

Alberta Prompt Payment and Construction Lien Act

What you Need to Know and Get Prepared



Prepared and provided compliments of the Construction Law Group at
Gowling WLG (Canada) LLP



WHAT IS IT?

The new *Prompt Payment and Construction Lien Act*, renaming the current *Builders' Lien Act*, introduces prompt payment, changes the existing *Builder's Lien Act*, and adds a fast track adjudication dispute resolution process.

The purpose of the new legislation is to provide consistency and speed up payment throughout the construction industry, and provide an alternative to the Courts to resolve disputes in relation to payment under a contract or subcontract during the project.



GET READY



WHO DOES IT APPLY TO?

Applies To:

- Anyone who is performing work, including services, or furnishing goods or materials, with respect to an improvement in land.
- All construction sectors, from home building to large oil and gas projects, regardless of delivery model or method, or type of contract or arrangement.
- Owners, developers and consultants, including architects and professional engineers who are registered as professionals and are providing consulting services with respect to an improvement.
- Projects involving municipal, county and regional authorities, including public private partnership projects that they are involved in.

WHO DOES IT NOT APPLY TO?

Does Not Apply To:

- Federal Government projects.
- Provincial Government projects governed by the *Public Works Act*.
- Public private partnership projects involving the Provincial Government.
- The operation and maintenance portions of any public private partnership projects.

WILL IT APPLY TO YOUR PROJECT?

Yes, If It Is An Improvement

- The definition of an improvement in the current *Builders' Lien Act* has not changed.
- An improvement means anything constructed, erected, built, placed, dug or drilled on or in land that improves the land, except a thing that is not affixed to the land or intended to be or become part of the land.
- Alberta Courts have over time characterized such things as design, planning, and permitting if used, renovation, demolition, and reclamation as improvements.
- The Act applies whether your contract is in writing or oral, but you have to have an agreement of some type to provide and be paid for work or services, or goods and materials, furnished with respect to an improvement in land.

SECTION A: PAYMENT

PAYMENT

The prompt payment legislation does not guarantee payment, but mandates specific requirements with respect to the timing of both invoicing and payment which parties cannot contract out of.

