

PLAIN LANGUAGE GUIDE

TO THE *PROMPT PAYMENT AND CONSTRUCTION LIEN ACT*

VOLUME 2: Prompt Payment
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Construction
Association**

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PREAMBLE

The Alberta Construction Association Plain Language Guide (the “Guide”) to the *Prompt Payment and Construction Lien Act* R.S.A. 2000, c.P26.4 including the Regulations relating to the legislation (the “Act”) is intended to assist participants in the construction industry in understanding and generally dealing with prompt payment, builders’ liens, and the adjudication process in a reasonably informed manner.

The Plain Language Guide has three volumes:

1. Builders’ Liens
2. Prompt Payment
3. Adjudication

In addition to the three individual topics addressed in the Guide, the Alberta Construction Association website hosts more than two hundred frequently asked questions from a broad cross section of the construction industry to supplement the information provided in the Guide to ensure that its members are fully informed about both the Act and specific issues which are of practical importance to its members. The FAQs and answers are available on the Alberta Construction Association’s website at www.albertaconstruction.net.

Use of the Guide should not replace individual judgement and does not, and cannot, take into account or address the particular circumstances of each and every individual situation involving the lien legislation. Accordingly, the Guide is not intended to preclude or replace consultation with other individuals and professional consultants who may be able to offer additional, or more specific, direction with respect to a particular concern, circumstance or requirement.

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PROMPT PAYMENT

INTRODUCTION

This is the second of three Guides published by the Alberta Construction Association regarding the Act. The subject of this Guide is the new prompt payment regime. This regime makes significant improvements to both the *timing of invoices* from contractor to owner and the *timing of payments* down the construction pyramid. Note, however, that the new prompt payment regime does not guarantee payment or replace good business practices. Everyone who supplies labour, material, or services to a construction project must still evaluate and manage the risks inherent in their involvement in the particular project.

WHAT IS THE PURPOSE OF PROMPT PAYMENT?

The purpose of prompt payment is to improve longstanding issues with the speed of payment in the construction industry. The Alberta Construction Association spearheaded the Prompt Payment Committee in 2015 following years of slow payments through the construction chain. A 2015 research report commissioned by the Alberta Trade Contractors Coalition found almost all surveyed companies said that late payments were a moderate or serious problem and that in 2014 the average number of days to receive payment was 79 days from invoicing.

Ontario was the first Province to legislate prompt payment, which came into effect in 2019.

WHICH PROJECTS HAVE PROMPT PAYMENT?

The prompt payment regime will only apply to projects that are subject to the Act. This will include anything considered to be an “improvement” to land under the Act, but will not apply to construction contracts with the Crown – both Federal and Provincial, Public Private Partnerships, turnaround, maintenance or repair projects, or work on land expressly excluded by the Act. Legal advice may be necessary to determine if the Act, and prompt payment, applies to a particular construction project.

WHICH CONTRACTS INCLUDE PROMPT PAYMENT?

The legislation will only apply to contracts between the owner and contractor, sometimes referred to as the prime contract, that are entered into after August 29, 2022, the date that the Act was proclaimed to be in force. The date of subcontracts will not be relevant as the prime contract between the owner and the contractor will determine if the benefits and obligations under the legislation apply to subcontracts.

WHO IS SUBJECT TO THE ACT?

The Act – and prompt payment – will apply to owners, contractors, and subcontractors. Suppliers of materials are considered “subcontractors”, and architects and engineers providing consulting services are considered either “contractors” or “subcontractors”, so prompt payment will also apply to them.

WHAT ARE THE TIMELINES FOR PROMPT PAYMENT?

Under the prompt payment regime, the owner has twenty eight (28) days to pay the contractor from the date the owner receives the contractor’s “proper invoice”. The contractor has seven (7) days from the date it receives payment from the owner to pay its subcontractors. Subcontractors have seven (7) days from the date they receive payment from the contractor to pay their sub-subcontractors. That seven (7)-day timeline applies to each successive level down the construction chain.

This means that the contractor should receive payment within twenty eight (28) days of the date the owner receives the proper invoice, subcontractors within thirty five days (35), and sub-subcontractors within forty two (42) days.

