



Ontario's new *Construction Act* - Prompt Payment, Holdback and Interim Adjudication: What you need to know

By Robert Harason

The new *Ontario Construction Act* came into force on July 1, 2018, except that Part I.1 Prompt Payment and Part II.1 Construction Dispute Interim Adjudication, do not come into force until October 1, 2019 and apply only to construction contracts entered into on or after October 1, 2019 (and subcontracts entered into under those contracts) unless the owner's procurement process started earlier.

Prompt Payment

To start the prompt payment process, the contractor must deliver a "proper invoice", on a monthly (unless the contract requires otherwise) basis, which is defined as a written bill or other request for payment for services or materials in respect of an improvement under a contract, if it contains the following information and meets any other requirements that the contract specifies (except that provisions making the delivery of a proper invoice conditional on prior certification or the owner's prior approval are of no force or effect):

1. The contractor's name and address.
2. The date of the proper invoice and the period during which the services or materials were supplied.
3. Information identifying the authority, whether in the contract or otherwise, under which the services or materials were supplied.
4. A description, including quantity where appropriate, of the services or materials that were supplied.
5. The amount payable for the services or materials that were supplied, and the payment terms.
6. The 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.

The owner must pay the contractor the amount of the proper invoice within 28 days of receipt unless, within 14 days of receipt, the owner gives the contractor a notice of non-payment in the statutory form specifying the amount that is not being paid and detailing all reasons for non-payment.

If payment in full is made to the contractor, then the contractor must pay its subcontractor the full amount owing within 7 days of its receipt of payment, unless the contractor delivers, within 7 days of receipt of the owner's notice of non-payment or (if the owner did not give a notice of non-payment) within 35 days of the date on which the contractor gave the owner the proper invoice, a notice of non-payment in the statutory form to its subcontractor and provides an undertaking to refer the matter to interim adjudication within 21 days of giving the notice of non-payment to the subcontractor.

If partial payment is made to the contractor, then the contractor must pay its subcontractor from the amount paid by the owner within 7 days of its receipt of payment, unless the contractor delivers, within 7 days of receipt of the owner's notice of non-payment or (if the owner did not give a notice of non-payment) within 35 days of the date on which the contractor gave the owner the proper invoice, a notice of non-payment to its subcontractor and provides an undertaking to refer the matter to interim adjudication within 21 days of giving the notice of non-payment to the subcontractor.

If payment in full is made to the subcontractor, then the subcontractor must pay its sub-subcontractor the full amount owing within 7 days of its receipt of payment, unless the subcontractor delivers, within 7 days of receipt of the contractor's notice of non-payment or (if the contractor did not give a notice of non-payment) within 42 days of the date on which the contractor gave the owner the proper invoice, a notice of non-payment in statutory form to its sub-subcontractor and provides an undertaking to refer the matter to interim adjudication within 21 days of giving the notice of non-payment to the sub-subcontractor.

If partial payment is made to the subcontractor, then the subcontractor must pay its sub-subcontractor from the amount paid by the contractor within 7 days of its receipt of payment, unless the subcontractor delivers, within 7 days of receipt of the contractor's notice of non-payment or (if the contractor did not give a notice of non-payment) within 42 days of the date on which the contractor gave the owner the proper invoice, a notice of non-payment in statutory form to its sub-subcontractor and provides an undertaking to refer the matter to interim adjudication within 21 days of giving the notice of non-payment to the sub-subcontractor.

As the date the proper invoice was given to the owner starts the 42 day period by which the subcontractor must pay the sub-subcontractor, or deliver a notice of non-payment and undertake to refer the matter to interim adjudication (provided that the contractor has not delivered a notice of non-payment, in which case the time limit for the delivery by the subcontractor of a notice of non-payment is within 7 days of its receipt of payment), subcontractors who are required to make payments to their sub-contractor (and sub-subcontractors who are required to make payments to their sub-sub-contractor) are entitled, on request made to the contractor, to the date that the proper invoice was given to the owner.

In all cases, interest is payable on unpaid amounts at the greater of the *Courts of Justice Act* pre-judgment interest rate (now 2%) and the interest rate specified in the contract or subcontract.