Let's look at the new Prompt Payment Cycle

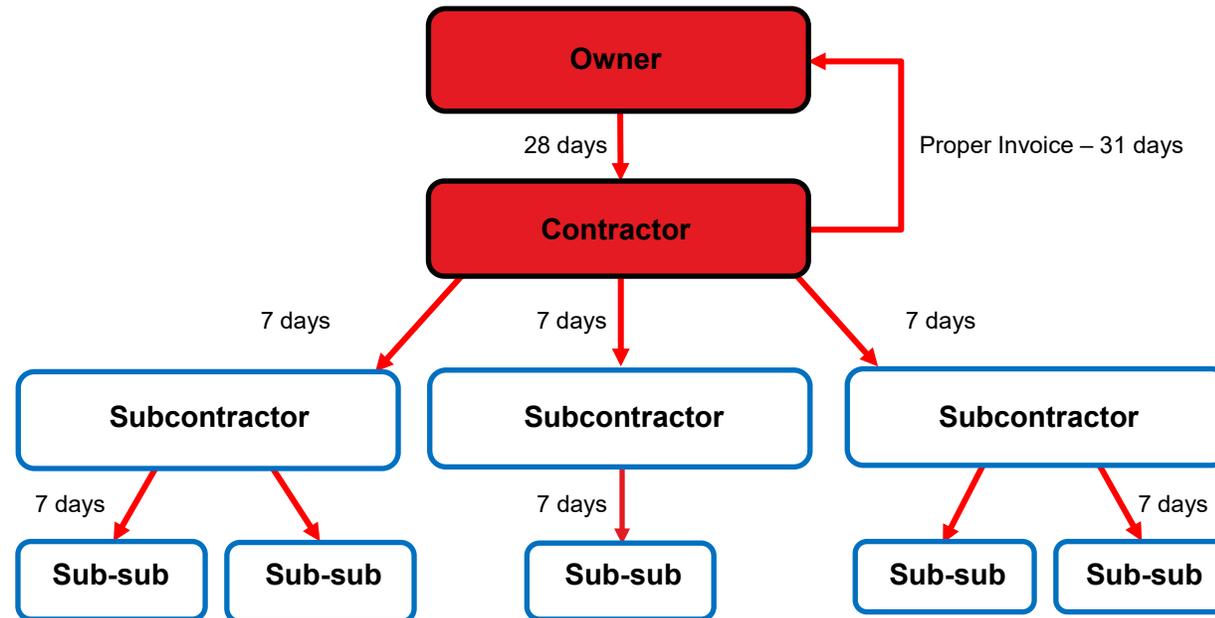
MANDATORY PROMPT PAYMENT CYCLE

**Owners → 28 days to pay
from receipt of proper invoice**

**Contractors → 7 days to pay
from payment by owner**

**Subcontractors → 7 days to pay
from payment by contractor**

THE PROMPT PAYMENT CYCLE: NO DISPUTES



YOU NEED A PROPER INVOICE

- A proper invoice must be issued by the contractor to the owner and must include:
 - A description of the work or services done or goods and materials furnished during the invoicing period;
 - The amount due and owing; and
 - Information identifying the authority under which the work or services were performed or goods and materials were furnished.
- You can agree in your contract to add requirements to the proper invoice as long as the additional requirements do not contradict the requirements of the legislation.
- The invoices should state that it is intended to be a proper invoice, otherwise draft invoices may unintentionally start the time periods required by the legislation.
- We anticipate that contractors will contractually require subcontractors to issue their invoices in a format similar to the proper invoice that the contractor is required to provide to the owner.

HOW STRICT ARE THE TIMELINES?

- The legislation requires that a proper invoice must be rendered by the contractor to the owner every thirty-one (31) days.
- The time periods are mandatory and can only be shortened by agreement, not extended.
- The legislation is silent on the issue of milestone, phased, lump sum or annual progress payments.
- However, it is possible that an invoice could be issued for a nil or nominal value until milestones are achieved, phases are reached or the lump sum is earned, when a proper invoice would be rendered for the amount earned for that milestone, phase or lump sum.
- The legislation does not provide any remedy or penalty for not issuing an invoice every thirty-one (31) days. However, the contractor who should have issued the invoice may have the invoice rejected when it is issued for non-compliance with the legislated time period
- A subcontractor who is required to make payments can demand the contractor confirm, as soon as possible, the date the contractor gave the proper invoice to the owner

HOW ARE TIMELINES CALCULATED?

- Timelines are expressed in “days”, not “working days”, so every day counts.
 - This includes deadlines or Notices of Non-Payment and Notices of Dispute
 - Deadlines that fall on Sundays or holidays will carry over until the following day that is not a holiday.
 - This means the deadline may fall on a Saturday.
 - However it is always prudent to avoid waiting until the last day if possible.
- Certain adjudication timelines are instead expressed in “calendar days”, which exclude Saturdays, Sundays, and statutory holidays.

ANY PRECONDITIONS TO PAYMENT?

UNACCEPTABLE PRECONDITIONS

- Approval or certification of the work cannot be a condition of the rendering of a proper invoice.
- The owner has fourteen (14) days from the date of receiving the proper invoice to object to paying some or all of the proper invoice, by issuing a Form 1 “Owner’s Notice of Dispute” to the contractor.
- As a consequence any approval or certification must be performed within fourteen (14) days of the date of receiving the proper invoice.
- Limited pay when paid is permitted as long as it complies with the requirements of the legislation by ensuring that payment is made within the time periods mandated by the legislation, all of which are tied to the timing of the submission of a proper invoice every thirty-one (31) days.