These are maximum deadlines for payment. Parties can agree in their contracts or subcontracts to shorter payment timelines. For example, the parties can agree “payment upon receipt” terms, but that must be agreed in the contract.

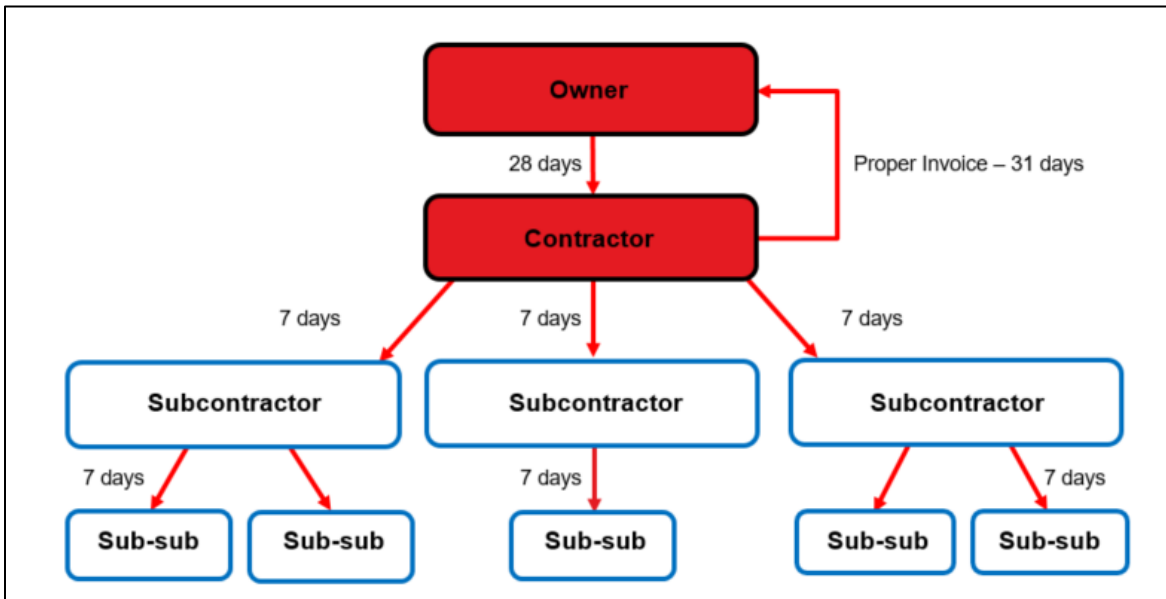


Figure 1: Timelines for payment down the construction chain

THE CONTRACTOR’S PROPER INVOICE TRIGGERS THE TIMELINES

The trigger for the prompt payment timelines is the contractor’s “proper invoice”. If the owner does not receive a “proper invoice” from the contractor, the timelines do not start. Therefore, the issuing of a proper invoice is very important.

To be a “proper invoice” the contractor’s invoice 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.
- A statement that the invoice is intended to be a proper invoice.

The last element – a statement that the invoice is intended to be a proper invoice – is important. Unless an invoice includes that statement, it is not a “proper invoice”. This means that a draft invoice – which does not contain the statement – can be sent by the contractor to the owner for review without inadvertently starting the prompt payment timelines.

The prime contract can add requirements to the proper invoice as long as the additional requirements do not contradict the legislation.

The proper invoice only applies to the contractor’s invoice to the owner. It does not apply to any invoices from other parties. However, contractors will likely require subcontractors to issue their invoices in a format similar to the proper invoice so that there is an easy flow-through of information from subcontractor to contractor to owner.

period. The clock to issue a proper invoice starts on the first day of work. The first proper invoice will likely be a stub invoice in order to have the invoicing period start at the beginning of a month and end at the end of a month.

The legislation does not provide any remedy or penalty for the contractor not issuing its proper invoice every thirty-one (31) days. However, the contractor is at risk if it does not comply with this deadline. It may risk builders' liens and adjudications from subcontractors if they expect the contractor to comply with the legislated requirement to issue a proper invoice every thirty one days.

