

Construction Act – Prompt Payment

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Summary

The *Construction Act* (CA) Part I.1 Prompt Payment provides for payments related to an improvement to be made within 28 days of the receipt of a *proper invoice* unless a notice of non-payment is issued within 14 days. These rules also impose obligations regarding payment and the delivering notices of non-payment at all the other levels of the construction pyramid. Prompt payment applies equally to payments made under the construction contract and under the architectural services contract. This Practice Tip addresses both situations.

Although prompt payment legislation has been in effect since October 2019, not everyone is aware of it and it has not been complied with or integrated into contracts where it should have been.

Note: Where the term “project” is used, it has the same meaning throughout as “improvement” in the CA. This is an over-simplification, but until the CA is clarified by amendment or court ruling, it is an appropriate approximation.

The CA contains Part I.1 Prompt Payment (the subject of this Practice Tip) and Part II.1 Construction Dispute Interim Adjudication (the subject of Practice Tip PT.10.5).

The information in this Practice Tip is organized under the following headings:

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Background

Prior to the 2019 amendments to the *Construction Act*, little could be done to get a recalcitrant payer to pay what was due. The contract might contain terms that required payment in 30 days, but it was common for clients to take 60 or 120 days. Further, interest would rarely be paid on overdue amounts despite clear provisions in the contracts. This put the contractor or consultant in the place of financing the project. The most common legal remedies involved liens or lawsuits, neither of which are inexpensive or quick.

The intent of the CA was to keep the money flowing at all levels in the construction pyramid. The primary mechanisms were a requirement for prompt payment, and a process for interim adjudication of construction disputes (including payment-related issues).

Prompt payment applies to all levels of the construction pyramid, from each prime or head contract, with the owner at the top of the pyramid, down to the lowest subcontract at the bottom of the pyramid. The requirements at the top are distinct from those applicable at all the other levels.

It is also important to appreciate the timelines mandated by the prompt payment rules for paying and disputing invoices are mandatory and cannot be extended by the terms of the parties' contract. Additionally, all references to "days" in the prompt payment rules, and this Practice Tip, are to "calendar" days rather than working or business days.

Holders of a Certificate of Practice should be familiar with the requirements that apply:

1. To the prime or head contract (this could be between the owner and the contractor [e.g. a CCDC 2 contract], owner and construction manager [e.g. a CCDC 5B], or owner and each trade contractor [e.g. a CCDC 5A/CCDC 17 contracting structure]) when the holder is the payment certifier;
2. To the contract between the owner and the holder;
3. To the subcontract between the holder and the subconsultants;
4. To the subcontract between the prime consultant and the holder as a subconsultant; and
5. To the contract between the design-builder and the holder.

The same prompt payment legislation applies in each of these situations, but the holder's role, responsibilities, and specific applicable clauses vary.

Holders should be particularly careful not to give legal advice to owners, some of whom may be unfamiliar with the prompt payment provisions. Owners should obtain legal advice about the responsibilities imposed on them by the CA, and about the timing and the wording of any notices or other documents related to prompt payment.

Suggested Procedure

1. Prompt Payment in Relation to the Construction Contract

1. Proper Invoice:

- a) The fundamental event that triggers the application of the CA's prompt payment rules is the owner's receipt of a "proper invoice" from the contractor. If an invoice submitted to the owner is not a "proper invoice," the owner's obligations under the prompt payment rules (and, consequently, the prompt payment obligations of the contractor, subcontractors, sub-subcontractors, and so on) are not triggered.

A "proper invoice" is defined in [Section 6.1](#) of the *Construction Act*.

In addition to meeting the seven requirements listed in Section 6.1., the invoice must also meet "any other requirements that the contract specifies," such as any additional pieces of information or documentation the contract requires be included with invoice submissions. An important exception is that a contract cannot make a contractor's submission of a proper invoice conditional on the payment certifier's prior certification or the owner's prior approval (CA [Section 6.3\(2\)](#)) except in respect of testing and commissioning (CA [Section 6.3\(4\)](#)).

- b) A proper invoice may be revised by the contractor after its submission. Doing so does not restart the time periods by which the owner must make payment or issue a notice of non-payment. However, a proper invoice can only be revised if:
 - i) the owner agrees in advance to the revision;
 - ii) the date of the proper invoice is not changed; and
 - iii) the invoice continues to meet the requirements of a "proper invoice" (CA [Section 6.3\(5\)](#)).

2. Notice of Nonpayment:

- a) If an owner does not wish to pay a proper invoice (in whole or in part), it must give the contractor a notice of non-payment no later than 14 days after the owner received the proper invoice. (CA [Section 6.4\(2\)](#)).
- b) The notice of non-payment forms are prescribed by the CA and are available [online](#).
- c) The owner will need to specify in the notice of non-payment the amount not being paid and the reasons for non-payment.
- d) While notices of non-payment must be used by owners to avoid paying a proper invoice, they are not intended as a means of notifying a contractor that its invoice does not meet the requirements of a “proper invoice.”

Note: Holders may be expected to assist clients with notices of non-payment by advising about the amount not being paid and by drafting reasons for non-payment. Keep in mind that clients may have reasons for non-payment unrelated to the value of work completed on site or the scope of work of holders, such as liens that have been filed.

Whether or not an invoice is a proper invoice is a legal determination similar to evaluating the substantial compliance of a bid. Holders may identify what appear to be discrepancies, but it should be left to the client and their legal advisors to make the final determination and advise the contractor.