PRECONDITIONS TO PAYMENT CONTINUED

ACCEPTABLE PRE-CONDITIONS

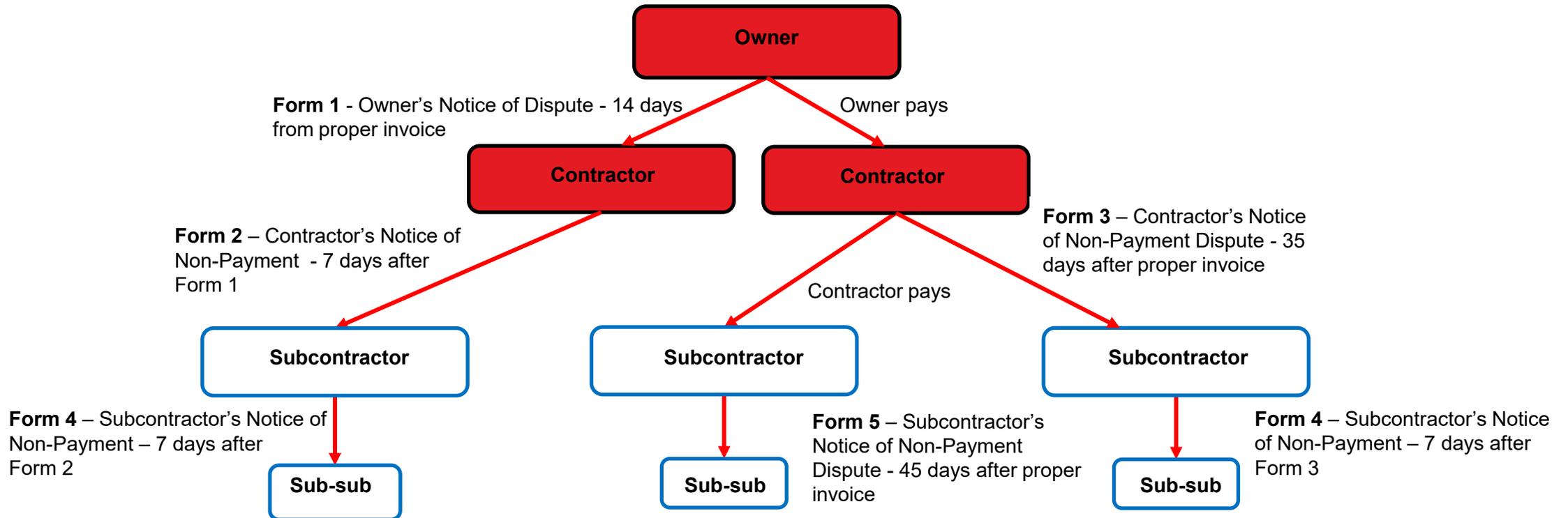
- Commissioning and testing of an improvement, or of the work or services performed, or goods or materials provided, can be a pre-condition of invoicing, and in turn, payment, as long as it is stated in the contract.
- Statutory declarations and WCB clearances will still be typical pre-conditions of payment provided at the time of invoicing.
- Conceptually, set off is still allowed. A set off will have to be identified in a Notice of Non-Payment issued by the party claiming the set off.

NON-PAYMENT

THE FORMS THAT NEED TO BE USED ARE:

- Form 1 – Owner’s Notice of Dispute
- Form 2 – Contractor’s Notice of Non-Payment
- Form 3 – Contractor’s Notice of Non-Payment Dispute
- Form 4 – Subcontractor’s Notice of Non-Payment Where Contractor Does Not Pay
- Form 5 – Subcontractor’s Notice of Non-Payment Dispute

THE PROMPT PAYMENT CYCLE: DISPUTED PAYMENTS



NON-PAYMENT BY THE OWNER

OWNER NON-PAYMENT TO CONTRACTOR – FORM 1

- The owner must provide a Notice of Dispute in writing to the contractor within fourteen (14) days of receipt of the contractor's proper invoice if the owner intends not to pay all or a portion of the proper invoice.
- The notice must provide the full particulars of the reason for non-payment and be sent using Form 1 – Owner's Notice of Dispute required by the Regulations under the Act.
- Statutory holdbacks of 10% will still need to be retained.

NON-PAYMENT BY THE CONTRACTOR

OWNER NON-PAYMENT TO CONTRACTOR – FORM 2

- The contractor must provide a Notice of Non-Payment to its subcontractors within seven (7) days of receiving a Notice of Dispute from the owner. The contractor will have to use Form 2 – Contractor’s Notice of Non-Payment provided for in the Regulations accompanying the legislation.
- The contractor must also undertake to refer the dispute with the owner to an adjudication with the owner within twenty-one (21) days of giving a Notice of Non-Payment to its subcontractors. Form 2 includes the undertaking by the contractor.

NON-PAYMENT BY THE CONTRACTOR (CONTINUED)

CONTRACTOR NON-PAYMENT TO SUBCONTRACTOR – FORM 3

- If the contractor disputes payment to one of its subcontractors, notwithstanding it has been paid by the owner, the contractor will have to issue a Notice of Non-Payment Dispute to the subcontractor within thirty-five (35) days of the date the contractor issued the proper invoice using Form 3 – Contractor’s Notice of Non-Payment Dispute.
- The notice must provide the full particulars of the reason for non-payment.
- If the contractor does not provide this notice within thirty-five (35) days of the date it issued the proper invoice, it is obligated to pay its subcontractors.

