

## Transitioning to the new *Construction Act*

April 4, 2018

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# Introduction and Overview

Brendan D. Bowles

## Key Dates

- Bill 69, *Prompt Payment Act*, presented to Ontario Legislative in April, 2014, but does not pass
- Government commits to reviewing *Construction Lien Act*, and as a result, Expert Review of *Construction Lien Act* Report released in September, 2016 after extensive consultation with stakeholders
- Bill 142 receives royal assent on December 12, 2017
- Draft Regulations released in February, 2018, public consultation on draft regulations closed in March, 2018
- New title and rules on procedure, liens and holdback in force as of July 1, 2018
- Adjudication, prompt payment and new rules for municipalities in force as of October 1, 2019

## Transition Rules for New Title, Procedure, Liens and Holdback Rules

- The *Construction Lien Act*, as it read immediately before the day subsection 2(2) of the *Construction Lien Amendment Act, 2017* came into force, continues to apply with respect to an improvement if,
  - a contract for the improvement was entered into before that day, regardless of when any subcontract under the contract was entered into;
  - a procurement process, if any, for the improvement was commenced before that day by the owner of the premises; or
  - the premises is subject to a leasehold interest, and the lease was first entered into before that day
  - S. 2(2) comes into force on July 1, 2018
  - Applicable regulations will need to be passed by July 1, 2018

## Transition Rules for Adjudication and Prompt Payment

- Parts I.1, Prompt Payment, and II.1, Construction Dispute Interim Adjudication, apply in respect of contracts entered into on or after the day subsection 11(1) of the *Construction Lien Amendment Act, 2017* comes into force, and in respect of subcontracts made under those contracts
  - S. 11(1) comes into force on October 1, 2019
  - Additional consultation on adjudication regulations still occur, will need to be passed by October 1, 2019

## Regulations

- Cover Four Broad Areas:
  1. Forms
  2. Procedures for Actions under Part VIII
  3. General regulations including monetary thresholds
  4. Adjudications under Part 11.1 of the *Act*
- Official government word: “Should the decision be made to proceed with the regulations following the 30 day posting period, the proposed regulations will be finalized, submitted for approval and filed.”

## Holdback – Release and Timing

- Mandatory Release of Holdback: sections 26 and 27 of the *CLA* dealing with release of holdback once the lien period has expired and no liens are left on title changed from permissive “may” to mandatory “shall”:
  - Owner may claim Set-Off, but must be done via a “Notice of Non-Payment due to Set-Off”, listing claims and amounts of claimed set-off.
- Phased, Annual, or Segmented Release of Holdback to be allowed:
  - Phased / Annual only on large, multi-year projects
  - Segmented on projects with clearly separable improvements (e.g AFP/P3 projects)
  - Potential to segment certain aspects of work from others (e.g Design v. other work) such that design portion can be released when complete rather than waiting for entire project completion.
- Allows for Deferral Agreements to be entered into to exclude portions of work from the calculation of substantial performance so as to allow for early holdback release.

## Holdback – Alternatives and Adjudication Issue

- Regulations include a “Demand-worded Holdback Repayment bond” that can be posted in lieu of retaining cash
- Transition issue – if owner gives Notice of Intention to Set-off, Contractor is required to refer dispute to adjudication or remains liable for holdback payment. What happens between July 1, 2018 and October 1, 2019?
- Clarification or transitional provisions by regulation needed for contracts entered into after July 1, 2018 but before October 1, 2019



# Prompt Payment

John Margie

## Prompt Payment

- Construction industry crippled by elongated payment cycles
- Burden of late payment borne by the most vulnerable industry participants
- Developed first in the US, then the UK and adopted by many commonwealth countries

## Prompt Payment

- Ontario provisions adopt elements from US and UK models
  - Proper invoice triggers payment timelines
  - Integration with adjudication
  - Balance between prompt payment and freedom of contract
- Prompt payment provisions to come into force on October 1, 2019

