

Bill 142, the *Construction Lien Act Amendment Act, 2017*: Prompt Payment and Adjudication

Bill 142
Construction Lien Act Amendments



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Construction Lien Act Amendments: **PROMPT PAYMENT**

Bill 142, Construction Lien Act Amendments
May 14, 2018



CLA Amendments – Prompt Payment

New bottom line payment cycle:

Owners → 28 days to pay

Contractors → 7 days to pay when paid by owner

CLA Amendments – Prompt Payment

Owners

Owners must pay within 28 days of receipt of a proper invoice

- must be a proper invoice as defined in s. 6.1
- subject to notice of non-payment under s. 6.3(2)
 - must provide notice of non-payment within 14 days of receipt of proper invoice
 - must be in prescribed form and manner
 - must specify the amount in dispute and provide reasons for non-payment
 - no restriction on grounds for non-payment, but owner must provide all of the reasons for non-payment
 - can include set-offs, deficiencies
- must pay undisputed portion of proper invoice

CLA Amendments – Prompt Payment

What is a “proper invoice”?

6.1 *In this Part, “proper invoice” means 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, subject to subsection 6.2 (2), meets any other requirements that the contract specifies:*

- 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.*

Owners can dispute an invoice, but must provide written notice in prescribed form

- must provide notice of non-payment within 14 days of receipt of proper invoice
- must be in prescribed form and manner
- must specify the amount in dispute and provide reasons for non-payment
- no restriction on grounds for non-payment, but owner must provide all of the reasons for non-payment
- must pay undisputed portion of proper invoice

CLA Amendments – Prompt Payment

Contractors

If contractor is paid by owner, contractor must pay subcontractors within 7 days after receiving payment

- subject to notice of non-payment under s. 6.4(6)
 - if owner has paid, must give notice of dispute within 7 days after receiving payment from owner
 - must be in prescribed form and manner
 - must specify the amount in dispute and provide reasons for non-payment
 - no restriction on grounds for non-payment, but owner must provide all of the reasons for non-payment
- if owner has not paid, must give notice of dispute within 7 days after receipt of owner's notice of non-payment or, if no notice, pay contractor out of own pocket within 35 days after giving the proper invoice to owner
- must pay undisputed portion of proper invoice

CLA Amendments – Prompt Payment

Does it apply to me?

YES.

What happens if you don't pay?

If you don't pay on time, you will pay statutory interest

Prompt payment rules apply to all projects:

- public and private sector
- conventional and P3
- new build and repair
- all owners, contractors and subcontractors
- all payments “made under contracts entered into on or after the day” the prompt payment provisions of the *Construction Act* (sections 6.1-6.8) come into force

CLA Amendments – Prompt Payment

Can I exclude the payment provisions?

NO!

The prompt payment regime is mandatory.

... however ...

What about milestones?

- you are allowed to structure your payment process with milestones (or phases) if that is set out clearly in the contract
- still must pay within timelines of prompt payment regime after proper invoice delivered

Issues to Consider

How Owners will deal with:

- potential gap in cash flow
- potential gap in interim coverage for payment
- aligning contract documents and policies with new payment rules
- potential new procedures for inspecting approving work
- cash flow management,
- Modeling and financial ratios that may change from lenders

Issues to Consider

How Contractors will deal with:

- changes to contract documents
- delay claims (increased invoicing for delay?)
- Increased use use of milestones
- cash flow management

How Consultants will deal with:

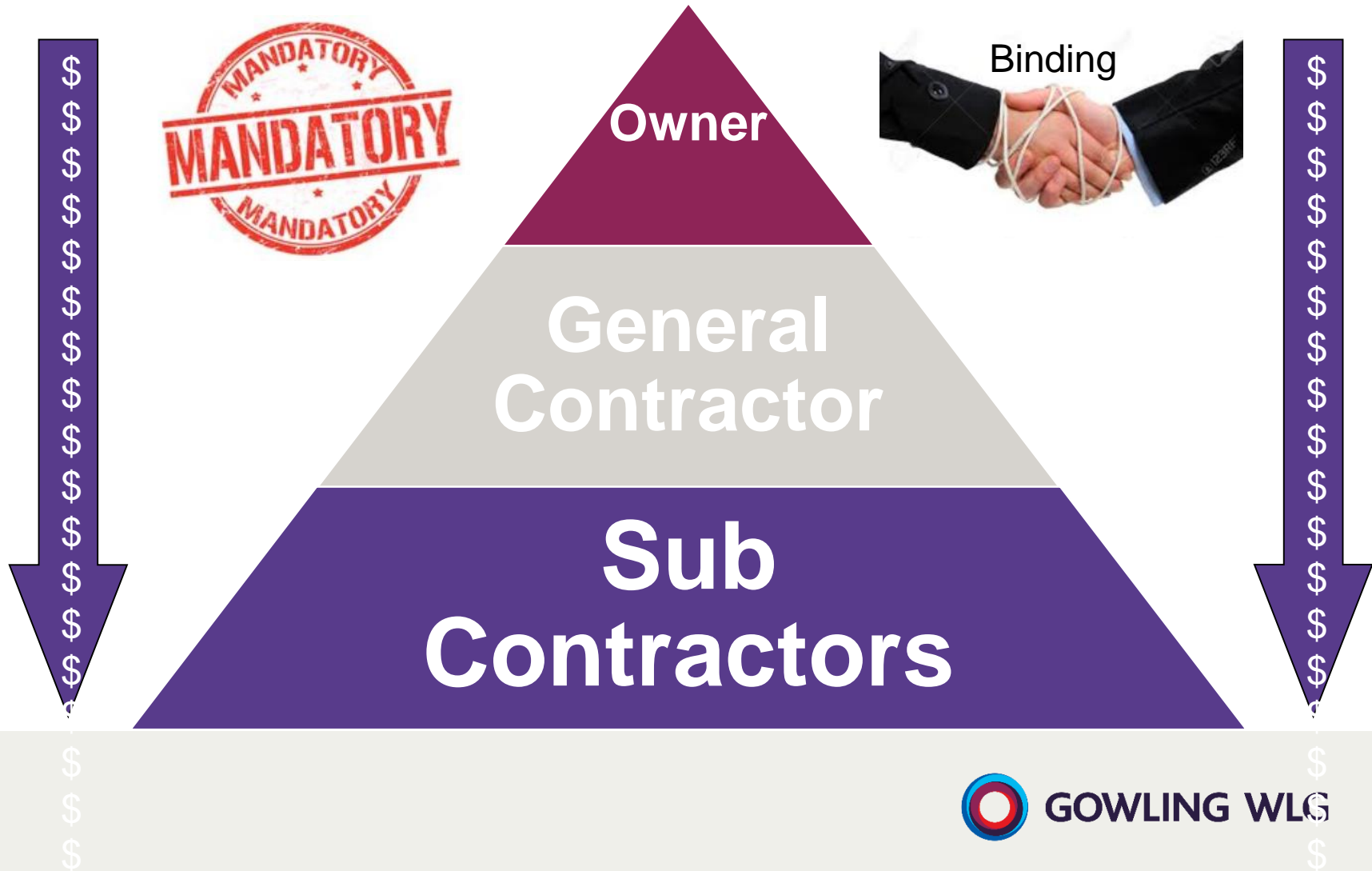
- truncated timelines to approve payment
- possible need for more staff

Construction Lien Act Amendments: **ADJUDICATION**

CLA AMENDMENTS - ADJUDICATION

- **Fast-track resolution of payment disputes**
- **Resolve disputes within 1 payment cycle (28 days)**
- **Detailed procedural rules to come in Regulations**
- **Will require improved document management systems and trained internal resources (personnel)**

