.

"Pay when paid" protection

Subcontractor should consider delivering notice of non-payment to its subcontractors in the prescribed form and manner within **42 days** after the proper invoice was given to the owner *[s. 6.6 (6) and 6.6 (8) (b)]*. Should the subcontractor receive payment before the expiry of those 42 days, the subcontractor must pay its own subcontractors within **7 days** of receiving payment *[s. 6.6 (4) and s. 6.6 (5) (a)]*.

If "pay when paid" protection is not used

If the subcontractor does not deliver its own notice of non-payment to its subcontractors, the subcontractor must pay its subcontractors no later than **42 days** after the proper invoice is given to the owner, notwithstanding that the subcontractor did not receive payment from the contractor *[s. 6.6 (4) and s. 6.6 (5) (b)]*. Should the subcontractor receive payment before the expiry of those 42 days, the subcontractor must pay its own subcontractors within **7 days** of receiving payment *[s. 6.6 (4) and s. 6.6 (5) (a)]*.

6.8. Lower tier subcontractors

KEY POINTS

- With necessary modifications, these rules apply equally to lower tier subcontractors

Each of these provisions, concerning both undisputed and disputed payments, apply with necessary modifications to any further subcontractors down the contractual chain. By way of example, a subcontractor who receives full payment from its payer subcontractor must pay its own subcontractors within **7 days** after receiving payment *[s. 6.6. (11)]*.

Tips for the trade contractor

1. Find out the date when proper invoices are given by the contractor to the owner. If necessary, send a formal request for that information pursuant to s. 6.6 (10) of the Act, reminding the contractor that his obligation to comply is "as soon as possible". There is no requirement for how this request can be made; an email will suffice or a written request in some other form (for example, a request accompanying the submission of the subcontractor invoice).

2. Routinely diarize four dates for each payment cycle:

   - **Date 1**: the date the proper invoice is given;
   - **Date 2**: 14 days following Date 1;
   - **Date 3**: 28 days following Date 1; and
   - **Date 4**: 35 days following Date 1.

3. If you are a subcontractor to the contractor: On Date 2, contact the contractor to confirm whether or not a notice of non-payment has been received from the owner. If not, expect payment on or before Date 4. If no notice of non-payment is given but the contractor simply does not pay, consider giving a notice of non-payment to your downstream subcontractors and commencing an adjudication to recover payment.

4. If you are a contractor (directly contracting with the owner): During the two weeks between Date 1 and Date 2, monitor whether a notice of non-payment is given by the owner. If it is given, you have 7 days from the date of receiving any such notice to decide whether a notice of non-payment should be given to your subcontractors to maintain "pay when paid" protection while you resolve the payment issue with the owner. If no notice of non-payment is received from the owner during this two-week period, expect payment on Date 3. If the owner simply does not pay, consider giving a notice of non-payment to your downstream subcontractors and commencing an adjudication to recover payment.

5. Pay undisputed invoices within 7 days of receiving the corresponding payment from upstream.

6.9. Disputing payment: progress payments

KEY POINTS

- The Act provides five different forms for notices of non-payment of progress payments, applicable to owners, contractors and subcontractors, as the case may be.
- To obtain "pay when paid" protection in the event funds are not paid from upstream, a contractor must refer its disputed payment to adjudication within 21 days.
- A subcontractor must also refer its disputed payment to adjudication within 21 days in order to obtain "pay when paid" protection, unless the failure of the contractor to pay is the result of non-payment by the owner.

The previous section of this Guide dealt with the time limits for payment, including the time limits which much be complied with for disputing payment. This section deal with the procedure by which notices of non-payment of progress payments are to be delivered under the Act in order to be legally effective.

Disputed payment of holdback is treated separately in the Act and will be dealt with in the next section.

Essential that the proper procedure be followed

To re-emphasize a key point: notices of non-payment must be given in the form and manner prescribed by the Act in order to be legally effective. Otherwise, the mandatory payment obligation remains, and that obligation can be enforced upon an adjudication.

Respecting progress payments, the Act prescribes the following five notices of non-payment:

The five notices of non-payment

1. Owner notice of non-payment to a contractor *[s. 6.4 (2)]:* **Form 1.1**
2. Contractor notice of non-payment to a subcontractor due to non-payment from owner *[s. 6.5 (5)]:* **Form 1.2**
3. Contractor notice of non-payment to a subcontractor disputing the entitlement of subcontractor to receive payment *[s. 6.5 (6)]:* **Form 1.3**
4. Subcontractor notice of non-payment to a subcontractor due to non-payment from contractor *[s. 6.6 (6)]:* **Form 1.4**

5. Subcontractor notice of non-payment to a subcontractor disputing the entitlement of subcontractor to receive payment *[s. 6.6 (7)]*: **Form 1.5**

Broadly speaking, reasons for non-payment fall into two categories:

Reasons for non-payment

1. Non-payment because of a dispute

The potential causes for dispute are many and varied, including alleged overbilling, billing for work which is said to be defective or incomplete, claims for set-off, and so on.

The right to dispute payment applies to owners, contractors and subcontractors. The applicable forms are Form 1.1 (for owners), Form 1.3 (for contractors), and Form 1.5 (for subcontractors).

Note that in each case of disputed payment, the reasons for non-payment must be set out on the form. The Act requires that "all the reasons" be disclosed.

2. Non-payment because upstream funds were not received

"Pay when paid" protection

It may be that payment cannot be made because the contractor or subcontractor did not receive funds from its upstream payer. In these circumstances, the payer contractor or subcontractor can opt to receive "pay when paid" protection under the Act and defer its payment obligation downstream pending resolution of the payment issue with the upstream payer.

This right is available to both contractors and subcontractors. The applicable forms are Form 1.2 (for contractors) and Form 1.4 (for subcontractors).

For the contractor

In order to receive this "pay when paid" protection, the unpaid contractor must do three things:

(a) it must deliver a notice of payment to its subcontractors using Form 1.2. This notice must be delivered no later than 7 days after receiving the owner's notice of non-payment. If there was no owner's notice of non-payment, the deadline is 35 days after the date the proper invoice was given to the owner;

(b) it must within the same deadline provide a copy of any notice of non-payment it received from its upstream payer (if none was received, and the upstream payer simply did not pay, this requirement is obviously inapplicable); and

(c) it must refer its upstream payment issue to adjudication within 21 days after giving the notice of non-payment mentioned in (a).

To receive "pay when paid" protection, the unpaid subcontractor must:

For the subcontractor

(a) deliver a notice of non-payment to its subcontractors using Form 1.4. This notice must be delivered no later than 7 days after receiving the contractor's notice of non-payment. If there was no contractor's notice of non-payment, the deadline is 42 days after the date the proper invoice was given to the owner by the contractor;

(b) it must within the same deadline provide a copy of any notices of non-payment received from its upstream payer; and

(c) it must refer its upstream payment problem to adjudication within 21 days.

Exception: no adjudication necessary if non-payment due to owner non-payment

Note this important exception to (c): if the failure of the contractor to pay is because of non-payment by the owner, no undertaking to adjudicate by the subcontractor is necessary. This is because the owner non-payment will already be the subject of an adjudication initiated by the contractor (a step the contractor had to take in order to receive its own "pay when paid" protection against the subcontractor) and another adjudication over the identical cause of the non-payment issue would be duplicative.

Why the requirement to adjudicate

The requirement to adjudicate the payment issue with the upstream payer is in keeping with a key legal and policy consideration underlying "pay when paid". In principle, a contractor or subcontractor who depends upon payment from upstream can be permitted to delay payment downstream, but that unpaid contractor or subcontractor cannot sit back and do nothing about getting its money from upstream; it must take commercially reasonable steps to obtain payment from its upstream payer. The Act effectively codifies this required commercially reasonable step as the commencement of an adjudication within 21 days.

The principles set out in the previous sections are illustrated in Figures 3 and 4 below:

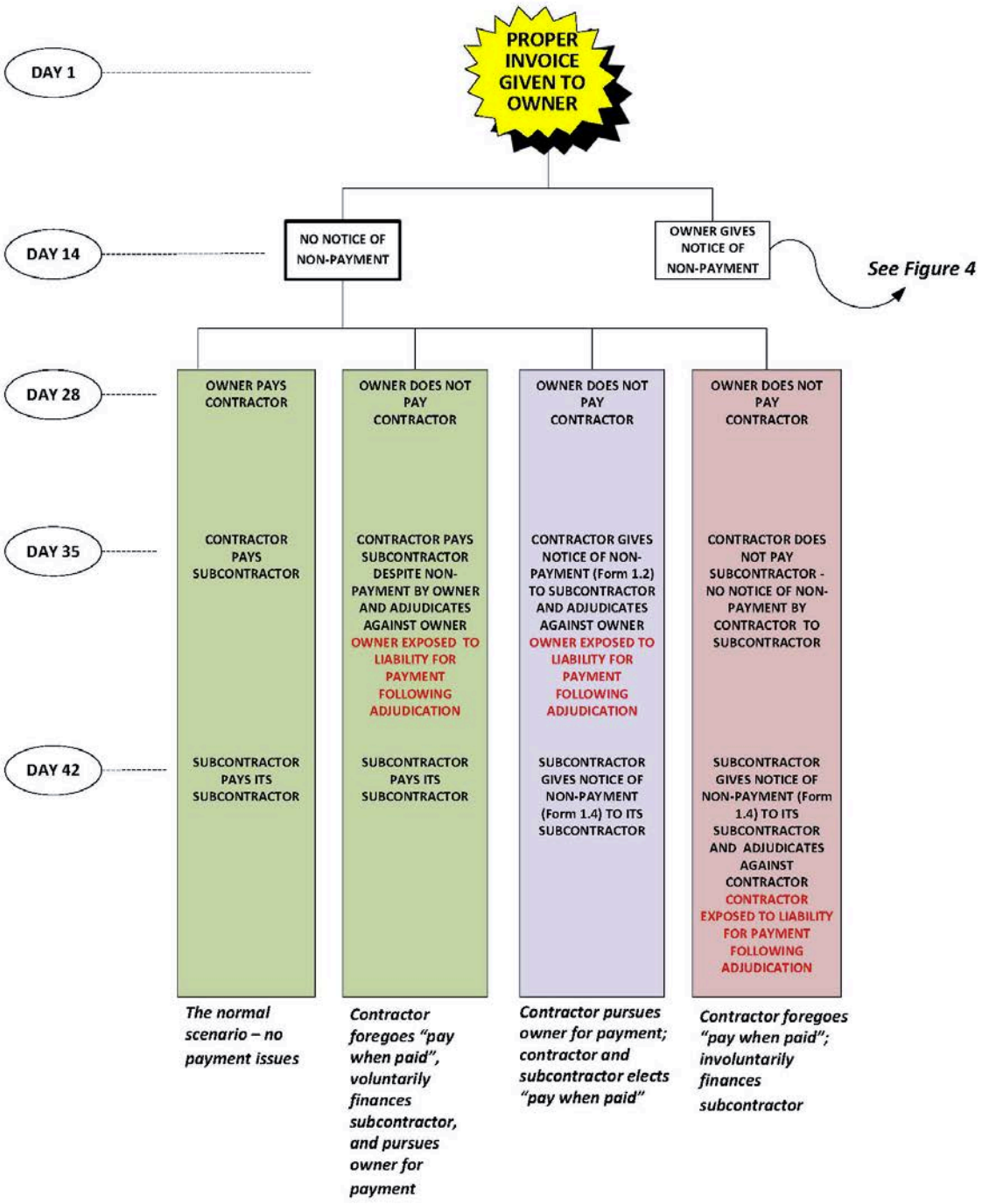


Figure 3: Prompt Payment Scheme – No notice of non-payment by owner

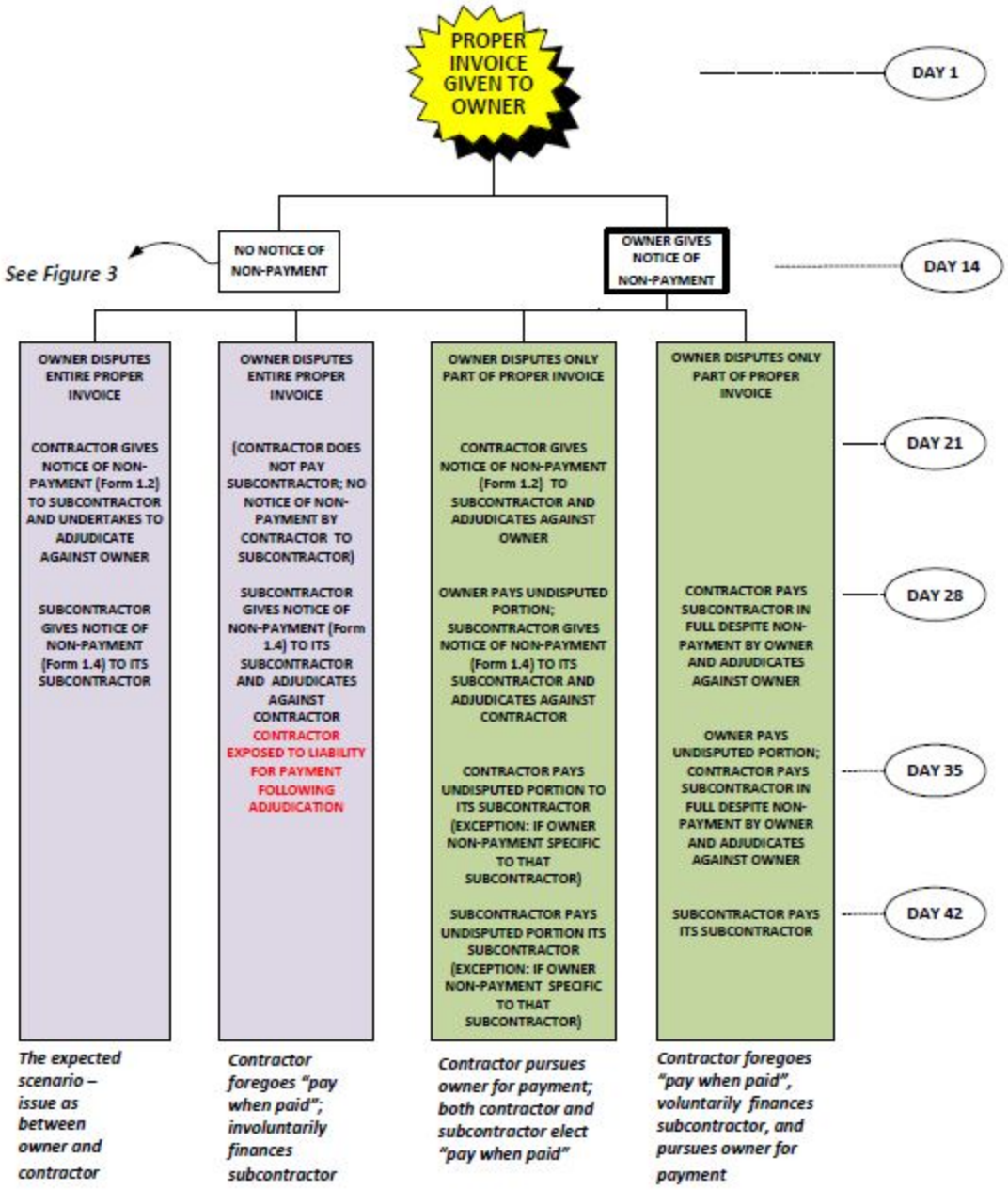


Figure 4: Prompt Payment Scheme – Owner gives notice of non-payment

Comments about Figures 3 and 4

Note the following from Figures 3 and 4:

- As always, there remain a number of different scenarios possible in any non-payment situation, depending upon the responses of the parties. Owners may find themselves having not made timely payment either after giving corresponding notices of non-payment or not, and contractors and subcontractors may do likewise. There are consequences to any failure to deliver a notice of non-payment, as the Figures illustrate.

- The Figures do not show all possible scenarios. For example, there may be disputes as between the contractor and subcontractor, or between one subcontractor and another subcontractor, which do not involve the owner. Forms 1.3 and 1.5 would be appropriate for those.

- Also not illustrated in the Figures is a hedging strategy a contractor or subcontractor may in certain circumstances consider it prudent to employ. Consider the situation in which an owner gives a notice of non-payment to its contractor alleging non-performance by a specific subcontractor. The contractor may disagree with the owner, obtain "pay when paid" protection by delivering its own Form 1.2 notice of non-payment to the subcontractor and proceed to adjudicate the issue with the owner. Form 1.2 simply notifies the subcontractor that the contractor will not be paying because the owner has not paid. In addition to this, however, the contractor may also consider it advisable to give a second notice of non-payment in Form 1.3 to the subcontractor (which covers disputes between contractors and subcontractors). In doing so, the contractor would, in the alternative, adopt the owner's position and prompt an adjudication with its downstream subcontractor. The issues common to the two adjudications which then be determined together in a consolidated adjudication.

Forms

The Forms are appended to this Guide for reference.

The Forms are also readily accessible in MS Word, form-fillable format at http://ontariocourtforms.on.ca/en/construction-lien-act-forms.

Notices of non-payment may be provided in electronic or paper format *[Ontario Regulation 304/18, s. 4].*

Tips for the trade contractor

1. Use the correct Form and follow it closely. Provide all of the information required.

2. If disputing payment, be sure to state all the reasons why payment is being disputed.

3. If seeking to defer payment because payment was not received from upstream ("pay when paid"), be sure to give notice of non-payment to your downstream subcontractors, together with the undertaking to refer to adjudication and any notice of non-payment which may have been received from the upstream payer within the time limits prescribed by the Act. Be sure to comply with the undertaking, and commence adjudication of the payment issue within 21 days.

4. Remember that proceeding to adjudication is generally necessary to receive "pay when paid" protection, with one exception: where the party seeking such protection is a subcontractor and the reason for the contractor's non-payment is that the owner has not paid. To confirm this, review the notice of non-payment received from the contractor and verify that it is Form 1.2.

5. In all cases, review any notice of non-payment you may receive closely to determine the reason(s) why payment is being refused. Consider whether the non-payment is justified and/or the problem can be resolved without taking further steps.

6. When receiving a notice of non-payment, there will often be a number of alternative courses of action potentially available, including the possibility of settling the problem without having to take further legal steps. Keep the big picture in mind, and get legal advice as necessary.

6.10. Disputing payment: holdback

KEY POINTS

- An owner intending to refuse payment of holdback must follow the rigorous procedure prescribed.
- Contractors and subcontractors are entitled to "pay when paid" protection in these circumstances provided they follow the correct procedure.

The Act prescribes a somewhat different mechanism for disputing payment of holdbacks.

How long holdback retains its status as "holdback"

Holdback is money which has already been presumptively earned on previous work. It is legally earmarked for the benefit of subcontractors, and remains so until the expiry of the lien period. If a subcontractor claims entitlement to that fund, it must preserve and perfect its lien rights within time, and that claim to the holdback is then determined in a lien action or by settlement.

If no liens are preserved within the lien period, however, there is no longer any need for the protection the holdback provides, and upon the expiry of the lien period the fund becomes a simple account payable between the owner and the contractor. While an owner is not permitted to set off against holdback, set off is permissible if and when the lien period expires without any liens having been preserved.

The Act balances all this by prescribing rigorous notification requirements with which the parties must comply if holdback is not intended to be paid. Failing compliance, the obligation to pay holdback remains and can be enforced.

Owner refusal to pay some or all holdback

Under the Act, an owner may refuse to pay some or all of the holdbacks provided:

(a) the owner publishes a notice of its intention to do so in the prescribed **Form 6** in a construction trade newspaper no later than **40 days** after a certificate or declaration of substantial performance has been published, or if there none, the date on which the contract is completed or abandoned; and

(b) the owner further notifies the contractor of the publication of that notice no later than **3 days** after publication. *[s. 27.1 (1); Regulation 304/18, s. 7 (1); Form 6]*

"Pay when paid" protection for contractor

The contractor, in turn, is afforded "pay when paid" protection against its downstream subcontractors if the contractor notifies every subcontractor to which it is otherwise required to pay holdback that the holdback is not being paid and refers the matter to adjudication *[s. 27.1 (2)]*. The contractor's notification to the subcontractors must itself be made within **3 days** of receipt of the owner's notice, and the contractor must give a copy of that owner's notice to the subcontractors *[Regulation 304/18, s. 7 (3)]*.

"Pay when paid" protection for subcontractors

Similarly, a subcontractor who does not receive holdback from the contractor in these circumstances also receives "pay when paid" protection if the subcontractor notifies every one of its own subcontractors that the holdback is not being paid and refers the matter to adjudication *[s. 27.1 (3)]*. The subcontractor's notification to its own subcontractors must itself be made within **3 days** of receipt of the contractor's notice, and the subcontractor must give a copy of that contractor's notice to its subcontractors *[Regulation 304/18, s. 7 (5)]*.

How notifications made

These notifications by the owner, contractor and subcontractor must be in writing, and can be in either electronic or paper format *[Regulation 304/18, s. 7 (6)]*

Why the short deadlines

The reason for the short deadlines is obvious: the lien period is 60 days. By the scheme in the Act, if owner does not intend to pay holdback, the Act requires the formal notifications of that intention down the construction pyramid reasonably in advance of the expiry of that lien period in order that the intended subcontractor recipients of the holdback can be informed accordingly, and they can then preserve their liens within time if necessary to secure payment.

Tips for the trade contractor

1. If receiving a notice that holdback will not be paid, act immediately to prepare a claim for lien before lien rights expire. Be ready to preserve the lien if the problem is not resolved immediately.

2. If there are subcontractors who will be receiving holdback money you were expecting from upstream, consider the need to exercise the "pay when paid" protection which the Act prescribes, by sending to the subcontractors the required notification and a copy of the incoming notice that holdback will not be paid, and commencing an adjudication to recover payment.

7. Adjudication

Why adjudication

Adjudication, called "Construction Dispute Interim Adjudication" in the Act, is a new system of resolving payment disputes upon Ontario construction projects to which the Act applies.

It is designed to achieve quick determinations of disputes and avoid the expense and delay inherent in other dispute resolution methods which have plagued the industry, such as litigation (including lien actions) and arbitration.

Adjudication can be viewed as the mechanism which enables the prompt payment scheme in the Act to work effectively. The availability of adjudication is what gives prompt payment its "teeth".

Essential characteristics

The essential characteristics of adjudication are these:

1. It is much less formal than litigation or arbitration, and much quicker.
2. Decisions, which are called "determinations" in the Act, are made by qualified and accredited adjudicators, who may be legally trained or who may have non-legal, industry expertise.
3. The parties have the opportunity to agree upon the adjudicator who will determine their dispute.
4. Adjudicators have broad inquisitorial authority under the Act. In some respects, they have broader powers than judges or arbitrators.
5. Determinations are interim binding, in other words they are legally enforceable but the parties retain their right to revisit the issues later in litigation or arbitration if they choose to do so.
6. In the interim, however, a determination that one party must pay another must be complied with in 10 days. Failing that, the party entitled to payment has all the rights to enforce that determination as if it were an order of the court, as well as a statutory right to suspend work.
7. There is no right of appeal.
8. There is a right to have an adjudicator's determination judicially reviewed by the court, but only in very limited circumstances and only upon leave of the court.