## Prompt Payment

- Two forms of documents that are central to the prompt payment regime
  - Proper invoices
  - Notices of non-payment

## Requirements of Proper Invoice

1. Contractor's name and address
2. Date of the invoice, and period during which services or materials supplied
3. Identify the authority, whether in the contract or otherwise, under which the services or materials were supplied
4. Description of the services or materials supplied
5. The amount payable and the payment terms
6. Name, title, telephone number and mailing address of the person to whom payment is to be sent
7. Any other information that may be prescribed
8. Any other requirements that the contract specifies

## Requirements of Proper Invoice

- Any other requirements specified in contract
  - WSIB Clearance Certificate
  - Statutory Declaration

## Requirements of Proper Invoice

- Any other requirements specified in contract
  - Other more onerous requirements
    - detailed monthly reports
    - accurate updated CPM schedule
    - proof of payment to subcontractors
    - waiver of all claims to date of invoice
    - current list of outstanding deficiencies and value
- Contract term requiring prior certification or owner approval is unenforceable

## Exceptions to Application of Prompt Payment

- AFP
  - Contract term that requires certification or owner's approval is permitted
  - Prompt payment only applies to construction portion



## Delivery Requirements of Proper Invoice

- Proper invoice to be given to owner
  - Sent by certified or registered mail
  - Served in any manner permitted by Rules of Court
    - Personal service (physically hand over the proper invoice)
    - By email, if the parties agree
    - By use of an electronic document exchange service

## Notices of non-payment

- Forms mandated by Regulations
- Different forms for different parties in different circumstances
  - 1) Where partial or no payments by owners or contractors without a notice of non-payment being given
  - 2) Where partial or no payments by owners or contractors due to a dispute with a notice of non-payment being given
- Simply, either pay in full, or give a notice of non-payment for disputed amount

## Where partial or no payment without notices of non-payment

- Where partial or no payment by owner without a notice of non-payment
  - Form 1.2 notice for contractor use: notice includes term that contractor will adjudicate the non-payment by the owner within 21 days
- Where partial or no payment by contractor without a notice of non-payment
  - Form 1.4 notice for subcontractor use: notice includes term that subcontractor will adjudicate the non-payment by contractor within 21 days

**FORM 1.2**  
**NOTICE OF NON-PAYMENT UNDER 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 submitting this notice of non-payment to the subcontractor.

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

Date: \_\_\_\_\_

(Contractor)

## Where partial or no payment due to disputes with notices of non-payment

- Form 1.1 – notice for owner use
- Form 1.3 – notice for contractor use
- Form 1.5 – notice for subcontractor use
  - Where amount is disputed
    - Required to set out amount that will not be paid
    - Required to set out reasons for non-payment
      - “detailing all of the reasons for non-payment”
    - Required to pay amount not in dispute

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

Name of owner: \_\_\_\_\_

Address: \_\_\_\_\_

*(Complete for each contractor who supplied services or materials to an improvement in relation to the proper invoice)*

Name of contractor: \_\_\_\_\_

Address: \_\_\_\_\_

Address for service, if known \_\_\_\_\_

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

*(Add the name, address and address for service of other contractors if applicable)*

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)

**FORM 1.3**  
**NOTICE OF NON-PAYMENT UNDER SUBSECTION 6.5(6) OF THE ACT**  
*Construction Act*

Name of contractor: \_\_\_\_\_

Address: \_\_\_\_\_

Description of the premises: \_\_\_\_\_

The reasons for non – payment are as follows:

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)*

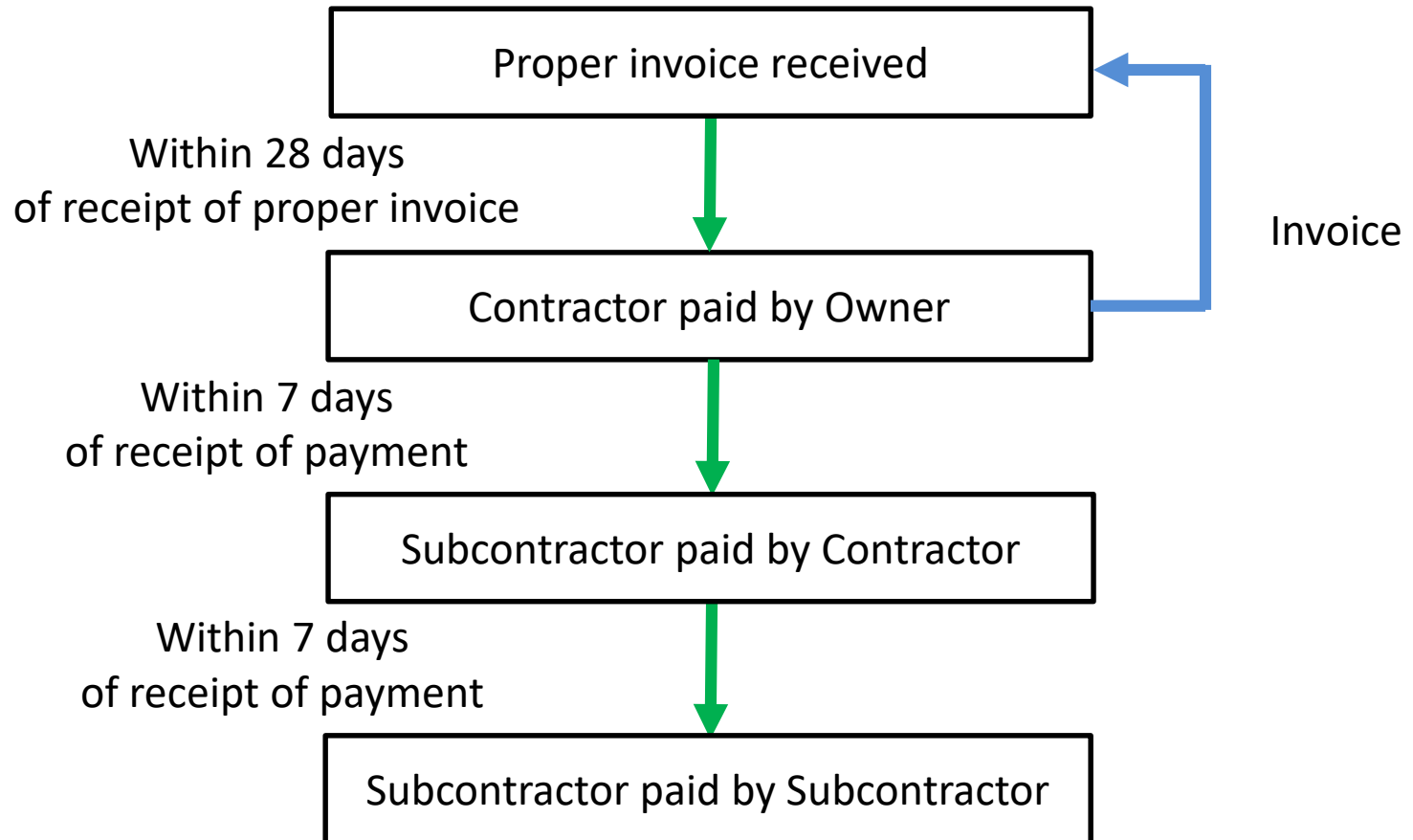
A. The full amount of the services or materials supplied by the subcontractor, being \$ \_\_\_\_\_.