NON-PAYMENT BY THE SUBCONTRACTOR

CONTRACTOR NON-PAYMENT TO SUBCONTRACTOR – FORM 4

- A subcontractor must provide a Notice of Non-Payment to its subcontractors within seven (7) days of receiving a Notice of Non-Payment or a Notice of Non-Payment Dispute from the contractor.
- The subcontractor must use Form 4 – Subcontractor’s Notice of Non-Payment Where Contractor Does Not Pay.
- The subcontractor must also undertake to refer the dispute with the contractor to an adjudication with the contractor within twenty-one (21) days of giving a Notice of Non-Payment to its subcontractors. Form 4 includes this undertaking.

NON-PAYMENT BY THE SUBCONTRACTOR (CONTINUED)

SUBCONTRACTOR NON-PAYMENT TO ITS SUBCONTRACTOR – FORM 5

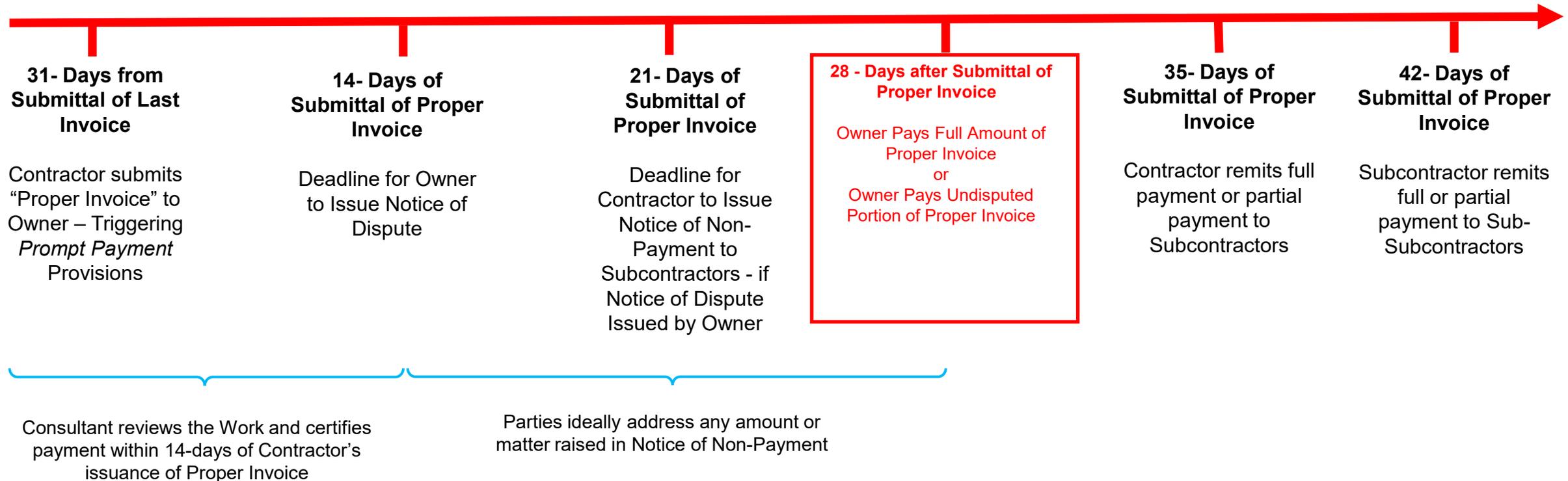
- If the subcontractor disputes payment to one of its subcontractors, notwithstanding it has been paid by the contractor, the subcontractor will have to issue a Notice of Non-Payment Dispute to its subcontractor within forty-two (42) days of the contractor issuing the proper invoice.
- The notice must provide the full particulars of the reason for non-payment and be sent using Form 5 – Subcontractor's Notice of Non-Payment Dispute as required by the Regulations accompanying the legislation.
- If the subcontractor does not provide notice, it is obligated to pay its subcontractors.

WHAT HAPPENS WHEN THERE IS A PARTIAL PAYMENT?