The *Construction Act* permits some modifications to the prompt payment regime by agreement so long as such modifications do not conflict with the statutory or regulatory provisions. Please contact us if you are interested in including such provisions in your agreements.

Holdback

For contracts entered into on or after July 1, 2018, unless the owner's procurement process started earlier, an owner may refuse to pay some or all of the holdback if it (a) publishes a notice of non-payment of holdback in the statutory form in a construction trade newspaper within 40 days of (i) publication of the certificate of substantial performance or (ii) if no certificate is published, the date on which the contract was completed, abandoned or terminated and (b) notifies the contractor of the publication of the notice.

For contracts entered into on or after July 1, 2018 (unless the owner's procurement process started earlier) and before October 1, 2019, and subcontracts entered into under those contracts, if the owner refuses to pay the holdback, the contractor may refuse to pay some or all of its holdback if it notifies its subcontractors of the non-payment.

For contracts entered into on or after July 1, 2018 (unless the owner's procurement process started earlier) and before October 1, 2019, and subcontracts entered into under those contracts, if the contractor refuses to pay the holdback, the subcontractor may refuse to pay some or all of its holdback if it notifies its sub-subcontractors of the non-payment.

For contracts entered into from and after October 1, 2019 (and subcontracts entered into under those contracts) unless the owner's procurement process started earlier, if the owner refuses to pay the holdback, the contractor may refuse to pay some or all of its holdback if the contractor refers the matter to interim adjudication and notifies its subcontractor that the holdback is not being paid and the matter is being referred to interim adjudication.

For contracts entered into from and after October 1, 2019 (and subcontracts entered into under those contracts) unless the owner's procurement process started earlier, if the contractor refuses to pay the holdback, the subcontractor may refuse to pay some or all of its holdback if the subcontractor refers the matter to interim adjudication and notifies its sub-subcontractor that the holdback is not being paid and the matter is being referred to interim adjudication.

Construction Dispute Interim Adjudication

For contracts entered into on and after October 1, 2019 (and subcontracts entered into under those contracts) unless the owner's procurement process started earlier, any party to a contract or subcontract, may refer any one of the following matters for interim adjudication, even if the matter is already the subject of an action or arbitration provided that it has not yet been finally determined, unless the contract or subcontract is completed and one or more of the parties to the adjudication will not agree to proceed with interim adjudication:

1. The valuation of services or materials provided under the contract.
2. Payment under the contract, including in respect of a change order, whether approved or not, or a proposed change order.
3. Disputes that are the subject of a notice of non-payment.
4. Amounts retained by way of set-off.
5. Payment or non-payment of holdback.
6. Any other matter that the parties to the adjudication agree to, or that may be prescribed.

A party who wishes to refer a dispute to adjudication does so by the delivery of a written notice of adjudication to the other party to the contract or subcontract, which contains the referring party's contact information, a brief description of the dispute, the nature of the redress sought and the name of the proposed adjudicator.

The parties to an adjudication may agree on a particular adjudicator, or may request that ADR Chambers Inc. (the authorized nominating authority designated by the Minister responsible for the administration of the *Construction Act* to run the interim adjudication system) appoint an adjudicator.

The adjudicator named in the notice of adjudication has 4 days to consent to conduct the adjudication. If the proposed adjudicator does not consent, the person who gave the notice must request that ADR Chambers appoint an adjudicator. ADR Chambers then has 7 days to appoint an adjudicator who has agreed to conduct the adjudication.

The referring party who seeks interim adjudication must give a copy of the notice of adjudication, the contract or subcontract and the documents on which the referring party intends to rely, to the adjudicator no later than 5 days after the adjudicator agrees or is appointed to conduct the adjudication.

The adjudicator must conduct the adjudication and deliver his or her decision, in writing with reasons, no later than 30 days after receiving the documents from the referring party, subject to an extension (i) if requested by the adjudicator provided that all parties to the adjudication consent, for a period of no more than 14 days, or (ii) if the adjudicator and all parties consent, for the period agreed upon. A decision made after the expiry of the deadline is of no force or effect.