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

The reasons for non-payment are as follows:

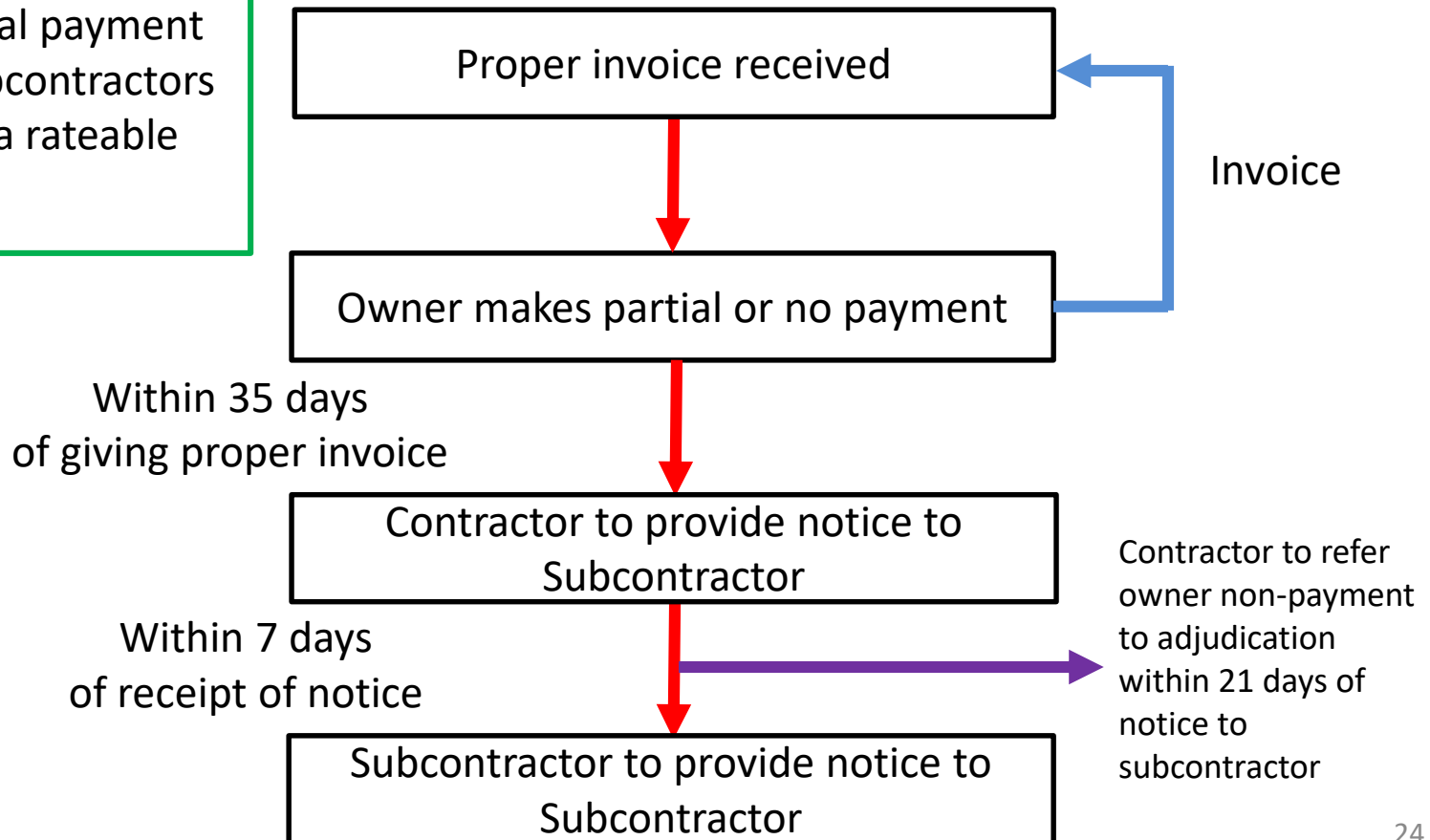
Date: \_\_\_\_\_  
\_\_\_\_\_ (Contractor)