These deadlines are expressed in "days", not "working days" or "business days", so every day counts. If the deadline expires on a Sunday or a statutory holiday, the deadline falls on the following day that is not a holiday. Therefore, the deadline may sometimes fall on a Saturday. It is always prudent to avoiding waiting until the last day if possible.

The deadlines to issue a proper invoice only apply to the contractor, because it is only the contractor who issues a proper invoice. Again, however, contractors will likely require subcontractors to issue their invoices with the same frequency. A subcontractor who submits their invoice too late to the contractor to be included in a proper invoice does not lose its right to invoice. Rather, the contractor can either submit an additional proper invoice to the owner, without changing the date of the original proper invoice, containing the subcontractor's late invoice or, more likely, include the subcontractor's late invoice in the next periodic proper invoice.

A flowchart of the proper invoicing process is shown below:

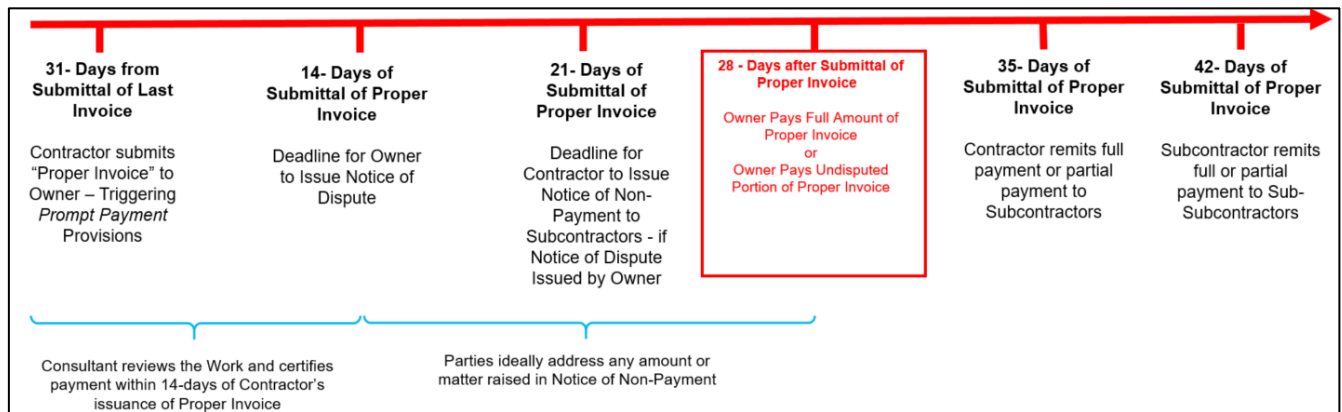


Figure 3: Flowchart of proper invoicing process

DOES THE ACT CONSIDER DIFFERENT CONTRACTING MODELS OR TIMELINES?

The Act does not mention different contracting models, under which invoicing would take place upon completion of certain milestones or phases or based upon lump sums. However, the proper invoice regime can be adapted for those kinds of invoicing models. Specifically, the contractor can issue proper invoices for nil or nominal amounts every thirty one (31) days, thus complying with the Act, then issue a proper invoice for completion of a particular phase or milestone when appropriate.

The Act does not set timelines for how frequently subcontractors can issue invoices to the contractor. This will depend upon the subcontract. Unless otherwise agreed in the subcontract, the subcontractor

can invoice the contractor as frequently as it wishes, but the contractor will only be obligated to issue a proper invoice every 31 days, and the owner will only be obligated to pay 28 days after.

PRECONDITIONS TO A PROPER INVOICE

The Act changes what can and cannot be a precondition for a contractor invoicing for work. The Act now disallows the owner from requiring approval or certification of an invoice before it can be sent by the contractor as a proper invoice. This means that the contractor can send a proper invoice – and trigger the payment timelines – without the owner first approving or certifying the invoice.

The owner then has fourteen (14) days from the date it receives 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 (discussed below). As a consequence, any approval or certification by the owner, or on the owner’s behalf, must be performed within those fourteen (14) days.