Each of these will be reviewed in detail in the next sections of this Guide.

7.1. How does the adjudication system work generally?

KEY POINTS

- Ontario Dispute Adjudication for Construction Contracts (ODACC) is the Authorized Nominating Authority which administers the adjudication system in Ontario.
- All adjudications must proceed through ODACC.
- ODACC has created a technology platform called the "ODACC Custom System" to facilitate the process.

Adjudication under the Act is administered by an entity called the Authorized Nominating Authority ("ANA").

ODACC

Following a competitive procurement process, the ANA which was selected is ADR Chambers, which operates the system under the name "Ontario Dispute Adjudication for Construction Contracts" ("ODACC"): https://odacc.ca/en.

As the ANA, ODACC has overall responsibility for the operation of the adjudication system in Ontario, including the qualification, training and oversight of adjudicators, administrative and support services for the management of adjudications (including fees), and the collection and maintenance of records.

Use of ODACC is mandatory

By law, all adjudications commenced under the Act must proceed through ODACC. Only adjudicators holding a certificate of qualification issued by ODACC are qualified to conduct adjudications. In fact, an adjudication conducted by someone other than a qualified adjudicator is one of the few grounds upon which the court may set aside a determination upon judicial review.

ODACC Custom System

ODACC administers the adjudication system using a technology platform called "ODACC Custom System": https://odacc.ca/en/odacc-custom-system. Parties to adjudication and their representatives must create an account on the ODACC Custom System in order to participate. The system gives the parties and the adjudicator a common platform for filing documents, communicating with one another, and dealing with the adjudication process generally.

Pre-Designed Processes

The process by which an adjudication is to be conducted always remains in the control of the adjudicator, who may conduct the adjudication in the manner he or she determines is appropriate. Subject to that, ODACC has suggested four Pre-Designed Adjudication Processes which parties may opt to use upon the adjudicator's agreement, each intended to reflect disputes of increasing complexity and dollar amount in dispute:

1. Pre-Designed Adjudication Process 1

   - Adjudication in writing only
   - Submissions limited to two pages per party (not including the contract and invoice)
   - Determination expected at one to two pages

2. Pre-Designed Adjudication Process 2

   - Adjudication in writing only
   - Submissions limited to five pages per party (not including the contract and invoice)
   - Determination expected at one to two pages

3. Pre-Designed Adjudication Process 3

   - Adjudication in writing only
   - Submissions limited to five pages per party (not including the contract and invoice)
   - Each party permitted to submit additional documents to a maximum of 10 pages
   - Determination expected at five pages

4. Pre-Designed Adjudication Process 4

   - Submissions limited to ten pages per party (not including the contract and invoice)
   - Each party permitted to submit additional documents to a maximum of 25 pages
   - Each party may make oral presentation, limited to 30 minutes, by videoconference or teleconference only
   - Determination expected at five pages

ODACC recommends fees for each of these suggested processes, in an escalating scale from $800 (for Pre-Designed Adjudication Process 1) to $3000 ((for Pre-Designed Adjudication Process 4).

There is a fifth process which ODACC calls "Adjudication Process 5", which is not pre-designed but which contemplates a conference call among the

parties and the adjudicator at the outset to establish the details of the process and the rules, and to confirm the timeline. The fees for this process will be determined by the time spent, calculated at the adjudicator's hourly rate.

Experience will determine how users will take up these suggested pre-designed processes. It can be expected that only relatively simple and straightforward matters will be considered appropriate to the four pre-designed processes, and that disputes involving more substantial sums and/or complexity will simply be dealt with using the scheme contemplated by Adjudication Process 5.

See https://odacc.ca/en/claimants/adjudication-process-2 for a detailed description.

Tip for the trade contractor

1. Create an account in the ODACC Custom System now – https://odacc.ca/en/odacc-custom-system.
2. Consider opting to use one of ODACC's Pre-Designed Adjudication Processes, recognizing that each will likely be appropriate only to more simple and straightforward disputes, and that the process ultimately used will always remain subject to the authority of the adjudicator to use whatever process he or she considers appropriate.

7.2. The process: summary of timelines

KEY POINTS

- Once initiated, an adjudication must proceed on a fast timeline.
- The overall objective of the process: a determination of the dispute within weeks, not months or years.

General limitation

A notice of adjudication cannot be given after the date the contract or subcontract is completed, unless the parties agree otherwise *[s. 13.5 (3)]*

Timeline:

Commencement of adjudication

An adjudication is commenced by a notice of adjudication given by a party to a contract or subcontract who wishes to refer a dispute to adjudication *[s. 13.7 (1)]*

Appointment of adjudicator

Within **4 days** after the notice of adjudication is given: the adjudicator nominated by the party seeking the adjudication must consent to act. *[s. 13.9 (4)]*

If the nominated adjudicator does not consent, the party seeking adjudication shall request that ODACC appoint an adjudicator.

ODACC must then appoint an adjudicator within **7 days** after receiving a request for the appointment. This is subject to the consent of the adjudicator. *[s. 13.9 (5)]*

Delivery of documents by party seeking adjudication

No later than **5 days** after the adjudicator agrees or is appointed, the party who gave the notice of adjudication must provide the adjudicator with a copy of the notice of adjudication, and must also provide to the adjudicator and the other party with a copy of the contract or subcontract and any documents the party intends to rely upon. *[s. 13.11]*

The adjudicator is required to provide written confirmation of receipt to the parties as soon as possible after receiving all the documents. *[O. Reg. 306/18, s. 16 (30)]*

Delivery of documents by the party responding to adjudication

A party responding to a notice of adjudication must provide copies of the response to the adjudicator and the other party no later than such date as the adjudicator specifies. *[O. Reg. 306/18, s. 17 (3)]*

Determination by adjudicator

The adjudicator must make a determination no later than **30 days** after receiving the documents from the party seeking the adjudication. *[s. 13.13 (1)]*

This deadline may be extended for no more than **14 days** if (1) the adjudicator requests the extension; (2) the parties provide their written consent to the extension; and (3) the extension is requested and agreed within the 30 day period set out above. *[s. 13.13 (2) (a)]*

This deadline may also be extended for a **longer** period if (1) the parties provide their written agreement to the extension; (2) the adjudicator consents; and (3) the extension is requested and agreed within the 30 day period set out above. *[s. 13.13 (2) (b)]*

Enforcement of adjudicator's determination

A party who is required by a determination to pay must pay no later than **10 days** after the determination has been communicated to all parties [s. 13.19 (2)]

Judicial review

A motion for leave to bring an application for judicial review of an adjudicator's determination must be served and filed no later than **30 days** after the determination is communicated to the parties [s. 13.18 (2)]

These timelines are shown graphically in Figures 5 and 6 below:

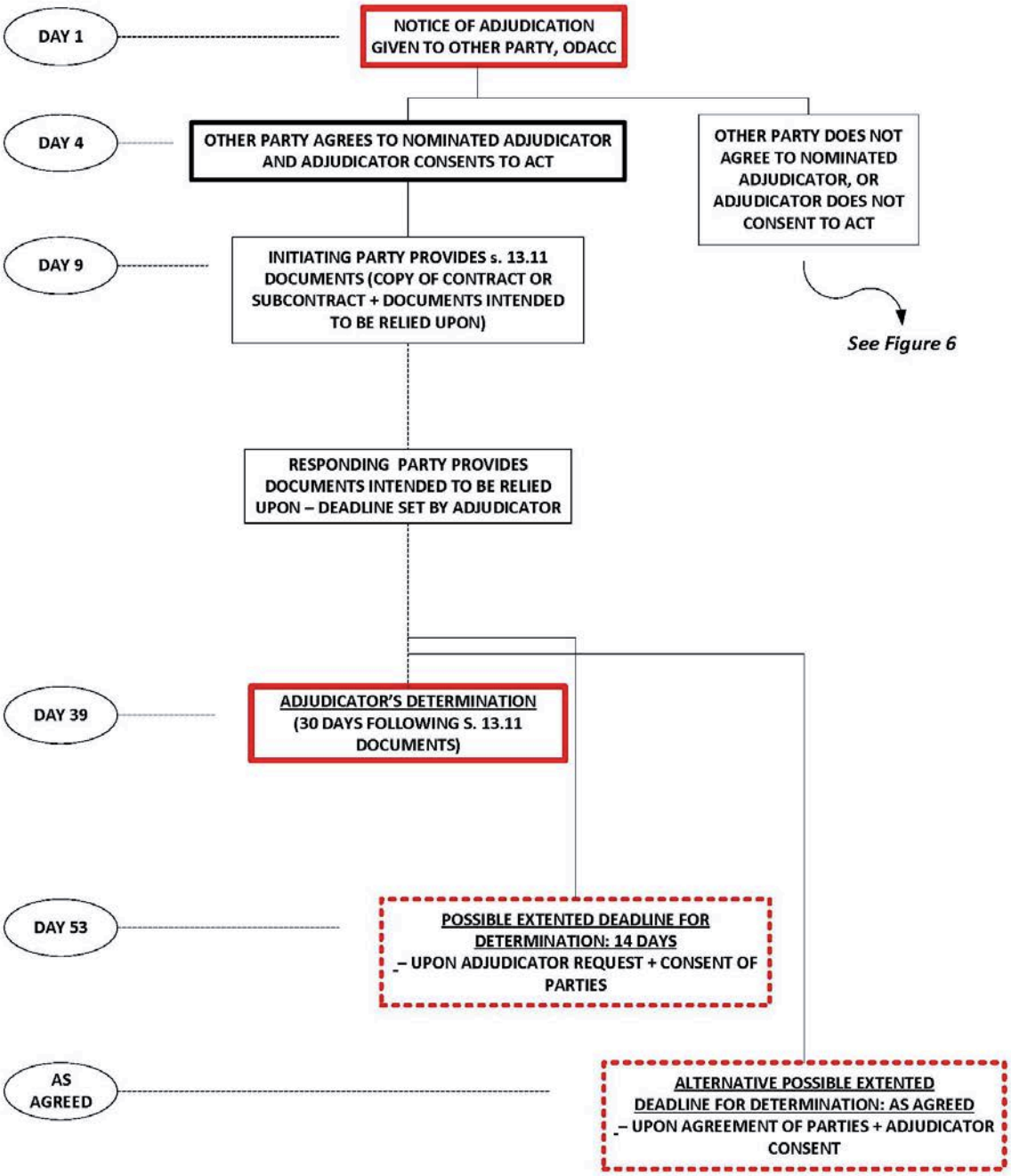


Figure 5: Adjudication Timeline – no ODACC appointment of adjudicator required

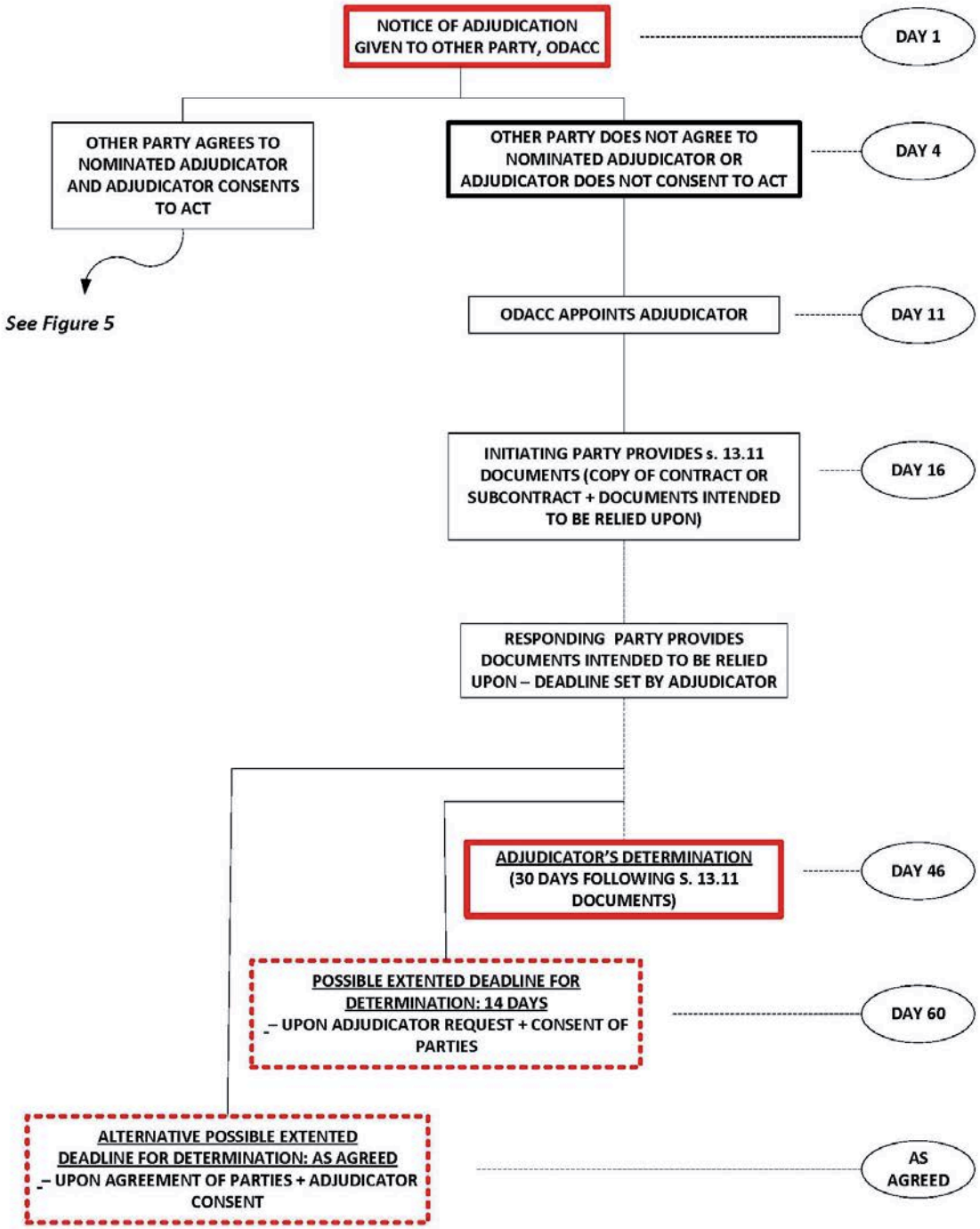


Figure 6: Adjudication Timeline –ODACC appointment of adjudicator required

Tips for the trade contractor

1. Given the very short timelines inherent in the adjudication process, it is essential that your project documentation be organized and readily accessible. This is good project management practice in any event. Whether initiating an adjudication or responding to one, it will be necessary to access all relevant documentation pertaining to the dispute quickly and efficiently.

7.3. Who can be an adjudicator?

KEY POINTS

- Only persons holding a certificate of qualification are permitted to be listed as adjudicators in the mandatory registry established and maintained by ODACC.
- Adjudications may only be conducted by holders of a certificate of qualification.
- Adjudicators are permitted from across the industry, covering a wide spectrum of relevant experience and expertise, including accounting, design professional, quantity surveying, project management and legal.

Qualifications

In order to hold a certificate of qualification as an adjudicator, an individual must meet the following qualifications:

1. the individual has, in ODACC's view, at least 10 years of relevant working experience in the construction industry;
2. the individual has successfully completed the required training programs;
3. the individual is not an undischarged bankrupt;
4. the individual has not been convicted of an indictable offence in Canada or a comparable offence outside Canada;
5. the individual pays the applicable fees for training and qualification to ODACC;

6. the individual agrees in writing to abide the requirements for holders of the certificate of qualification, including compliance with the Code of Conduct established by ODACC, providing proof upon request of the holder's eligibility to hold the certificate, and maintaining the required records and reporting the required information to ODACC as requested.

Examples of relevant construction industry experience include working in the industry as an accountant, architect, engineer, quantity surveyor, project manager, arbitrator or lawyer. This is not an exhaustive list.

The process to apply for accreditation as an adjudicator is set out on ODACC's website: https://odacc.ca/en/adjudicators/certification-process.

Code of Conduct

The Code of Conduct (https://odacc.ca/en/adjudicators/code-of-conduct) is an extensive document, intended to set out an adjudicator's professional and ethical responsibilities; maintain the principles of civility, procedural fairness, competence, proportionality and integrity; and promote public confidence in the system. All adjudicators are required to subscribe to and abide by the Code of Conduct, and a failure to do so may result in loss of the certificate of qualification.

Broad geographical and subject matter coverage

Among its responsibilities under the Act, ODACC is required to develop procedures and take other reasonable steps to ensure that adjudication is available to parties throughout Ontario. Further, ODACC must develop procedures and take other reasonable steps to ensure that the "aggregate breadth of expertise and working experience" of the holders of certificates of qualification is sufficient to account for the industry sectors in which parties refer matters to adjudication and the matters referred to adjudication. It is clear from the Act, therefore, that both geographic and subject matter coverage are core principles governing the operation of ODACC.

Tips for the trade contractor

1. When considering the nomination of an individual to act as adjudicator, consider carefully the nature of the dispute and the issues to be determined. As appropriate, nominate an adjudicator with subject matter expertise in the matter to be decided.

7.4. What can be adjudicated?

KEY POINTS

- In order to qualify for adjudication under the Act, the dispute must be one falling under one of the enumerated items in section 13.5 of the Act. The list is reproduced below.
- Disputes under labour and material payment bonds may also be adjudicated.
- Only one matter per adjudication, unless everyone, including the adjudicator, agrees otherwise.
- There is a mechanism available for the consolidation of adjudications involving the same matter or related matters.

What can be adjudicated

The Act provides that any of the following disputes may be referred to adjudication:

1. the valuation of services or materials supplied under a contract or subcontract;
2. payment under a contract or subcontract, including payment upon a change order (whether approved or not) or a proposed change order;
3. disputes that are the subject of notices of non-payment;
4. amounts retained as a set-off;
5. payment of holdback required to be paid on an annual basis or a phased basis;
6. non-payment of holdback by a owner, contractor or subcontractor;
7. any other matter that the parties to the adjudication agree to; and
8. any other matter that may be prescribed.

Including claims under LMP bonds

There is presently one other matter that is prescribed as permissible for adjudication: disputed claims for payment under a labour and material payment bond *[Ontario Regulation 306/18, section 25]*.

Broad scope

As is clear from this list, adjudication is intended to deal broadly with disputes involving the valuation and payment of construction services or materials, including claims under payment bonds. Any dispute which concerns valuation, payment, change orders (whether or not approved), proposed change orders, claims to set off, and payment of holdbacks can be adjudicated, whether or not the matter has been invoiced and whether or not it has become the subject of a notice of non-payment.

It is expected that a significant proportion of the disputes typically arising in construction will be covered by this process.

Including any other dispute agreed upon

Note that in addition to the disputes listed in items 1 to 6 above, the Act allows the parties to agree to submit to adjudication any other matter they agree upon. These words in the Act are general, and appear to encompass any dispute whatsoever, irrespective of whether or not it is a payment dispute.

Only one dispute per adjudication

An adjudication may only address a single matter unless the parties and the adjudicator agree otherwise.

Consolidation

There are situations, however, where multiple adjudications are commenced and it would be appropriate to have them determined together because they arise out of the same or related issues. Examples include:

- an owner who disputes a portion of the contractor's proper invoice alleging that the disputed portion pertains to the work of an identified subcontractor, and both the contractor and the subcontractor take the problem to adjudication;

- an owner who disputes a contractor's proper invoice in circumstances in which the issue potentially involves the work of two or more subcontractors, and adjudications are commenced as between owner and contractor, and between the contractor and each of the subcontractors involved.

For reasons of cost efficiency and consistency of outcome, it is in the interests of everyone that problems like this be determined once and for all by the same adjudicator at the same time.

In these situations, the parties can agree to consolidate them. Failing agreement, the contractor has power to require consolidation as of right by notice of consolidation given to each of the affected parties.

That notice of consolidation must be given within 5 days after the adjudicator receives the documents required to be provided by the last of the parties seeking adjudication (being a copy of the contract or subcontract, and the documents intended to be relied upon).

The Act and Ontario Regulation 306/18 prescribe various details providing for the deemed resignation of the adjudicators previously named and the reappointment of one of them to deal with the consolidated adjudication, the delivery of documents and related matters.

Tips for the trade contractor

1. A common source of trouble in construction is a series of unresolved issues which accumulate and fester over the life of the project, only to explode in prolonged, expensive litigation at the end. Think of adjudication as an effective "relief valve" to prevent this from happening.

2. Keep in mind the wide scope of matters which can be adjudicated under the Act, including such common problems as disputes over proposed change orders, set-off claims, and disputes about valuation.

3. Also keep in mind that any other matter that the parties agree to can be adjudicated. Occasionally, parties who are otherwise in a well-functioning contractual relationship find themselves with a genuine difference of opinion, and both would benefit by an authoritative determination by a neutral person. The adjudication procedure in the Act gives them a quick and relatively inexpensive mechanism to achieve that objective.

7.5. When can adjudication take place?

KEY POINTS

- Adjudication can take place at any time, but no adjudication is permitted after the contract or subcontract is completed unless the parties agree otherwise.

Under the Act, a notice of adjudication cannot be validly given after the date the contract or subcontract is completed, unless the parties agree otherwise. This is in keeping with the overall objective of the Act, being the

timely and prompt resolution of payment disputes in real time, while the project is underway.

Any time during the contract or subcontract

There is one other time limitation in the Act relevant to adjudications: the requirement that a contractor or subcontractor seeking "pay when paid" protection (in the event a payment from upstream is not received) proceed to adjudication of that payment issue within 21 days of giving the notice of non-payment to their downstream payees. This raises the question: what if the contract or subcontract being adjudicated is completed prior to the expiry of that 21 day period? Must the party initiating the adjudication do so before their contract or subcontract completes, or will they have the full 21 days available to do so?

Completion of contract or subcontract before expiry of 21 days

Case law will be necessary to determine this. In the meantime, parties seeking adjudication should adopt a conservative strategy – assume the adjudication must be brought within the shorter deadline (i.e. prior to completion of the contract or subcontract in question) and deliver a notice to adjudicate within that deadline.

Tips for the trade contractor

1. Adjudicate in real time, while the project is under way. The purpose of the adjudication system is to not let problems fester, but rather to allow parties to resolve payment disputes quickly and efficiently, put the conflicts behind them, and get on with the project.