## Where Full Payment Made



## Where No or Partial Payment Made

Where partial payment is made, subcontractors are paid on a rateable basis

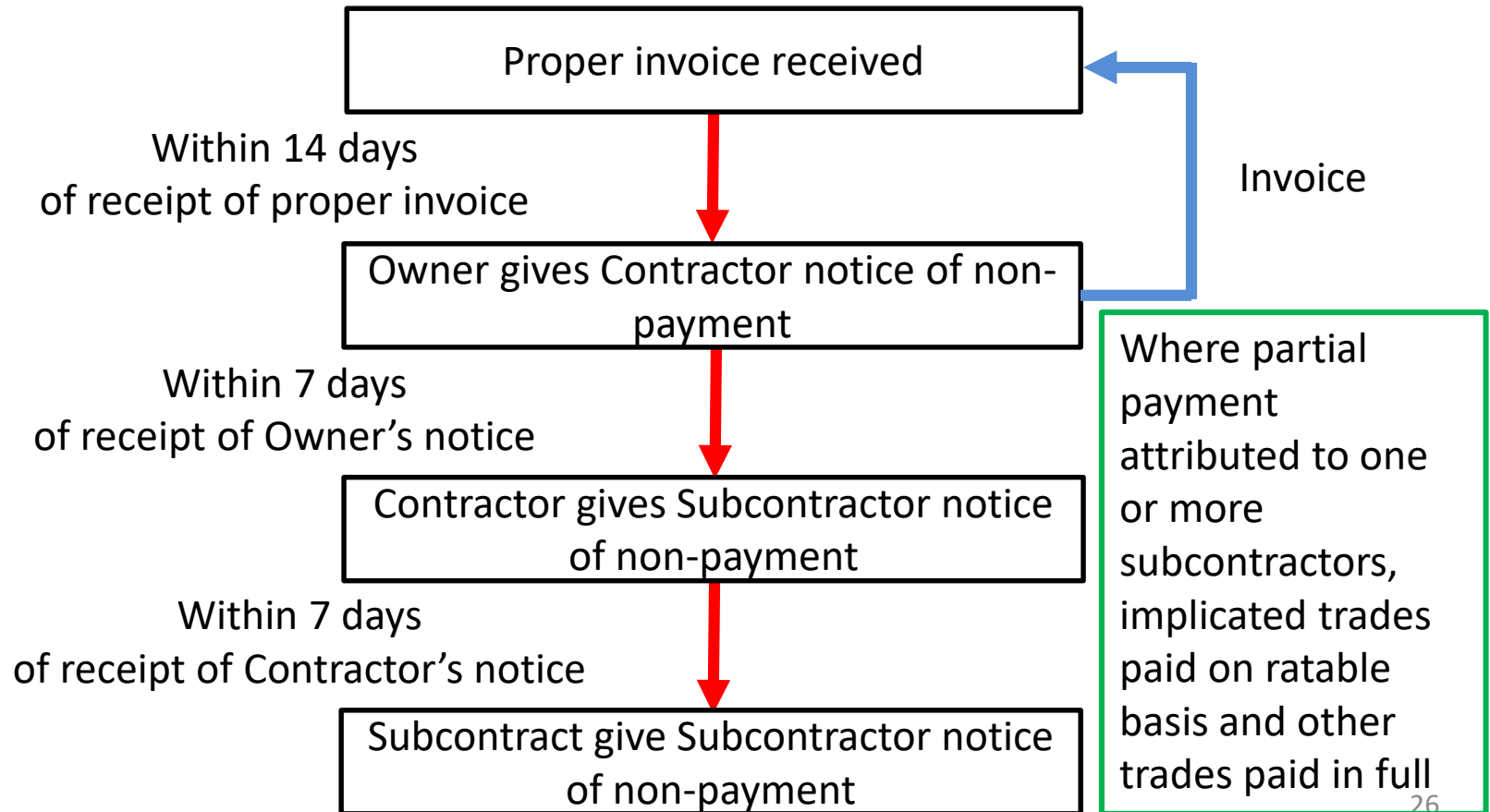