- The contractor must determine which subcontractor's work the owner is not paying for.
- If the amount not paid relates to one or more subcontractors' work, then the contractor will pay those subcontractors proportionately from the amount paid to the contractor by the owner for the work that has been paid.
- If the amount not paid cannot be related to a subcontractor's or subcontractors' work, then the contractor shall pay all subcontractors proportionately from the amount paid by the owner.
- Subcontractors' obligations of payment mirror the contractor's obligations of payment.
- Owners, contractors and subcontractors must pay amounts that are not the subject matter of a Notice of Dispute or Notice of Non-Payment.

PROMPT PAYMENT CONTINUED

Prompt Payment Process – Invoicing MUST occur every 31 Days



SECTION B: BUILDERS' LIENS AND HOLDBACKS

CAN A PARTY STILL REGISTER A LIEN?

- A party's ability to register a builders' lien is not affected by the new prompt payment legislation.
- Even if a party is involved in an adjudication process.
- A party can still register a builders' lien for amounts that are due and owing arising from the performance of work or services, or the provision of goods and materials, in relation to an improvement to lands.
- Parties cannot contract out of, release or waive lien rights.

ARE THERE NEW LIEN TIMELINES?

A PARTY NOW HAS LONGER TO REGISTER

- The lien period has been extended from forty-five (45) days to sixty (60) days.

WHO GETS NINETY (90) DAYS?

- Oil and gas well sites, as previously provided for in the current *Builders' Lien Act*.
- The manufacture and supply of ready-mix concrete, but not the installation of concrete.

WHAT ABOUT LIEN HOLDBACKS?

- The statutory requirement for the owner to retain ten (10%) percent has not changed.
- Holdbacks between the contractor and its subcontractors, and the release of holdback, remain as contractual requirements.

EXCEPT

- Given the longer lien period for ready mix supply, the holdback for ready mix suppliers will have to be held longer.
- Also, it is mandatory that for projects over ten million dollars (\$10M), that the holdback must be released by the owner to the contractor annually.

WHAT ABOUT LIEN HOLDBACKS?

- Holdback can be progressively released to subcontractors if agreed to in the subcontract.
 - For most subcontractors, the holdback would be releaseable 60 days after the event triggering the progressive release of holdback, as long as no liens are registered.
 - For concrete suppliers or those working on oil and gas wells or well sites, the holdback would be releaseable 90 days after the triggering event.
 - Contractors will want to ensure there are permissive mirroring clauses in the prime contract that allow for the progressive release of holdback.

ANY CHANGES TO SUBSTANTIAL PERFORMANCE?

- The concept of substantial performance is still significant and has not changed. The date of substantial performance still affects when can be released by the owner to the contractor.

HOWEVER:

- Certificates of substantial performance can be posted electronically if provided for in the contract and do not need to be posted on the project site.
- Other jurisdictions require a party to publish the posting in an industry publication or send the posting directly to all of the parties involved in the project.
- Alberta's legislation does not elaborate on how electronic posting should be carried out, so should be dealt with in the contract provisions.
- The industry is working on establishing a central on line posting site using Build Works or similar site.

ANY CHANGES TO RIGHTS TO INFORMATION?

- Parties can obtain information about the status of invoicing and payment using the expanded demand for information under the new legislation.
- Anyone working on the improvement can demand that the owner, contractor, or subcontractor, provide, within six (6) days, copies of the prime contract or subcontract, and a statement of accounts between owner and contractor or contractor and subcontractor.