The Act permits some preconditions to proper invoices. 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. This means that, until the particular aspect of work is successfully commissioned or tested, it cannot be invoiced for, and thus does not trigger the prompt payment deadlines. “Commissioning” or “testing” are not defined in the legislation, so will be left to the prime contract to define. Parties should pay particular attention to this requirement.

Additional preconditions for proper invoices can be agreed in the prime contract. For example, it is likely that owners will require that the contractor’s invoice include sworn statutory declarations and WCB clearances before the invoice can be considered “proper”. These conditions would not be contrary to the Act.

WHEN DO I KNOW THE CONTRACTOR HAS ISSUED A PROPER INVOICE?

For contractors, a proper invoice is deemed to be issued when it is *received by the owner*, rather than when it is *sent by the contractor*. Sometimes, both dates will be identical. However, proper invoices sent in hard copy, and even potentially electronically, may not be received until a day or more later. Therefore, it is best to ensure that the proper invoice, when sent, will be received by the owner by the thirty-one (31) day deadline.

As the date of the owner’s receipt of the proper invoice is so important to the deadlines for payment and notices of dispute, the Act permits subcontractors to ask the contractor to tell them the date it issued the proper invoice, and requires the contractor to provide that information. The Act also permits the subcontractor to ask the contractor for a statement of accounts between the owner and contractor. However, the Act does not give the subcontractor the right to review the proper invoice or confirm that its own invoice is included in the contractor’s proper invoice. However, it will become apparent to the subcontractor on the next payment period if the contractor’s proper invoice did not include the subcontractor’s invoice.

WHAT IF THERE ARE PAYMENT DISPUTES?

The Act requires a party who disputes a payment to another person to use a specific form found in the Regulations to the Act. These forms 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

OWNER’S DISPUTE OF THE PROPER INVOICE

Form 1 – Owner’s Notice of Dispute – arises when the owner disputes some or all of the proper invoice. If the owner does, it must send a Form 1 Notice of Dispute to the contractor within fourteen (14) days of receiving the proper invoice. The notice must provide the full particulars of the reason for non-payment. The statutory form must be used; a letter or alternative means is not sufficient. If the owner does not issue the Form 1 Notice of Dispute within that deadline, it is obligated to pay the contractor all of the proper invoice. The owner must still retain the 10% holdback from the contractor as a lien holdback is still a requirement of the Act. This is not considered a payment dispute and will not require a Form 1 Notice of Dispute.

If the contractor receives a Form 1 from the owner, it must provide that Form 1 to the affected subcontractors as soon as possible. This alerts subcontractors, as soon as possible, that there is a payment dispute, and the reason why.

CONTRACTOR’S DISPUTE OF PAYMENTS TO SUBCONTRACTORS

If the contractor intends to dispute a payment to a subcontractor, the contractor has two forms available to it, to cover two scenarios.

- In the first scenario, the contractor is not paid in full for its proper invoice. As a result, the contractor will not pay one or more subcontractors for their work. In this scenario, the contractor sends the subcontractor whom it does not intend to pay in full a Form 2 – Contractor’s Notice of Non-Payment. This signals that full payment was not received from the owner, and will not be made in full to the subcontractor.
- In the second scenario, the contractor has received full payment of a proper invoice from the owner, but disputes a payment to a subcontractor. In this scenario, the contractor sends to that subcontractor a Form 3 Contractor’s Notice of Non-Payment Dispute. This signals to the subcontractor that, although the contractor’s proper invoice was paid in full by the owner, the contractor will not be paying that subcontractor in full for its invoice.

In the first scenario, the contractor must provide a Form 2 Notice of Non-Payment to its subcontractors within seven (7) days of receiving a Notice of Dispute from the owner. 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.

In the second scenario, the contractor must provide the subcontractor with whom it has a payment dispute a Form 3 Notice of Non-Payment Dispute within thirty-five (35) days of the date the contractor issued the proper invoice. 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.

If the contractor does not send either Form 2 or Form 3 by the deadlines, it is obligated to pay each subcontractor in full for the amount of their invoices included in the proper invoice.