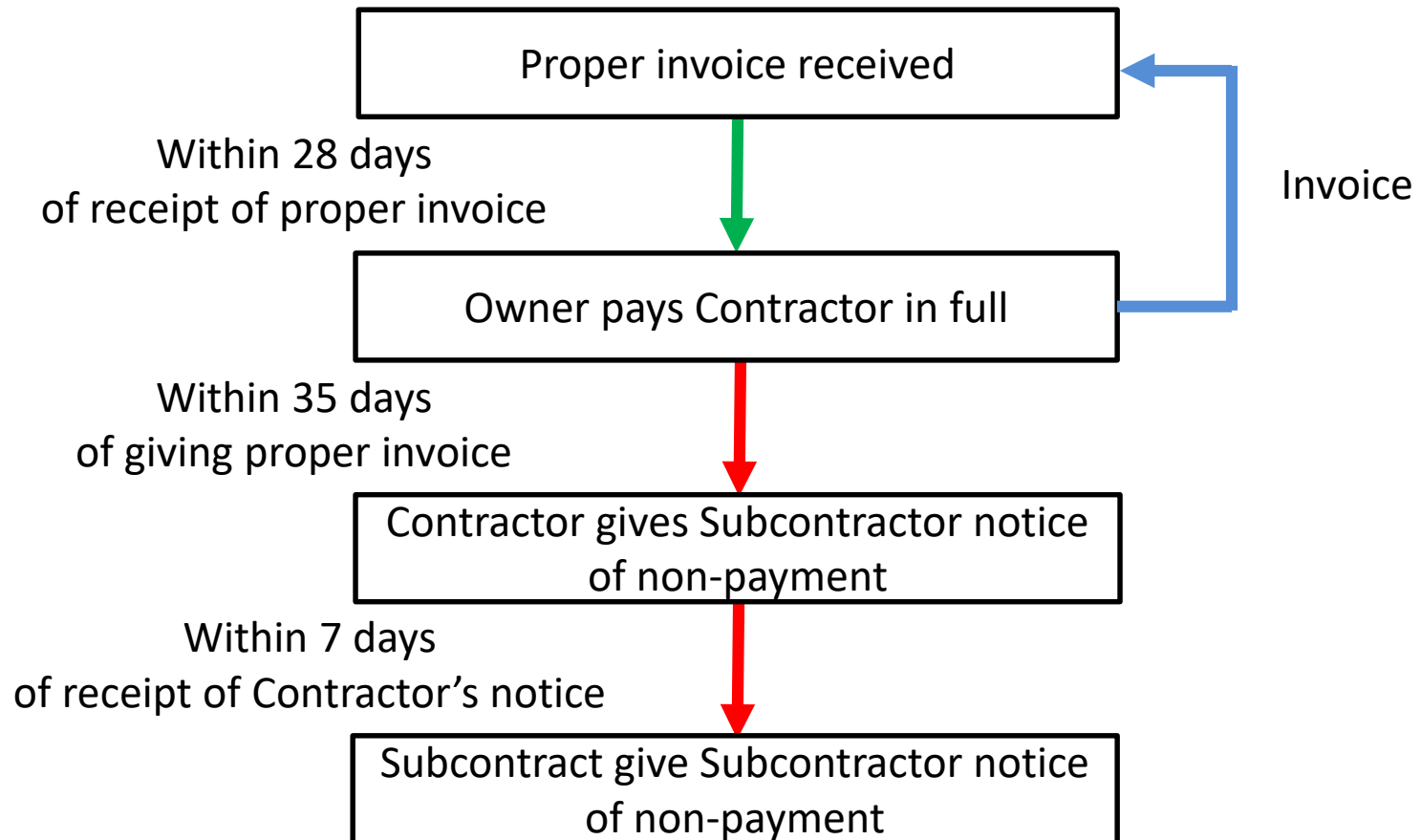
## Consequences of non-payment

- Interest
  - As specified in contract or Courts of Justice Act
- Adjudication
  - Amount determined is not paid, contractor may suspend work