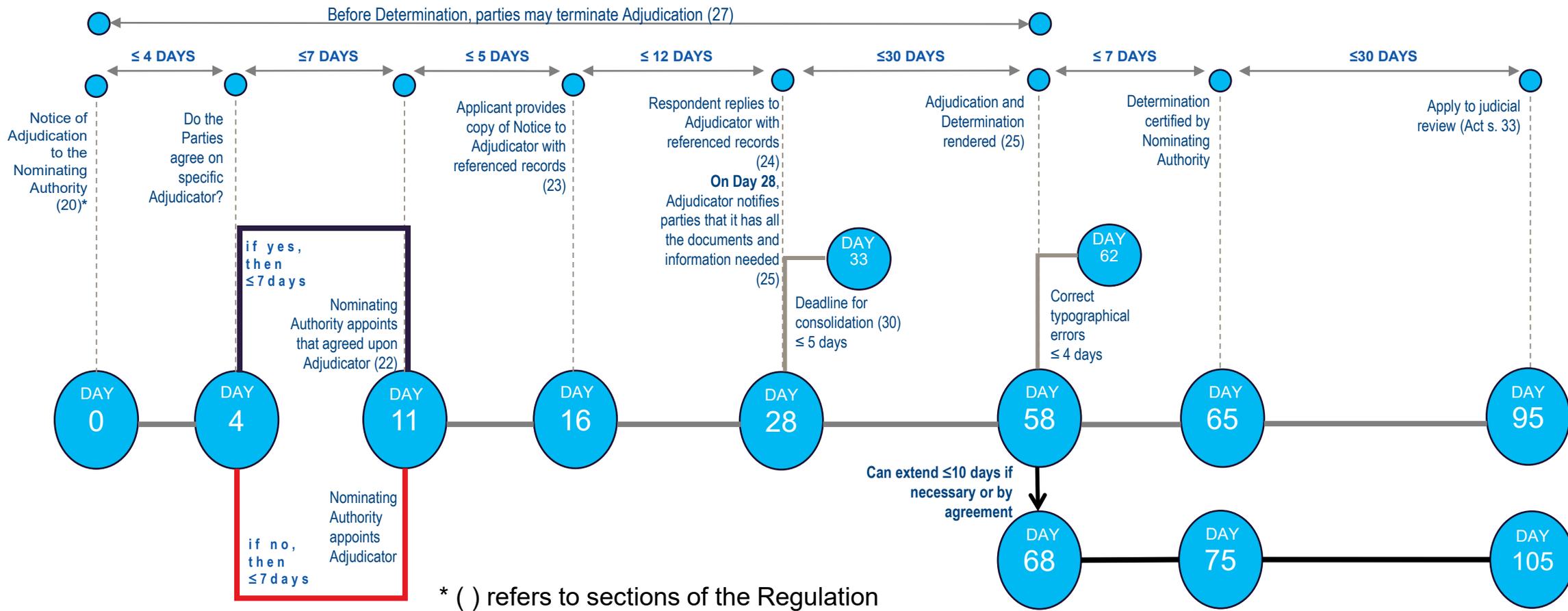
SECTION C: ADJUDICATION

WHAT IS ADJUDICATION?

The new prompt payment legislation introduces a fast track dispute resolution process called adjudication, not to be confused with the much more formal process of arbitration.

- Adjudication involves the appointment of a certified adjudicator to determine a payment dispute between the parties during the performance of the contract or subcontract.
- Typically there will be no oral hearing, sworn affidavits, questioning or cross examining of witnesses.
- Intended to be a fast track process with predetermined dates to submit written submissions and supporting documents.
- The adjudicator renders a decision – a written determination and corresponding order - within thirty (30) days of receiving the parties' written submissions and supporting documents.
- Key to success is having your project records organized and being able to distill issues and access relevant project documents for easy presentation and understanding by the adjudicator.

ADJUDICATION TIMELINES



WHAT CAN BE THE SUBJECT OF AN ADJUDICATION?

- Valuation of work or services provided or goods and materials furnished.
- An issue involving non-payment, including:
 - An invoice that is due and owing but unpaid within the legislated time periods;
 - Written change orders, whether approved or not, and proposed change orders; and
 - Release of holdback.
- Any other matter in relation to the contract or subcontract that the parties agree to have adjudicated.

NOT EVERYTHING CAN BE SUBJECT TO AN ADJUDICATION

- Even if your contract requires disputes to be addressed through mediation, arbitration, or Court, an adjudication can still proceed, before or at the same time, but not if a Court proceeding has already been initiated by a party to the dispute relating to the same issue in dispute.
- If the matter in dispute is not permitted by the legislation – must relate to a payment issue or otherwise be agreed to be submitted to adjudication by the parties.

OR

- If the adjudicator feels that the matter in dispute is frivolous and vexatious, then the adjudicator can refuse to hear the issue.
- You can have a matter in dispute determined by an adjudication during, but not after, the completion of the contract or subcontract.

HOW TO INITIATE AN ADJUDICATION?

- You will have to provide a formal Notice of Adjudication to the other party and the applicable Nominating Authority.
- Adjudication is mandatory once a party issues a Notice of Adjudication.

ARE ADJUDICATIONS PRIVATE AND CONFIDENTIAL?

- Yes. The proceedings and the determination are private and confidential. The adjudication does not occur publicly and the documents submitted in the adjudication are not publicly filed.