SUBCONTRACTOR'S DISPUTE OF PAYMENTS TO SUB-SUBCONTRACTORS

If a subcontractor intends to dispute a payment to a sub-subcontractor, it also has two forms available to it, covering similar scenarios:

- In the first scenario, the subcontractor is not paid in full for its invoice by the contractor. As a result, the subcontractor will not pay one or more sub-subcontractors for their work. In this scenario, the subcontractor sends the sub-subcontractor whom it does not intend to pay in full a Form 4 – Subcontractor's Notice of Non-Payment Where Contractor Does Not Pay. This signals that full payment was not received from the contractor, and will not be made in full to the sub-subcontractor.
- In the second scenario, the subcontractor has received full payment of an invoice from the contractor, but disputes a payment to a sub-subcontractor. In this scenario, the subcontractor sends to that sub-subcontractor a Form 5 – Subcontractor's Notice of Non-Payment Dispute. This signals to the sub-subcontractor that, though the subcontractor's invoice was paid in full by the contractor, the subcontractor will not be paying that sub-subcontractor in full for its invoice.

In the first scenario, the subcontractor must provide a Notice of Non-Payment to its sub-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 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 sub-subcontractors. Form 4 includes this undertaking.

In the second scenario, the subcontractor must issue a Notice of Non-Payment Dispute to its sub-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 sub-subcontractors.

As with the contractor, if the subcontractor does not send either Form 4 or Form 5 by the deadlines, it is obligated to pay each sub-subcontractor in full for the amount of their invoices included in their invoice to the contractor that was in turn included in the proper invoice issued by the contractor.

HOW DO THE NOTICES OF DISPUTE FLOW DOWN THE CONSTRUCTION CHAIN?

The diagram “Figure 4” shows these Notices of Dispute and Notices of Non-Payment will flow down the construction chain:

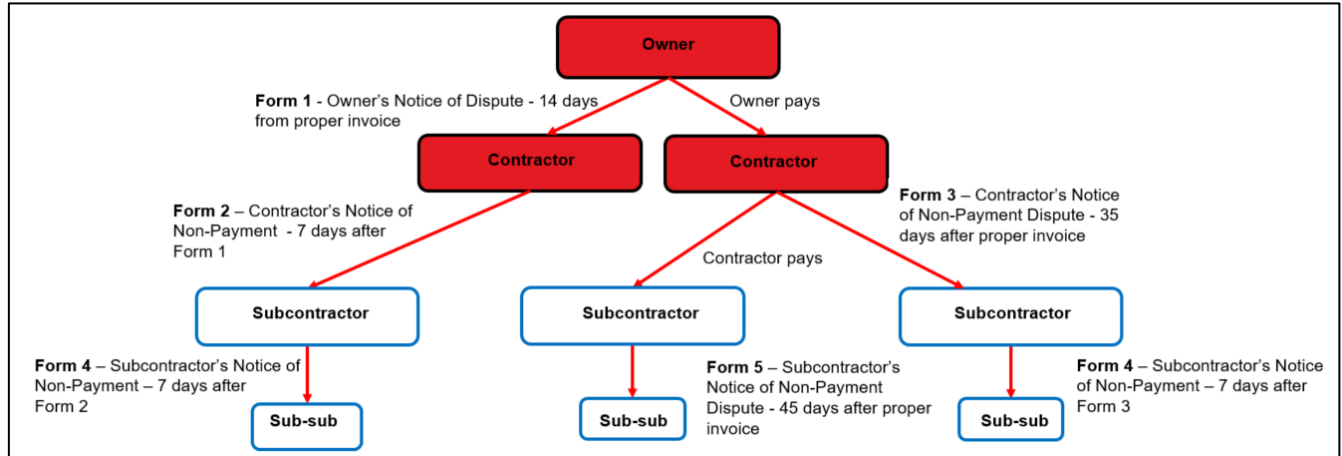


Figure 4: Forms for Notices of Dispute down the construction chain

WHAT HAPPENS IF THERE IS A PARTIAL PAYMENT?