## Where There is a Dispute



## Where There is a Dispute – Subcontractor



# Statutory Adjudication: 5 Things to Know

Keith Bannon

## **What You Need to Know**

1. UK Origins;
2. Minimum Requirements;
3. 'Real Time' Dispute Resolution;
4. Authorized Nominating Authority; and
5. Role of the Court

## Origins of the Statutory Adjudication Scheme

- UK Construction Industry Reform
- Eight fundamental components
  1. The right to refer a dispute at “any time”;
  2. Notice requirements;
  3. Seven days to brief an adjudicator;
  4. Twenty-eight days to an adjudicator’s decision;
  5. Elementary due process;
  6. Inquisitorial jurisdiction of the adjudicator;
  7. Interim binding decisions, enforceable in court if necessary; and
  8. Adjudicator Immunity

## **Minimum Requirements**

- No opting out; or
- Extending timelines

## Interim Dispute Resolution

- Real time resolution → avoiding project shutdown
- Timeline → 46 days



## **Authorized Nominating Authority**

- Authorized Nominating Authority
- Adjudicator powers

## **Court's Role**

- Limited and narrow role

## **Statutory Adjudication: Conclusion**

# Preservation and Perfection of Liens

Andrea Lee

## New Timeframes for Preservation

- July 1, 2018: Subsections 31(2) and 31(3) extend the time to preserve a lien from 45 to 60 days
  - CSP
  - Date the contract is completed, abandoned or terminated
  - Date a subcontract is certified complete under s. 33
- Notice of Termination – s. 31(6)

## New Timeframes for Perfection

- July 1, 2018: Subsection 36(2) extends the time to perfect a lien from 45 to 90 days
- Still must:
  - Commence action in jurisdiction where premises are situated
  - Register certificate of action if the lien is registered on title and has not yet been vacated
  - Serve the statement of claim within 90 days
  - Set action down for trial within 2 years

## New Rules re: Municipalities

October 1, 2019:

16 (1) A lien does not attach to the interest in a premises of

- (a) the Crown; or
- (b) a municipality.

16 (2) Where an improvement is made to a premises in which the Crown or a municipality has an interest but the Crown or municipality is not an owner of the premises, the lien may attach to the interest of any other person in the premises.

16(3) A lien does not attach to a premises, but constitutes a charge under section 21 (charge on holdbacks), if,

- (a) the owner of the premises is the Crown or a municipality; or
- (b) the premises is a railway right-of-way.

## New Rules re: Condominiums

- July 1, 2018: subsection 34(9) of the Act will require the lien claimant who preserves a lien to give notice of the preservation of lien.
- Subsection 33.1(2): Notice of intention to register a condominium - The Act has been amended and provides that the timing of publication will be “in the manner set out in the regulations”. There is currently no regulation dealing with manner of publication.



## Liens and Adjudication

October 1, 2019:

- Subsection 34(10): If the subject of a lien is also the subject of an adjudication, the lien will be deemed to have expired on the later of the date on which it would expire under s. 31 and 45 days after the adjudicator receives documents under section 13.11 of the Act
  - Selection of adjudicator within 11 days after notice of adjudication (s. 13.9)
  - Documents delivered to adjudicator 5 days after adjudicator is appointed
- A lien could expire at any point during the period of 45 to 61 days after a notice of adjudication has been given

## Transition Rules

- July 1, 2018: s. 87.3(1) of the Act comes into force. The new Act will apply if:
  1. the contract for the improvement (regardless of subcontract);
  2. the procurement process; or
  3. the lease concerning the premises is entered into after July 1, 2018
- Subsection 87.3(2): Examples of the commencement of a procurement process include the making of a request for qualifications, a request for proposals or a call for tenders
- October 1, 2019, ss. 87.3(3) will be added: prompt payment and adjudication rules apply to contracts after October 1, 2019

## QUESTIONS?

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