HOWEVER, THE RESULT MAY BECOME PUBLIC IF

- A party seeks to have the order of the adjudicator registered with the Court after thirty days following the rendering of the order by the adjudicator.

WHO IS THE ADJUDICATOR AND WHAT IS A NOMINATING AUTHORITY?

- The parties can agree on who will be the adjudicator.
- You cannot pre-name an adjudicator in a contract or subcontract.
- However, you can name a Nominating Authority in a contract or subcontract.

WHAT IS A NOMINATING AUTHORITY?

- A Nominating Authority acts as an administrator of the adjudication process.
- The Nominating Authority is responsible to educate, qualify, and appoint adjudicators in situations where the parties cannot agree on an adjudicator.

WHO PAYS FOR ADJUDICATION?

- Paid by the parties – to be split equally unless the Adjudicator rules otherwise
- Fees to be paid to the adjudicator will be set by the Nominating Authority.
- For Example, the fees in Ontario are:

Amount Claimed	Adjudicator Fee
Less than \$9,999	\$800
\$10,000 - \$24,999	\$1,000
\$25,000 - \$34,999	\$2,000
\$35,000 - \$49,999	\$3,000
\$50,000 - \$249,000	\$250/hr
\$250,000 - \$499,000	\$400/hr
\$500,000 - \$1 million	\$500/hr
Over \$1 million	\$750/hr

A BINDING DECISION?

- The written determination and corresponding order of the adjudicator is interim and binding on the parties involved in the adjudication.

UNLESS

- A Court Order is made in respect of the dispute;
- A party applies for judicial review of the adjudicator's determination;
- The parties agree to appoint an arbitrator following the conclusion of the adjudication process; or
- The parties agree in writing to a resolution of the dispute.

WHAT IF A PARTY DOES NOT LIKE THE ADJUDICATOR'S DETERMINATION?

LIMITED RIGHTS OF JUDICIAL REVIEW

- The adjudicator's order is subject to judicial review on very specific and narrow grounds involving procedural issues or misconduct of the adjudicator resulting in unfairness.

NOTE

- The order of the adjudicator is stayed pending the outcome of the judicial review.

WHAT IF A PARTY IS NOT PAID FOLLOWING AN ADJUDICATION?

- The successful party can file the adjudicator's order with the Court, with the same affect as a Court Order, after thirty (30) days following the issuance of the adjudicator's order.
- If the time for payment specified in the adjudicator's order has expired without the successful party being paid, that party may be able to stop performing work or services, or providing goods or materials, under the contract or subcontract, if the adjudicator has expressly provided for that in their order.

SECTION D: CONSOLIDATION

CAN MULTIPLE ADJUDICATIONS BE CONSOLIDATED?

YES

- You can request the adjudicator conducting the first adjudication for a consolidation of all of the adjudications in progress into one adjudication.
- The adjudicator will decide whether to consolidate all of the adjudications into one.
- Meaningful with respect to multiple disputes where one party is caught in the middle between upstream and downstream disputes.

SECTION E: TRANSITION PERIOD

WHEN ARE CONTRACTS AND SUBCONTRACTS SUBJECT TO THE NEW LEGISLATION?

- Whether the old or new provisions apply depends upon the date the contract is entered into between the owner and the contractor – before or after August 29, 2022.
- Subcontracts will follow the date of the contract between the owner and the contractor.
- The existing *Builders' Lien Act* will continue to apply to contracts or subcontracts entered into before August 29, 2022 while the new legislation will not apply.

HOWEVER

- If the contract remains in effect for at least two (2) years after August 29, 2022, the contract must be revised to comply with the new legislation by August 29, 2024.
- This transitional period applies to all of the new provisions – prompt payment, extended lien periods, and adjudication.

SECTION F: GETTING PREPARED



HOW DO WE GET READY?

Parties need to revise their contract documents to reflect the new requirements.

- In particular:
 - What needs to be included in a proper invoice;
 - The timing of invoicing and payment, including partial payments;
 - Any commissioning or testing requirements;
 - The mandated time for issuing a Notice of Dispute or Notice of Non-Payment, where and to whom notices should be provided; and
 - What happens if a Notice of Dispute, Notice of Non-Payment or Notice of Adjudication is issued.

AM I GOING TO NEED TO REVISE MY ADMINISTRATIVE PROCESSES?