2. Conversely, and assuming pay when paid protection is not a factor, there is in theory nothing preventing a contractor or subcontractor from "saving up" claims on various issues, then initiating multiple adjudications simultaneously near the end of the contract or subcontract. This is a poor strategy and is to be strongly discouraged. Besides defeating the principle objective of the adjudication scheme, a contractor or subcontractor doing this risks having to pay some or all of the other party's costs if the adjudicator determines that the party has acted in a manner that is frivolous or vexatious, an abuse of process, or other than in good faith.

3. In any event, avoid "surprising" the other party with an adjudication. It is a strategy which rarely works, and will do nothing to assist the relationship. Raise the issue and give yourself and the other side an opportunity to resolve it. Use the threat of adjudication wisely, as a tool to bring attention to the problem and maintain the focus necessary to get to resolution.

7.6. How is an adjudicator appointed?

KEY POINTS

- The adjudicator is nominated by the party seeking adjudication, at the time adjudication becomes necessary.
- An adjudicator cannot be named in advance by contract.
- The parties then either agree upon the adjudicator (either the one nominated or an alternative) or ODACC appoints one.
- The adjudicator must consent to his or her appointment.

By agreement or by appointment

An adjudicator is appointed either upon agreement of the parties or by ODACC.

No appointment in advance

The Act contemplates that the adjudicator is appointed at the time the need for adjudication arises. It is not permissible to name an adjudicator in advance, and any provision in a contract or subcontractor purporting to do so is of no force and effect.

Initiating the appointment

At first instance, the party seeking adjudication must name a proposed adjudicator in the notice of adjudication which that party must complete. The adjudicator proposed must be an individual listed on the registry of adjudicators maintained by ODACC, accessible at https://odacc.ca/en/adjudicator-registry.

Interestingly, the ODACC form of notice of adjudication contemplates the possibility that a party will simply ask ODACC to appoint an adjudicator for the matter, rather than nominating any specific person to act. This seems inconsistent with section 13.7 of the Act, which requires that the party seeking adjudication must include the name of a proposed adjudicator in its notice of adjudication. It is, however, consistent with section 13.9 of the Act, which provides that parties "may agree to an adjudicator, or may request that [ODACC] appoint an adjudicator".

In any event, parties seeking adjudication should take advantage of their opportunity to nominate a specific individual to act, rather than have an adjudicator appointed by ODACC. In this way, the parties can retain better control of the process, and have the assurance that they have selected an individual with the industry or legal expertise they consider appropriate to deal with the matter.

Agreement upon the adjudicator

In its process, ODACC provides a mechanism whereby the parties can obtain agreement on the adjudicator, provided this agreement is reached within 4 days after the notice of adjudication is given. A responding party who receives a notice of adjudication may either accept the adjudicator proposed by the party initiating the adjudication, or may counter-propose another adjudicator. The party initiating can then either accept that individual, or propose another adjudicator, and so on. If agreement is not reached within the 4 day time limit, the party seeking adjudication must request that ODACC appoint an adjudicator and ODACC will do so within 7 days, as the Act requires.

Adjudicator consent necessary

The appointment of an adjudicator is always subject to the consent of the proposed adjudicator to act. There are a number of reasons why any particular proposed adjudicator may decline to consent, including scheduling issues, conflict of interest, concern about expertise, and so on. If the proposed adjudicator does not consent within 4 days of giving the notice of adjudication and the parties do not otherwise agree upon another adjudicator, ODACC must then select an adjudicator for the matter upon that adjudicator's consent to act.

Tips for the trade contractor

1. When considering who should be appointed to adjudicate your dispute, consider the issues involved and the qualifications of the adjudicator.

2. If possible, take advantage of the opportunity to tailor your solution to the problem, and seek an adjudicator appropriate to the issue. For example, a dispute about measurement and quantification may be most appropriately resolved by an adjudicator with quantity surveying experience, while a dispute involving the interpretation of a contract may be best dealt with by an adjudicator with legal experience.

3. Consider informally contacting a proposed adjudicator prior to nominating him or her to confirm their availability and the absence of any conflicts which might prevent them from acting.

4. If possible, seek agreement with the other party upon a specific adjudicator to be appointed.

5. Use the ODACC appointment process only as last resort, if agreement upon an adjudicator cannot be achieved.

7.7. I'm adjudicating – what documents must I file?

KEY POINTS

- An adjudication commences with the giving of a written notice to adjudicate.
- ODACC prescribes a form of Notice of Adjudication.
- Once the adjudicator is confirmed, the party initiating adjudication has 5 days to provide a copy of the notice of adjudication together with copies of the contract or subcontract and the other documents being relied upon.
- Use of the ODACC Custom System will facilitate all this.

Contents of a notice of adjudication

A party to a contract or subcontract who initiates an adjudication must give the other party a written notice of adjudication including the following information:

a) the names and addresses of the parties;

b) the nature and a brief description of the dispute, including details of how and when it arose;

c) the nature of the redress being sought; and

d) the name of the proposed adjudicator. *[s. 13.7(1)]*

ODACC form

The Act does not prescribe any particular form for this notice of adjudication, but ODACC does. See the ODACC Notice of Adjudication included in the Forms section of this Guide.

To repeat the commentary in section 7.6 of this Guide: while the Act requires that the party seeking adjudication must include the name of the proposed adjudicator, the ODACC form contemplates the possibility that ODACC will simply appoint an adjudicator upon request. It is preferable that a specific individual be nominated to act as adjudicator.

The notice of adjudication must be given to the other party and, on the same day, to ODACC.

The process for confirmation of the appointment of the adjudicator then follows.

Other documents to be provided

No later than **5 days** after the adjudicator agrees or is appointed, the party who gave the notice of adjudication must:

1. provide the adjudicator with a copy of the notice; and

2. provide both the adjudicator and the other party with a copy of the contract or subcontract, and any other documents the party intends to rely upon in the adjudication.

How documents are "given"

These documents must be "given" in a manner permitted by the rules of court for service of a document other than an originating process, unless the adjudicator directs otherwise. Again, using the ODACC Custom System will facilitate this and avoid unnecessary complications. The party initiating adjudication may upload the documents mentioned above on the system, which will constitute compliance with the obligation to "give" the documents provided that the other party is also a subscriber to the system. If that other party has not created an account on the ODACC Custom System, the initiating party should simply serve these documents by personal service upon the other party and the adjudicator, and have an affidavit of service prepared to prove timely compliance.

Tips for the trade contractor

1. Use the ODACC Notice of Adjudication form.

2. Take the form seriously. For example, the form (and the Act) requires a short synopsis of the dispute, including details of how and when it arose. Since there is the possibility that your adjudication will be decided only on paper, without an opportunity to make oral submissions, use this as your first opportunity to articulate your case and persuade the adjudicator of the merits of your claim.

7.8. What has to be filed in response to an adjudication?

KEY POINTS

- The documents which the responding party will need to file will be determined by the issues raised in the adjudication, and the types of documents required may be subject to the direction of the adjudicator.

- The adjudicator will also set the timeline within which these responding documents will need to be filed.

Act does not specify

The Act does not specify what documents need to be filed by a party responding to an adjudication. This will necessarily depend upon the issues raised by the initiating party and the documents that party files in support of its claim.

Required ODACC form

ODACC, however, requires a responding party to complete a "Response to Notice of Adjudication" form, which includes information concerning adjudicator selection, a proposed ODACC Adjudication Process, and space for a short summary (250 word limit) of the responding party's position.

Timeline for filing

The Act also does not specify the timeline for the filing of responding documents, and this will be set by the adjudicator. Recognizing that unless extended, the adjudicator's determination must be made within 30 days of receipt of the documents filed by the initiating party, the responding party can expect a short deadline.

Possible types of documents

The documents which the responding party will file within this deadline may be subject to the direction of the adjudicator, in the exercise of his or her power to take the initiative to ascertain the relevant facts. The documents to be filed may also be subject to page limitations prescribed under whatever Pre-Designed Adjudication Process the parties agree to use. Documents might include site inspection reports, photographs, excerpts from site logs, relevant portions of the contract documents, supporting emails and correspondence, and similar documentation seeking to establish the case for the responding party.

How documents given

The documents to be filed by the responding party must be served on the initiating party and the adjudicator in a manner permitted under the rules of court for service of a document other than an originating process. The adjudicator may direct otherwise, and it can be expected that most adjudicators will direct the easiest and most expeditious manner of delivery.

Assuming the parties make use of the ODACC Custom System, the responding party's documents can simply be uploaded into the system, and that will constitute good service.

Tips for the trade contractor

1. Do not underestimate the importance of the documentation. Many adjudications will be determined solely upon the documents which the parties file, without any oral evidence at all.

2. To repeat a previous tip: it is important that you keep your project files organized and readily accessible. This is especially the case if you are required to respond to an adjudication. While the other party may have had weeks to prepare its notice of adjudication and supporting documentation, you will have much less time available and it will be essential that you be able to access your documents quickly.

7.9. What are the adjudicator's powers?

KEY POINTS

- The adjudicator has broad inquisitorial powers under the Act, which are in some respects even broader than those of a judge in court or an arbitrator.
- These include conducting on-site inspections, obtaining the assistance of others to assist with factual matters, issuing directions with respect to the disclosure of documents, and assessing costs where it is determined that a party has acted in a frivolous or vexatious manner, abused the process, or acted in other than good faith.
- The adjudicator, however, must carry out his or her duties in an impartial and unbiased manner, and is subject to other legal constraints intended to ensure the integrity of the process.

Broad inquisitorial power

The adjudicator has broad inquisitorial power to inquire into and make a determination about any dispute which is properly before him or her, including taking the initiative in ascertaining the relevant facts and law, conducting on-site inspections, and procuring the assistance of others to assist in determining factual matters.

The parties may give the adjudicator other powers by their contract, provided those are not inconsistent with the powers granted by the Act.

In exercising his or her authority, the adjudicator must ensure fairness to the parties and the integrity of the process. This includes a duty to remain impartial.

Specific powers

Under the Act, the adjudicator may exercise the following powers:

- Issuing directions respecting the conduct of the adjudication.
- Taking the initiative in ascertaining the relevant facts and law.
- Drawing inferences based on the conduct of the parties.
- Conducting an on-site inspection (subject to the consent of the owner of the premises and that of any other person with legal authority to exclude others from the premises).
- Obtaining the assistance of any person in such a way as the adjudicator thinks fit to enable him or her to better determine any factual matter in question, including a merchant, accountant, actuary, building contractor, architect, engineer or other person. This includes the power to fix the remuneration of that person, and to direct that either or both of the parties pay that remuneration.
- Making a determination in the adjudication
- Issuing directions with respect to the disclosure of documents
- Determining that a party has acted in a manner that is frivolous or vexatious, an abuse of process or other than in good faith, and making a cost order against such a party.

Contractual right to specify other powers – but adjudicator may likely be free to ignore them in the circumstances

Parties are permitted to specify other powers by their contract or subcontract, provided that such other powers are not inconsistent with those set out above. However, an adjudicator may conduct any adjudication "in the manner he or she determines appropriate in the circumstances". This suggests that an adjudicator is legally permitted to ignore such contractual provisions if he or she determines that they are inappropriate in the particular circumstances of the dispute.

It is important to appreciate the scope of this adjudicator power. In essence, an adjudicator posses a broad inquisitorial power to inquire into and determine a dispute. In this respect, an adjudicator has greater authority than does a judge in court or an arbitrator.

Limitations on adjudicator's powers

Although the powers are extensive, there are limitations upon an adjudicator designed to ensure fairness to the parties and the integrity of the process, including the following:

(a) the adjudicator must conduct the adjudication in an impartial and unbiased manner;

(b) the adjudicator cannot make a determination upon any matter that may not otherwise legally be the subject of an adjudication under the Act;

(c) the adjudicator may not make a determination of a matter entirely unrelated to the subject of the adjudication before him or her;

(d) the adjudicator must comply with the time limits for making a determination, failing which his or her determination is of no force and effect.