The timeline for the adjudication, assuming that each event occurs on the last day that it should occur, can be summarized as follows:

A. If the proposed adjudicator agrees to conduct the adjudication

Day 1 – Notice of adjudication given.

By day 5 – Adjudicator agrees to conduct the adjudication.

By day 10 – The party who gave the notice of adjudication delivers its documents to the adjudicator.

By day 40 – The adjudicator delivers his or her written decision, with reasons, unless the parties to the adjudication and the adjudicator agree to an extension.

B. If the proposed adjudicator does not agree to conduct the adjudication

Day 1 – Notice of adjudication given.

By day 5 – Proposed adjudicator does not agree to conduct the adjudication. The party who gave the notice of adjudication requests that ADR Chambers appoint an adjudicator who will agree to conduct the adjudication.

By day 12 – ADR Chambers appoints an adjudicator who has agreed to conduct the adjudication.

By day 17 – The party who gave the notice of adjudication delivers its documents to the adjudicator.

By day 47 – The adjudicator delivers his or her written decision, with reasons, unless the parties to the adjudication and the adjudicator agree to an extension.

There is no time limit for the delivery of responding materials by the party who receives a notice of adjudication, but practically speaking, the responding party must do so expeditiously as the adjudicator is required to make a determination, in writing with reasons, no later than 30 days after receiving the documents from the referring party, subject to an extension if the parties to the adjudication agree.

As can be seen, these short timelines will require all parties, but especially the responding party, to ensure that their document management and retrieval systems are up to date and responsive on short notice.

The potential for prejudice to the responding party is great, as the referring party may have spent months preparing its case, while the responding party must build and present its case and deal with the procedural and substantive issues relating to the adjudication within the 30 day period from the delivery of the referring party's documents to the adjudicator, unless the adjudicator and all parties consent to an extension.

For that reason, parties may wish to include provisions in their agreements which require those who wish to proceed to interim adjudication to provide advance notice. The *Construction Act* permits some modifications to the interim adjudication regime by agreement so long as such modifications do not conflict with the statutory or regulatory provisions. Please contact us if you are interested in including such provisions in your agreements.

The determination of the adjudicator is binding on the parties to the adjudication unless a determination of the dispute is made by a court or arbitrator or unless the parties agree otherwise. In this way, the determination of the adjudicator is subject to being replaced by the determination of the court or arbitrator.

Each party to the adjudication is required to bear their own costs of the adjudication, unless the adjudicator makes an order for costs based on his or her determination that a party has acted in a manner that is frivolous, vexatious, an abuse of process or other than in good faith.

A party who is ordered to make a payment shall make the payment within 10 days of the date the determination is communicated to the parties.

In all cases, interest is payable on unpaid amounts at the greater of the *Courts of Justice Act* pre-judgment interest rate (now 2%) and the interest rate specified in the contract or subcontract.

If the amount determined to be paid is not paid when due, then the payee contractor or subcontractor may suspend work until the payor pays the amount determined to be paid plus interest, reasonable costs incurred as a result of the suspension and, if the payee resumes work, the reasonable costs incurred as a result of the resumption of work.

If not paid when due, the adjudicator's determination is enforced by filing it with the court. After filing, any related requirement that the contractor or subcontractor make payment to its subcontractor or sub-subcontractor is deferred pending the outcome of the enforcement.

The adjudicator's determination can only be reviewed by an application for judicial review with leave of the Divisional Court, by notice of motion filed with the court within 30 days of the date the determination is communicated to the parties. The grounds upon which the adjudicator's determination may be set aside are technical or procedural in nature and do not include whether the adjudicator acted in error.

There are other changes to the law in the new *Construction Act* which are not addressed in this memo. Please contact us if you have questions or require further information.

The information provided herein is an overview and does not constitute legal advice. Please contact us in order to obtain legal advice which is applicable to your particular circumstances.



Robert Harason is a partner at Beard Winter LLP and has practised law and litigation for over 36 years.

Do you have questions about this topic? Email Robert at rharason@beardwinter.com or call him at 416-306-1707.

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