CLA AMENDMENTS – ADJUDICATION



CLA AMENDMENTS – ADJUDICATION

Notice of Adjudication



Adjudicator Confirmation



Claim Documents Submission
and Response

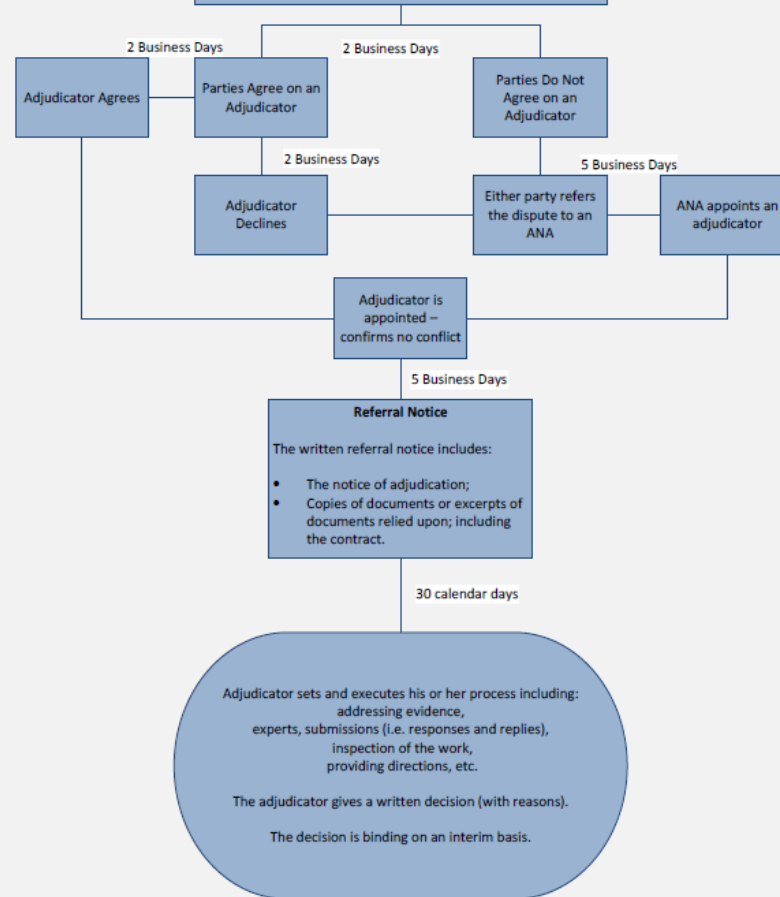
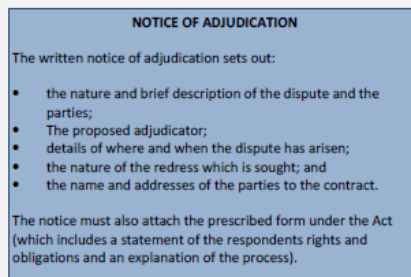


Setting up Adjudication,
Submissions and Decision

CLA AMENDMENTS – ADJUDICATION

13.5 (1) Subject to subsection (3), a party to a contract may refer to adjudication a dispute with the other party to the contract respecting any of the following matters:

- 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 under Part I.1.*
- 4. Amounts retained under section 12 (set-off by trustee) or under subsection 17 (3) (lien set-off).*
- 5. Non-payment of holdback under section 27.1.*
- 6. Any other matter that the parties to the adjudication agree to or that may be prescribed.*



CLA AMENDMENTS – ADJUDICATION

- **Who can request adjudication?**

Owner

Contractor

Subcontractor

Who bears the cost of an adjudication?

- The parties to the adjudication shall split payment of the adjudication fee equally

CLA AMENDMENTS – ADJUDICATION

Is an adjudicator's decision binding?

YES!!

- The determination of a matter by an adjudicator is binding until a determination by a court or a determination by an Arbitrator.
- 10 days to pay.
- interest is payable if not paid; and
- the contractor can suspend performance and charge remobilization costs.

CLA AMENDMENTS – ADJUDICATION

Issues to Consider

- Adjudication readiness
 - Are Owners ready for increased invoicing?
 - What do contracts require for notice, remedies?
- Use of prescribed forms
 - Will they be strictly applied?
- Sufficient qualified adjudicators
 - Consider compiling roster of approved adjudicators



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