Subject to this, the adjudicator has a broad jurisdiction to conduct the process in the manner he or she determines appropriate in the circumstances.

Tips for the trade contractor

1. In contemplating an adjudication, keep in mind the very wide powers which an adjudicator possesses under the Act. Unlike a judge or arbitrator, an adjudicator is not constrained to passively assess whatever documents, witnesses and legal theories the parties might choose to bring to the case, but instead, may actively take the initiative to ascertain the relevant facts and the law, including visiting the site and hiring specialist advisors to help with factual matters. There is much less room to hide in an adjudication, and must less opportunity for legal gamesmanship!

2. **Consider including provisions in the contract or subcontract that address adjudication procedures beyond those set out in the Act**. For example, you might agree that in any adjudication exceeding a certain threshold amount, the parties will be free to introduce oral evidence under oath before the adjudicator in addition to documentary evidence. While the adjudicator always retains the power to issue differing directions respecting the conduct of the adjudication, contractual provisions like these may nonetheless be useful in assisting the adjudicator in setting the process.

7.10. Can an adjudication be terminated?

KEY POINTS

- An adjudication can be terminated at any time before determination by agreement of the parties.
- An adjudication is also subject to being terminated upon the resignation of the adjudicator.

At any time by agreement

Parties are perfectly free to terminate an adjudication by agreement at any time before the adjudicator makes the determination. They must give notice to the adjudicator and to ODACC, and are subject to paying the adjudicator's fee.

Adjudicator resignation

An adjudication is also subject to being terminated upon the resignation of the adjudicator. By Regulation 306/18 under the Act, an adjudicator is permitted to resign at any time if he or she determines that:

a) the matter is not eligible for adjudication under s. 13.5 of the Act; or

b) he or she is not competent to conduct the adjudication.

Section 13.5 of the Act lists the types of matters which may be adjudicated, being essentially valuation and payment disputes. See also Section 7.4 of this Guide. It is conceivable that a party may commence an adjudication, and an adjudicator may become appointed, in circumstances in which the issue raised in the adjudication falls outside s. 13.5 and the adjudicator therefore lacks the jurisdiction (authority) to determine it. Examples include an adjudication to determine the propriety of a notice to replace a site superintendent due to unacceptable behaviour (not a payment issue), or an adjudication is commenced after the contract was completed.

Where the adjudicator determines that he or she lacks jurisdiction in this manner, the adjudicator will resign, and the adjudication will terminate. The parties remain free to resolve their problem using whatever other processes may be available to them.

Where an adjudicator resigns because he or she determines they are not competent to conduct the adjudication, the adjudication is also terminated. However, the initiating party remains free to deliver a fresh notice of adjudication and restart the process.

There is a third circumstance in which an adjudicator may resign: where two or more adjudications have been consolidated. The adjudicator(s) selected by the parties in these circumstances are deemed to have resigned on the day they receive notice of the consolidation. An adjudicator who is deemed to have resigned remains free to be selected or appointed to conduct the consolidated adjudication afterwards.

Tips for the trade contractor

1. The prompt resolution of valuation and payment disputes is a key underlying objective of the Act, and a problem solved by mutual agreement is usually a better outcome than a solution imposed by an adjudicator.

2. You can always settle - even after an adjudication has been commenced!

7.11. I won the adjudication – now what?

KEY POINTS

- A party entitled to payment under an adjudication has the right to receive that payment no later than 10 days after the determination is communicated to the parties.
- If there is a failure to pay within this time period, the party entitled to payment can enforce the determination as if it were an order of the court.
- The party entitled to payment is also entitled to interest.
- The Act provides one further remedy: a statutory right to suspend work.

Determination must be in writing

An adjudicators' determination must be in writing, and must include reasons for the determination. The adjudicator must communicate the determination to the parties by providing them with an electronic copy on the day the determination is made. ODACC requires that adjudicators upload the determination on ODACC's Custom System.

ODACC-certified determinations

ODACC will certify the determination and provide the parties with a certified determination no later than 5 days following the making of the determination.

Determination requiring payment must be complied with in 10 days

A party who is required to pay under a determination must pay that amount no later than 10 days after the determination has been communicated to the parties.

A requirement to pay an amount upon a determination is subject to any requirement to retain a holdback under the Act. This does not apply to adjudications upon disputes under labour and material payment bonds.

Interest

Interest begins to accrue on any amount which is not paid when due at the prejudgment interest rate determined under the Courts of Justice Act, or such interest rate as may be specified by the contract or subcontract, whichever is greater.

Enforcement of a determination

A party to an adjudication may file that certified copy obtained from ODACC with the court and must notify the other party of doing so within 10 days of filing. The determination is then enforceable as if it were an order of the court. This includes garnishment and seizure and sale of assets, as well as a right to conduct examination in aid of execution.

Time limit to enforce

There is a time limit to file determinations with the court, being two years after the date the determination is communicated to the parties. If a party makes an application for leave for judicial review, that deadline is the second anniversary of the dismissal of the motion, or the final determination of the application if that did not result in the adjudicator's determination being set aside.

Right to suspend work

In addition, a party found entitled to payment under a determination has one further powerful remedy: the statutory right to suspend work. The right to suspend continues until the other party pays the amount required to be paid under the determination, plus interest, plus any reasonable costs incurred by the suspending party as a result of suspending work (demobilization). A party who suspends and then resumes work is also entitled to the reasonable costs of resuming work (remobilization).

Tips for the trade contractor

1. Upon receiving a favourable determination, contact the other party immediately to confirm that payment will be made within 10 days.

2. As necessary, remind the other party of the various rights available under the Act to enforce that determination, including garnishment and seizure and sale of assets, as well as suspension of work.

3. It can be expected that this will, in most cases, be sufficient to get payment, and further enforcement will not be required.

7.12. I lost the adjudication – now what?

KEY POINTS

- While a determination in an adjudication is interim binding, the parties retain their right to revisit the issue in litigation or arbitration, including lien proceedings, if they wish.
- There is a right to have the determination judicially reviewed, but only with leave and only in limited circumstances.
- Adjudicator's determination and the reasons are admissible in court.

Determination is interim binding

An adjudication is binding upon the parties until the matter may be determined otherwise by a court, or in arbitration, or by a written agreement between the parties.

Revisiting a determination

The Act provides that the parties remain free to revisit the subject matter of their dispute later in litigation or arbitration and that nothing restricts the authority of a court or arbitrator to consider the merits of a matter determined by an adjudicator. However, a losing party at adjudication should note the following:

(a) there is no right to appeal an adjudicator's determination;

(b) though there is a right to seek judicial review of a determination, the right is restricted; and

(c) an adjudicator's determination and the reasons for that determination are admissible in any later court proceedings.

Judicial review of a determination

A court has the power to set aside an adjudicator's determination upon judicial review. But there are significant barriers which must be taken into account in any decision to proceed:

(a) Judicial review is not available as of right. A party seeking it must obtain the leave of the court (permission) to do so as a first step. A court is free to dismiss any such application for leave without reasons, and there is no appeal from that decision.

(b) Assuming leave is granted, judicial review of an adjudicator's determination will only be successful upon one or more of the following grounds:

(i) the applicant participated in the adjudication while under a legal incapacity;

(ii) the contract or subcontract was invalid or ceased to exist;

(iii) the determination was of a matter that could not be the subject of adjudication under the Act;

(iv) the determination was of a matter entirely unrelated to the subject of the adjudication;

(v) the adjudication was conducted by someone other than a qualified adjudicator;

(vi) the procedures followed in the adjudication did not accord with the procedures to which the adjudication was subject under the Act and the failure to accord to the correct procedure prejudiced the applicant's right to a fair adjudication;

(vii) there is a reasonable apprehension of bias on the part of the adjudicator; or

(viii) the determination was the result of fraud.

This list represents a narrow group of relatively infrequent, more egregious, circumstances which must be met before a court will intervene. This is consistent with the underlying purposes of the Act, being the timely and efficient resolution of payment disputes, with restricted opportunities for the kind of legal gamesmanship which gridlocks the orderly flow of project funds.

No stay pending judicial review

Unless the court orders otherwise, bringing an application for judicial review does not operate to stay the operation of any determination – in other words, if a determination requires the payment of money, that money must still be paid within 10 days. However, if the court sets aside a determination

upon judicial review, the court has the power to order the return of any money which had been paid.

Rights remain intact

A losing party who is denied money will still retain the right to claim a lien (assuming lien rights have not expired), to sue in court, or pursue an arbitration if there is an agreement to arbitrate between the parties.

Determinations admissable in court

The adjudicator's determination and the reasons for that determination are admissible as evidence in court proceedings later. It is not yet clear how a judge in court would or should treat such determinations, including what, if any, weight the determination should be given, and case law will be necessary to provide guidance about this.

In the meantime, parties should expect some uncertainty. Some judges will likely give an adjudicator's determination considerable deference, while others may treat that determination as simply one opinion coming at the end of an abbreviated process, without all the legal protections that are available to parties in court, and therefore subject to little weight within a full-blown trial.

Interestingly, the Act does not specifically provide that adjudicator's determinations are admissible in arbitrations (as distinct from court). Whether a determination is admissible in an arbitration would seem to be an open question for the arbitration panel to decide.

Tips for the trade contractor

1. Should you lose an adjudication, you will naturally feel aggrieved, and the "Now what?" question will be top of mind, particularly if the result is that you must pay money.

2. In considering your options, begin by carefully and dispassionately reviewing the determination and the reasons behind it. Is it conceivable that the adjudicator's determination was justified and would be seen as such by an objective third party?

3. Remember that the determination and the reasons are admissible in any court proceedings later. Whatever weight a trial judge may give it, once the parties have taken all the various steps required to get to trial, there remains the practical reality that in seeking a different result before a court, you will have the hurdle of overcoming the adverse opinion of the adjudicator and the reasons upon which that opinion was based.

4. Get legal advice in considering your options following a loss in an adjudication.

7.13. What are the costs of adjudication?

KEY POINTS

- Excluding a party's legal fees, the primary cost of an adjudication is the adjudicator's fee, which is either negotiated or set by ODACC.
- Adjudications involving $50,000 or more also are subject to an Adjudication Referral Fee and a Certification Fee, both payable to ODACC.
- The adjudicator is subject to paying either 40% or 50% of its fee to ODACC an Administrative Fee.
- Parties are potentially subject to also paying the costs of any third party assistance on factual matters which the adjudicator may consider necessary.
- The parties split these costs equally, subject to the right of the adjudicator to allocate them differently in cases of abusive or bad faith conduct.

Adjudicator's fee determined by agreement or set by ODACC

The adjudicator is entitled to be paid a fee for his or her services, and those arrangements must be determined before the adjudication commences.

The adjudicator's fee is either determined by agreement among the parties and the adjudicator, or are set by ODACC upon the adjudicator's request.

If the adjudicator requests ODACC to set the fee, that fee will be determined in accordance with a Fee Schedule approved by the Attorney General. The Fee Schedule stipulates fees on a sliding scale dependent upon the amount claimed in the notice of adjudication, and range from $800 (for claims under $10,000) to hourly rate fees of $750 (for claims in excess of $1 million). The Fee Schedule can be found at https://odacc.ca/en/claimants/fees.