If the owner only partially-pays the contractor's proper invoice, 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 only the amount for the work not being disputed from the amount paid to the contractor by the owner. If the amount not paid cannot be related to a particular subcontractor's or subcontractors' work, then the contractor must pay all subcontractors proportionately from the amount paid by the owner.

Subcontractors' obligations of payment mirror the contractor's obligations of payment, so if the contractor only partially-pays the subcontractor, the subcontractor must determine which sub-subcontractors' work the contractor is not paying for.

Owners, contractors, and subcontractors must pay amounts that are not the subject matter of Forms 1-5. In other words, if a party does not receive payment, it should have also received a Form explaining why.

WHAT IF A PARTY DOES NOT PROVIDE THE STATUTORY FORM?

The Act requires a party to pay the amounts from a proper invoice unless they issue the proper Form indicating a payment dispute. This means that a party who does not issue the Form is obligated to pay, even if there is a dispute. This is why it is important for a party to send the appropriate Forms by the deadlines even if the parties above have not done so.

ARE PAY WHEN PAID CLAUSES STILL PERMITTED?

Pay when paid clauses are still technically permitted by the Act. However, in some ways the prompt payment regime works similarly to a pay when paid clause; for example, if the contractor is not paid by the owner, the contractor is not obligated to pay a subcontractor if the contractor issues a notice of dispute or non-payment (Forms 2 and 3) by the deadline. This is similar to a pay when paid clause.

However, unlike a pay when paid clause, the contractor in this scenario must issue the proper Form 2 or 3, which will communicate to the subcontractor why it is not being paid. If the contractor does not, it must pay the subcontractor in full.

Therefore, a pay when paid clause, while still permitted, will only be enforceable when the additional requirements of the Act are included.

WHAT IS ADJUDICATION?

Form 2 (Contractor's Notice of Non-Payment) and Form 4 (Subcontractor's Notice of Non-Payment) both include an undertaking to bring the payment dispute to "adjudication". The undertaking to take a dispute to an adjudication is a statutory obligation that must be complied with by the party not being paid who disputes the reason for non-payment – contractor with owner and subcontractor with contractor. Adjudication will be detailed in Volume 3 of the Plain Language Guide.

Briefly, adjudication is a relatively fast dispute resolution process that occurs during performance of the work, rather than waiting until after the work is complete. It is presided over by an adjudicator, who may be a construction professional, engineer, or lawyer, who has received adjudication training and passed the certification exam. The adjudication can be quick as it only involves only documentary evidence, and does not involve oral testimony, a hearing or a trial.

Adjudication is the "teeth" of the legislation and works in tandem with the prompt payment regime. The prompt payment regime sets timelines for issuing invoices and, if there is a dispute, timelines for issuing notices of dispute. Adjudication is the method of resolving those disputes. Forms 2 and 4, which involve non-payment from the party above, both include undertakings to bring the dispute to an adjudication, thereby forcing a timely resolution. When working together, prompt payment and adjudication should speed up and regularize undisputed payments down the construction pyramid and resolve disputed payments relatively quickly and cost efficiently.

An adjudication can be triggered to resolve some but not all kinds of disputes. Disputes about invoices *can* be adjudicated. Forms 2 and 4 include an undertaking by the contractor and subcontractor to bring the dispute to adjudication. However, parties can trigger an adjudication about a payment dispute whether or not a Form 2 or Form 4 has been issued, including the validity of changes to the work under a contract or subcontract.

CONCLUSION

This prompt payment regime sets mandatory timelines for the frequency of invoices from contractor to owner and for payment down the construction chain. These timelines are substantially better than those experienced in the industry, and the parties are entitled to agree to faster invoicing and payment timelines in their contracts or subcontracts. If disputes arise, the Act now requires timely, formal notice, in a clear format using the mandated Forms, with the reasons for non-payment communicated between the affected parties. The adjudication process allows for those payment disputes to be determined by a trained professional in a relatively quick and cost efficient manner, during the performance of the work. These measures operate together to improve the timelines of invoicing and payment and for resolving payment disputes during the performance of the contract.

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