Yes

- The new payment regime will impact most if not all of your internal team including project managers, accounting and finance.
- Review your internal processes for:
 - Procurement practices, terms and conditions of tender calls and submissions, proposals and quotes;
 - Contracting approaches – special consideration will have to be given to alternative delivery methods including project management and integrated project delivery;
 - Contract terms and conditions, supplementary conditions, forms and schedules;
 - Content and issuing of invoices and use of draft invoices;
 - Receiving and processing invoices including partial payment and apportioning payment; and
 - Managing project documents.

REVISING ADMINISTRATIVE PROCESSES (CONTINUED)

- Adopt tracking systems to ensure compliance with the mandatory time periods with respect to:
 - The issuance, receipt, processing and payment of proper invoices;
 - The certification of work and cash flow requirements;
 - Differing holdback and lien periods; and
 - Issuance of Notices of Dispute and Notices of Non-Payment in the proper forms, when and as required.
- Ensure that your accounting systems are able to process partially approved proper invoices.
- Be able to accommodate the posting of certificates of substantial performance electronically.
- As well, in the event of an adjudication, project documents will have to be up to date and accessed in very short time periods to initiate or respond to disputes in very tight time frames.

WHAT ELSE WILL THIS LEGISLATION AFFECT?

- As construction financing terms may not align with payment obligations, more attention may need to be directed to your financing arrangements, payment certifications and cash flow.
- Borrowers will have to raise issues with payment through Notices of Dispute and Non-Payment in order to avoid gaps in construction draws.
- Check to see if there are gaps between the availability of the financing you need and the timing of your obligations to pay.
- The period to certify work is only fourteen (14) days and the payment period is shortened to twenty-eight (28) days between owner and contractor, and seven (7) days between contractor and subcontractor, so administrative processes and contracts with consultants and payment certifiers will need to be revised.
- Likely to see an increased use of draft invoices provided in advance to avoid disputes.

WHAT ELSE WILL THE PROMPT PAYMENT LEGISLATION AFFECT?

- There will be little impact on your insurance.
- Determinations of an adjudicator may not be binding upon a party's insurer depending upon the terms of the insurance policy. Adjudication may not be suitable or permitted to determine some insurance coverage issues.
- There will still be a need for bonding to ensure creditworthiness, performance and payment in circumstances currently covered by surety bonds, like an insolvency. Sureties will want to know how you are addressing any gaps in your financing and if a Notice of Dispute has been issued and the result of an adjudication process.

HOW DO ALBERTA'S RULES DIFFER FROM ONTARIO?

- Both public and private sector projects are included in Ontario's prompt payment legislation.
- Invoicing and payment obligations and time periods are similar.
- Procurement processes are included in the transitional provisions in Ontario.
- Bonds are mandated on public projects.
- Statutory lien periods are the same for all parties.

LESSONS LEARNT FROM ONTARIO?

- Invoicing and payment happens in a more structured, reliable and consistent basis, rendering invoicing and payment a much more formal and reliable process.
- Use of draft invoices to address concerns before final progress invoices are issued.
- The ability to have a dispute adjudicated encourages parties to address their differences during the undertaking of the work. Almost twenty (20%) percent of the disputes referred to adjudication in Ontario in 2021 were settled by the parties before the adjudication was conducted.
- Critical to have quick access to project records in order to advance or defend your position in the event that you become involved in an adjudication.

PROMPT PAYMENT TO DO LIST

“To Do” List

- Review and update contract terms including any supplementary conditions, forms and schedules.
- Review and update procurement documents, tender calls, proposal submissions and quotes.
- Review and adjust your financing arrangements.
- Update invoicing, receipt, processing and payment processes, including accommodating partial and the apportionment of payments.
- Update certification processes by adding prompt payment timelines to consulting and payment certifying contracts.
- Ensure that prompt payment timelines are known and added to all administrative, project management and execution processes.
- Determine method of electronic posting.
- Adjust payment timelines and tickler systems to track new holdback and varying lien periods.
- Ensure project document management systems are in place, prepared and are robust enough to issue or respond to an adjudication process.



Prepared with the input and insights of various industry associations including the Alberta Construction Association

THANK-YOU

For more information please visit our website or contact a member of our prompt payment construction team:

<https://gowlingwlg.com/en/topics/construction-law-reform/>

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