Other fees

In addition to the adjudication fee, ODACC charges two other fees in adjudications where the amount claimed in the notice of adjudication is $50,000 or more:

- an Adjudication Referral Fee of $500; and
- a Certification Fee of $100.

Neither of these two fees are charged where the amount claimed in the notice of adjudication is less than $50,000.

Costs of assistance

In addition to these fees, the parties are potentially liable for payment of the costs of assistance on factual matters provided to the adjudicator by a merchant, accountant, actuary, building contractor, architect, engineer or other person the adjudicator considers fit. The adjudicator may fix the remuneration for such people as is reasonable and proportionate, and may direct payment by either or both of the parties.

Split equally

The adjudication fee is split equally between the parties. The adjudicator retains the right to order a different allocation of these costs, however, in circumstances in which the adjudicator determines that a party has acted in a manner that is frivolous or vexatious, an abuse of process, or other than in good faith.

Administrative fee

There is one additional fee, paid by the adjudicator to ODACC out of the monies otherwise paid by the parties to the adjudicator. ODACC calls it an "Administrative Fee", and it is either 50% of the amounts paid by the parties (where the adjudication fee is $3000 or less) or 40% (where the adjudication fee is over $3000).

Tips for the trade contractor

1. Realistically, you should expect that adjudicators will generally wish to undertake mandates on a negotiated fee basis rather than have ODACC set fees from the Fee Schedule. Many adjudicators will consider their remuneration using the rates in the Fee Schedule to be excessively low, particularly given that the adjudicator will have to pay 40% or 50% of that remuneration to ODACC as its Administrative Fee.

2. When considering the costs of adjudication, keep in mind that those costs will be a fraction of the costs which would otherwise have to be incurred in pursuing a lien, a court case or an arbitration – and it's a process in which there is an excellent probability of achieving a solution to a problem that everyone can live with.

8. Expanded publication requirements

Under the old CLA, the only publication requirements were the publication of the certificate or declaration of substantial performance of the contract and publication of notice of intention to register a condominium.

What has to be published

The Act includes these and adds two other publication requirements as follows:

1. Owner's obligation to publish notice of intention to refuse to pay some or all holdback *[s. 27.1]*

2. Right to publish certificate or declaration of substantial performance of the contract *[s. 31 (2)]*

3. Obligation to publish a notice of termination of a contract *[s. 31 (6)]*

4. ***Obligation to publish notice of intention to register a description and declaration under the Condominium Act, 1998.***

Construction trade newspaper

Publication must be done in a "construction trade newspaper", which is defined as a newspaper,

(a) that is published either in paper format with circulation generally throughout Ontario or in electronic format in Ontario;

(b) is published at least daily (Saturdays and holidays excepted);

(c) in which calls for tender on construction projects are customarily published; and

(d) is primarily devoted to publication of matters of concern to the construction industry.

At present, the following publishers receive publications under the Act:

1. **Daily Commercial News** (https://canada.constructconnect.com/dcn/certificates-and-notices)

2. **Ontario Construction News** (https://ontarioconstructionnews.com/certificates)

3. **Link2Build** (https://www.link2build.ca/certificates)

Tips for the trade contractor

1. Since each of Daily Commercial News, Ontario Construction News and Link2Build receives publications of notices under the Act, it is essential that the trade contractor check each one. Simply because a notice does not appear in one does not mean it has not been published in another!

9. Special cases

The Act deals with two special cases which are of particular interest to trade contractors:

- projects delivered under alternative financing and procurement arrangements (P3s); and
- projects involving nuclear facilities

9.1. Alternative financing and procurement arrangements

P3s

An alternative financing and procurement arrangement is described in the Act as an improvement whereby the Crown, a municipality or a broader public sector organization, as owner, enters into a project agreement with a special purpose entity that requires that entity to finance and undertake the improvement on behalf of the Crown, municipality or other broader public sector organization, and for that purpose, to enter into an agreement with a contractor for the improvement.

Such arrangements are commonly called "public-private partnerships", or P3s. The special purpose entity contracting with the owner is commonly known as "Project Co".

The Act generally applies to P3s, but there are three special features of this type of project delivery which were considered necessary to be accommodated:

1. P3 arrangements often include an agreement to provide operations and maintenance services over an extended period of time, in addition the construction services required to build the facility itself;
2. P3s typically involve an independent certifier, who is responsible for certifying payments and milestones in a binding way upon the various parties involved; and
3. P3s tend to be large projects, typically requiring more sophisticated forms of performance security.

The Act deals with each of these as follows:

Special provisions for P3s

a) The prompt payment scheme does not apply respecting the operations and maintenance services portions of project

agreements, or any subcontract pertaining to operations and maintenance;

b) Adjudication may not be used to determine when the project agreement, or any agreement between Project Co and the contractor, is substantially performed or substantially completed;

c) Adjudication may not be used to determine whether or not any milestone requiring a payment has been reached;

d) Assuming the project agreement names an independent certifier, the parties must request a representative of such independent certifier to conduct any other adjudication upon the project, assuming such representative is otherwise listed in the adjudicator registry maintained by ODACC;

e) The owner Crown, municipality or broader public sector organization may require a coverage limit for both performance and labour and material payment bonds different than the 50% of the contract price limit otherwise prescribed for public contracts, provided that such different coverage limits meet or exceed the prescribed limit. That prescribed limit is (i) 50% of the contract price for contracts of $100 million or less, and (ii) $50 million for contracts exceeding $100 million in value; and

f) Those prescribed bonding limits do not apply if the bonds otherwise provided, together with any other security which may be required, reflect an appropriate balance between the adequacy of security required to ensure payment of contractors and suppliers and the cost of the security.

Tips for the trade contractor

1. If subcontracting for work on a P3, make the necessary inquiries to determine whether or not there is a representative of the independent certifier who is listed as an adjudicator under the ODACC registry. This will be the person who will be required to adjudicate any disputes under your subcontract.

2. Prior to entering into a subcontract on a P3 project, confirm the bonding and any other security required to be provided, and also confirm that you are eligible for protection under such security. Use the right to request this information under s. 39 if necessary.

9.2. Nuclear facilities

No prompt payment or adjudication on nuclear work

Neither the prompt payment scheme nor the adjudication system applies to contracts for improvements to land used in connection with a Class 1 nuclear facility as defined in SOR/2000-204 (Class 1 Nuclear Facilities Regulation) or to subcontracts made under such contracts *[Ont. Reg. 304/18, s. 13]*.

See the Regulation at https://laws.justice.gc.ca/eng/regulations/sor-2000-204/page-1.html. Generally speaking, nuclear power generation facilities such as Darlington and Bruce will fall within this Regulation.

Tips for the trade contractor

1. If contracting for work to be done on a nuclear facility, it is likely that prompt payment and adjudication do not apply to your contract or subcontract. Confirm as much prior to contracting, and assess your project risk accordingly.

10 Forms

Forms

The following are the forms referenced in this Guide. Users should consult the Guide and the Ontario Court Forms website (see link below) as necessary to ensure that their use of any particular Form is appropriate in the circumstances. In case of doubt, legal advice should be sought.

This is only a partial listing of all of the Forms promulgated under the Act. A comprehensive listing of the Forms is contained in Ontario Regulation 303/18, and can also be found at:

http://ontariocourtforms.on.ca/en/construction-lien-act-forms

Form 1 (Construction Act): Written Notice Of A Lien

FORM 1
WRITTEN NOTICE OF LIEN UNDER SUBSECTION 1(1) OF THE ACT
Construction Act

Name of person having a lien: _____

Address for service: _____

Name of payer: _____

Address: _____

Name of person to whom person having a lien supplied services or materials: _____

Address:

Time within which services or materials were supplied:

_____ to _____
(date supply commenced) (date of most recent supply)

Short description of services or materials that have been supplied:

_____

Description of premises:

Contract price or subcontract price: $

Amount claimed as owing in respect of services or materials that have been supplied: $ _____

Date: _____ _____
(signature of person having a lien)

CA-1-E (2018/04)

Form 1.1 (Construction Act): Owner Notice of Non-Payment

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

Name of owner: .....

Address: .....

Description of premises:

Name of contractor: .....

Address: .....

Address for service, if known .....

The owner disputes the proper invoice dated ....., 20 ....., submitted to the owner by the contractor in respect of the improvement. The owner will not pay the following amount payable under the invoice:

(Use 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 $ ..... .

The reasons for non-payment are as follows:

Date: ..... _____
(owner)

CA-1.1-E (2019/01)

Form 1.2 (Construction Act):Contractor Notice of Non-Payment Where Owner Does Not Pay

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.

Date: .....

_____
(Contractor)

CA-1.2-E (2019/01)

Form 1.3 (Construction Act): Contractor Notice of Non-Payment If Dispute

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:

Date: _____

_____
(Contractor)

CA-1.3-E (2019/01)

Form 1.4 (Construction Act): Subcontractor Notice of Non-Payment Where Contractor Does Not Pay

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(11) 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.

Date: .....

_____
(Subcontractor)

CA-1.4-E (2019/01)

Form 1.5 (Construction Act): Subcontractor Notice of Non-Payment If Dispute

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:

Date: .....

_____
(Subcontractor)

CA-1.5-E (2019/01)

Form 6 (Construction Act): Notice of Non-Payment of Holdback

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

Name: _____
(Name of owner, contractor or subcontractor)

Address: _____

Description of the premises:

Name of [contractor/subcontractor (choose one)]: _____

Address: _____

Address for service, if known: _____

The [owner/contractor/subcontractor (choose one)] will not pay the following amount required to be paid under sections 26 and 27 of the *Construction Act*:

(Use A or B, whichever is applicable)

A. The full amount of the holdback, being $ _____ .

B. A portion of the amount of the holdback, being $ _____ .

[If applicable] A copy of any notice of non-payment of holdback from the [contractor/subcontractor (choose one)] is enclosed.

Date: _____ _____
(Owner)

CA-6-E (2019/01)

Notice of Adjudication (ODACC)

Ontario Dispute Adjudication for Construction Contracts

180 Duncan Mill Road, 4th Floor
Toronto, ON M3B 1Z6
Email: authority@odacc.ca
Tel: 416-307-0008 | Toll Free: 1-888-221-3721
Fax: 416-362-8825 | Toll Free Fax: 1-877-862-8825
www.odacc.ca

NOTICE OF ADJUDICATION

Construction Act, R.S.O. 1990, c. C.30

Case Number:

Case Name:

CLAIMANT'S INFORMATION

Company Name and Operating Name (if Operating Name is Different):

_____

Name of Individual:

_____

Email: _____

Phone Number: _____

Title: _____

Address:

_____

_____

_____

Is the Claimant a Contractor as defined by the *Construction Act*, R.S.O. 1990, c. C.30?

Yes ☐ No ☐

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Fax: 416-362-8825 | Toll Free Fax: 1-877-862-8825
www.odacc.ca

CLAIMANT'S REPRESENTATIVE'S INFORMATION

Name of Individual at Claimant's Representative's Organization:

_____

Email: _____

Phone Number: _____

Company Name: _____

Title _____

Address:

_____

_____

_____

RESPONDENT'S INFORMATION

Company Name and Operating Name (if Operating Name is Different):

_____

Name of Individual: _____

Title:

_____

Email: _____

Phone Number: _____

Address:

_____

_____

_____

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www.odacc.ca

DESCRIPTION OF DISPUTE

Dispute Amount: _____

Industry Category of the Construction Contract:

_____

Date of Construction Contract:

_____

Please provide a brief description of the dispute, including details respecting how and when it arose. In order for the Adjudicator to check for potential conflicts of interest, please include owners, officers and directors of the company (if any) and the names of potential witnesses in the text box below *(to a maximum 250 words):*

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www.odacc.ca

Nature of the redress sought (what you would like the Adjudicator to order):

SUGGESTED ODACC ADJUDICATION PROCESS

Suggested ODACC Adjudication Process*:

_____

**More information on ODACC Pre-designed Adjudication Processes can be found at* https://odacc.ca/en/claimants/adjudication-process-2/.

SUGGESTED ADJUDICATOR

I suggest the following Adjudicator to conduct the adjudication:

_____

** Proposed Adjudicator must be a Certified ODACC Adjudicator. ODACC's Adjudicator Registry can be found at the following link:* https://odacc.ca/en/adjudicator-registry/.

☐ I consent to potential adjudicators be given the information in the Notice of Adjudication to allow them to determine whether they have a conflict of interest and whether they are prepared to adjudicate the dispute. I confirm that there is no confidential information in the Notice of Adjudication that cannot be seen by potential adjudicators.

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Email: authority@odacc.ca
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Fax: 416-362-8825 | Toll Free Fax: 1-877-862-8825
www.odacc.ca

☐ I agree to pay the retainer within seven days of receiving the retainer from ODACC and any additional fees and costs related to the adjudication (beyond the amount paid as a retainer) within fourteen days from the date the Determination is issued to the Parties. Please click here for more information: https://odacc.ca/en/claimants/payments/.

☐ I agree that communications, documents and the Determination (the "Information") shared or disclosed in the adjudication shall not be disclosed to anyone who is not a Party to the adjudication, except in the following limited specified circumstances:

- where the Information is required in a subsequent adjudication respecting the same Improvement;
- where a Party applies to a court or to an arbitral tribunal to consider matters dealt with in the adjudication;
- pursuant to an order of a court of competent jurisdiction or where the disclosure is required by law;
- where the Information is otherwise in the public domain;
- where the person to whom the Information is disclosed is a legal or financial advisor to a Party to the adjudication;
- where the person to whom the Information is disclosed is involved in the adjudication (such as a contract administrator, an expert or a witness in a hearing);
- with the consent of all of the Parties to the adjudication; and
- where the Information suggests that there will be actual or potential threat to human life or safety or where the disclosure is required in order to prevent the commission of a crime.

_____
Signature
I have authority to bind the Claimant
(if the Claimant is an organization)

_____
Date

_____
Printed Name of Person Signing

_____
Position of Person Signing

NOTICE TO RESPONDENT:	**IF YOU DO NOT FILE A RESPONSE** with ODACC the adjudication may proceed without you and a Determination may be obtained against you. Information about ODACC and the adjudication process can be found at: www.odacc.ca

Ontario Dispute Adjudication for Construction Contracts

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www.odacc.ca

Instructions for Referring a Dispute to Adjudication

To start an adjudication, the Claimant must register on ODACC's Custom System. If the Claimant has an ODACC Custom System account from a previous adjudication matter, the same account may be used for multiple adjudications. To register on ODACC's Custom System, please visit: https://app.odacc.ca/en-CA/Identity/Account/Login?ReturnUrl=%2F.

ODACC's Custom System is the technology platform used by ODACC to administer and facilitate adjudications. ODACC's Custom System will enable the Claimant to fill in a Notice of Adjudication, upload documents and progress through the adjudication process. The Claimant can also communicate with the Respondent and the Adjudicator within ODACC's Custom System.

If the Claimant does not wish to use ODACC's Custom System, the Claimant may file the Notice of Adjudication with ODACC by sending it to ODACC via email at authority@odacc.ca or via fax 416-362-8825.

The Claimant will also need to provide to the other party the Notice of Adjudication form in accordance with the *Construction Act*, R.S.O. 1990, c. C.30.

Where the Notice of Adjudication is uploaded to the custom system between 4:00 p.m. and midnight (EST), it will be deemed to have been uploaded on the following Day.

Ontario Dispute Adjudication for Construction Contracts

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www.odacc.ca

RESPONSE TO NOTICE OF ADJUDICATION

Construction Act, R.S.O. 1990, c. C.30

Case Number: _____

Case Name: _____

CLAIMANT'S INFORMATION

Name: _____

Email: _____

Phone Number: _____

RESPONDENT'S INFORMATION

Company Name and Operating Name (if Operating Name is Different):

_____

Name of Individual: _____

Title: _____

Email: _____

Phone Number: _____

Address:

_____

_____

_____

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Fax: 416-362-8825 | Toll Free Fax: 1-877-862-8825
www.odacc.ca

RESPONDENT'S REPRESENTATIVE'S INFORMATION

Name of Individual at Respondent's Representative's Organization:

_____

Email: _____

Phone Number: _____

Company Name: _____

Title _____

Address:

_____

_____

_____

ADJUDICATOR SELECTION

Select one of the three options below*:

☐ I agree to the Adjudicator suggested by the Claimant to conduct the Adjudication.

Adjudicator suggested by the Claimant:

_____

☐ I request ODACC to appoint an Adjudicator to conduct the adjudication.

☐ I would like to suggest a different Adjudicator to conduct the adjudication.

Adjudicator suggested by the Respondent:

_____

**Proposed Adjudicator must be a Certified ODACC Adjudicator. ODACC's Adjudicator Registry can be found at the following link:* https://odacc.ca/en/adjudicator-registry/.

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www.odacc.ca

SUGGESTED ODACC ADJUDICATION PROCESS

Suggested ODACC Adjudication Process*:

**More information on ODACC Pre-designed Adjudication Processes can be found at* https://odacc.ca/en/claimants/adjudication-process-2/.

RESPONSE TO NOTICE OF ADJUDICATION

Please provide a brief summary of your response to the Notice of Adjudication (to a maximum 250 words). In order for the Adjudicator to check for potential conflicts of interest, please include owners, officers and directors of the company (if any) and the names of potential witnesses in the text box below.

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Toronto, ON M3B 1Z6
Email: authority@odacc.ca
Tel: 416-307-0008 | Toll Free: 1-888-221-3721
Fax: 416-362-8825 | Toll Free Fax: 1-877-862-8825
www.odacc.ca

☐ I consent to potential adjudicators be given the information in the Notice of Adjudication to allow them to determine whether they have a conflict of interest and whether they are prepared to adjudicate the dispute. I confirm that there is no confidential information in the Notice of Adjudication that cannot be seen by potential adjudicators.

☐ I agree to pay the retainer within seven days of receiving the retainer from ODACC and any additional fees and costs related to the adjudication (beyond the amount paid as a retainer) within fourteen days from the date the Determination is issued to the Parties. Please click here for more information: https://odacc.ca/en/claimants/payments/.

☐ I agree that communications, documents and the Determination (the "Information") shared or disclosed in the adjudication shall not be disclosed to anyone who is not a Party to the adjudication, except in the following limited specified circumstances:

- where the Information is required in a subsequent adjudication respecting the same Improvement;
- where a Party applies to a court or to an arbitral tribunal to consider matters dealt with in the adjudication;
- pursuant to an order of a court of competent jurisdiction or where the disclosure is required by law;
- where the Information is otherwise in the public domain;
- where the person to whom the Information is disclosed is a legal or financial advisor to a Party to the adjudication;
- where the person to whom the Information is disclosed is involved in the adjudication (such as a contract administrator, an expert or a witness in a hearing);
- with the consent of all of the Parties to the adjudication; and
- where the Information suggests that there will be actual or potential threat to human life or safety or where the disclosure is required in order to prevent the commission of a crime.

_____ _____

Signature
I have authority to bind the Respondent
(if the Respondent is an organisation)

Date

_____

Printed Name of Person Signing

_____

Position of Person Signing

Ontario Dispute Adjudication for Construction Contracts

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www.odacc.ca

Instructions for filing a Response to Notice of Adjudication Form

The Response to Notice of Adjudication Form allows a Respondent to provide a summary response to the Notice of Adjudication, a proposed Adjudicator, a proposed adjudication process and contact information. After an Adjudicator is appointed, the Respondent will be given an opportunity to provide a further written Response, in accordance with s. 17 of *Ontario Regulation 306/18*. The Adjudicator will specify the form of the Response, including the number of pages and the deadline for submitting the Response.

The Respondent can respond to the Notice of Adjudication through ODACC's Custom System. ODACC's Custom System is the technology platform used by ODACC to administer and facilitate adjudications. ODACC's Custom System will enable the Respondent to view the Claimant's Notice of Adjudication, respond to the Notice of Adjudication, upload documents and progress through the adjudication process. The Respondent can also communicate with the Claimant and the Adjudicator within ODACC's Custom System.

If the Respondent has an ODACC Custom System account from a previous adjudication matter, the same account may be used for multiple adjudications. To register on ODACC's Custom System, please visit https://app.odacc.ca/en-CA/Identity/Account/Login?ReturnUrl=%2F.

If the Respondent does not wish to use ODACC's Custom System, the Respondent may file the Response to Notice of Adjudication Form with ODACC by sending it to ODACC via email at authority@odacc.ca or via fax 416-362-8825.

The Respondent will also need to provide to the other party the Response to Notice of Adjudication Form in accordance with the *Construction Act*, R.S.O. 1990, c. C.30.

Where the Response to Notice of Adjudication Form is uploaded to the custom system between 4:00 p.m. and midnight (EST), it will be deemed to have been uploaded on the following Day.

11. High Level Summary of Key Points

1. Confirm whether the former provisions of the Construction Lien Act or the new provisions of the Construction Act apply to the project you are bidding upon.

2. Subcontractors should request a copy of the Prime Contract before submitting tender, for various purposes including:
    a. Determining what constitutes a proper invoice (and to make sure your invoices reflect those requirements)
    b. Determining invoicing terms/timelines
    c. Seeing if there are any additional adjudicable items included beyond payment issues
    d. Determining how you will be notified when the proper invoice is accepted
    e. Confirming if the owner is a municipality (different lien process)
    f. Confirming if any provisions for annual or phased holdback release.

3. Remember your rights to information and use them.

4. Make sure the people involved in the project, including accounting staff, are aware of all timelines governing the lien and prompt payment obligations, and confirm the following:
    a. Are all the relevant forms that pertain to prompt payment/adjudication/liens accessible?
    b. Know when to use each form and the timeline for its execution
    c. Maintain good documentation (contract, invoicing, change notices, etc.)

5. Have process in place so that decision makers are notified in a very short timeframe (24 hrs) of any non-payment notification or failure to receive payment by the date required so they can act within stipulated timelines. Remember:
    a. Reasons why a payment isn't made in full must be given
    b. Without issuing a notice of non-payment you are liable to pay your downstream subs and suppliers
    c. There is a 21-day period after the notice of non-payment is issued for the parties (contractor/owner or sub-contractor/contractor, on so on) to resolve their differences before an adjudication must be commenced or full payment made.

6. Familiarize yourself with the different approaches (and related costs) that can be used for adjudication (pre-designed process or self-established).

7. Review the roster of approved adjudicators and keep those in mind that you may wish to use.

8. Set up an account with ODACC.

9. Check all sources for (currently 3) for published notification of:
    a. Certificate of Substantial Completion
    b. Notice from owner to refuse to pay some or all of the holdback
    c. Notice of termination of the contract.

10. Note the exemption/anomalies to the Act:
    a. Nuclear facilities are not bound to this legislation – bid accordingly
    b. P3's have different rules that apply to them, review them prior to bidding.

**This is not an exhaustive list of key points. It is a high-level list of things a contractor or subcontractor should consider under the Construction Act. For details refer to the Guide.*