3. Payment:

- a) Subject to the owner giving the contractor a notice of non-payment, it must pay the amount payable under the proper invoice within 28 days of receiving it (CA [Section 6.4\(1\)](#)).
- b) To assist in an efficient and accurate invoice review process, payment certifiers may wish to develop a proper invoice checklist for a particular contract as well as a calendar or tickler system to keep track of the various deadlines under the CA.

2. Prompt Payment in Relation to the Architectural Services Contract

This section applies when the architectural services contract is a prime contract (directly with the owner). For situations where the architectural services contract is not directly with the owner, see Section 3.

1. Proper Invoice.

- a) To trigger the client’s obligation under the prompt payment rules to pay (or dispute) an invoice, the Certificate of Practice holder will need to deliver a “proper invoice.” To this end, it is important to check and confirm the invoice complies with the requirements of “proper invoices” under the CA and in the contract, as described in Section 1 of this Practice Tip.

2. Notice of Nonpayment:

- a) If a client does not wish to pay a proper invoice (in whole or in part), it must give the holder a notice of non-payment no later than 14 days after receiving the proper invoice (CA [Section 6.4\(2\)](#)).

3. Payments

- a) Subject to the client giving a notice of non-payment, it must pay the amount payable under the holder’s proper invoice within 28 days of receiving it (CA [Section 6.4\(1\)](#)). The failure of the client to pay a proper invoice does not give the holder an immediate right under the CA to suspend services (although the holder should consult the terms of its contract for any contractual rights of suspension and consult a lawyer if necessary).

3. Prompt Payment in Relation to the Subconsultants

This section applies when the holder has contracts with one or more subconsultants.

1. Proper Invoice:

a) Relationship between holder's proper invoice and the subconsultant's invoice:

The "proper invoice" requirements do not apply at the subcontract level. Specifically, the holder's obligation to pay a subconsultant under the prompt payment rules is not contingent on the subconsultant giving the holder a "proper invoice." Proper invoices are only given by "contractors" (including holders) to "owners."

However, a holder will likely want to structure its invoicing processes so it has sufficient time to receive and vet its subconsultants' invoices and incorporate them into its proper invoice.

Further, all the holder's obligations under the prompt payment rules to pay or dispute a subconsultant's invoice discussed below will not apply if the holder has not included within its proper invoice the services performed by that subconsultant.

2. Notice of Nonpayment:

a) Issuing Notices of Non-Payment:

There are two primary instances where a holder may need to issue a notice of non-payment to a subconsultant:

- i) when the holder has not received payment of its proper invoice from the owner and wants to rely on the owner's non-payment as a reason to not pay the subconsultant; or
- ii) when the holder disputes subconsultant's entitlement to payment for other reasons.

b) Notice of Non-Payment in the Case of an Owner Non-Payment:

In the scenario where an owner does not pay some or all of the holder's proper invoice within 28 days, unless the holder issues a notice of non-payment it must pay its subconsultants within 35 days of the submission of the proper invoice. In the case of a partial payment by the owner, there are certain rules in the CA with respect to how partial payments are to be distributed—see Subsection 3.3 of this Practice Tip below (CA [Section 6.5\(5\)](#)).

Importantly, the holder's notice of non-payment (form 1.2) must include an undertaking by the holder to refer the matter to adjudication with the owner within 21 days (CA [Section 6.5\(5\)](#)). In effect, the prompt payment rules force holders and contractors to commence adjudications against the owner over the owner's non-payment if the holder or contractor wants to rely on the owner's non-payment as an excuse to not to pay subcontractors. Refer to Practice Tip PT.10.5 for information on adjudication.

c) Notice of Non-Payment where the Holder Disputes Subconsultant's Entitlement to Payment:

In the scenario where a holder disputes the entitlement of a subconsultant to payment (that is, for reasons not necessarily related to the owner's non-payment), the holder will need to give a notice of non-payment to the subconsultant (form 1.3). Unlike the form used in the case of a non-payment by the owner, this notice of non-payment form does not obligate the holder to refer the matter to adjudication with the owner (CA [Section 6.5\(6\)](#)).

d) Deadlines to Deliver Notices:

The holder must issue its notice of non-payment within certain deadlines, specifically:

- i) within seven days of receiving a notice of non-payment from the owner (so long as the owner delivered it within the required 14 days after receiving the proper invoice); or
- ii) if a notice of non-payment was not given by the owner, by 35 days after the holder gave their proper invoice to the owner.

3. Payment:

- a) Assuming the holder did not issue notices of non-payment, they will have to pay their subconsultants within certain timeframes. Specifically:
 - i) if the holder receives full payment of its proper invoice within 28 days, it must pay each subconsultant the amount payable to the subconsultant within seven days of receipt of payment from the owner (CA [Section 6.5\(1\)](#)); or
 - ii) if the holder receives only a partial payment of its proper invoice, they must pay the subconsultants from the amount paid by the owner within seven days of the holder's receipt of payment from the owner (CA [Section 6.5\(2\)](#)). When more than one subconsultant is entitled to payment, the holder has to follow these rules in distributing payment:
 - 1) if the amount not paid by the owner is specific to services supplied by particular subconsultants, then the remaining subconsultants must be paid (and any amounts the owner has paid the holder in respect of the subconsultants implicated in the dispute are payable to them on a ratable basis); and
 - 2) in any other case, the holder must pay its subconsultants on a ratable basis (CA [Section 6.5\(3\)](#)).

4. Prompt Payment in Relation to the Holder not Being the Prime Consultant

This section applies when the architectural services contract is not a prime contract (not directly with the owner such as when the holder is contracted to a design-builder or subcontracted to a prime consultant).

1. Proper Invoice:

- a) Relationship between holder's invoice and the design-builder's or prime consultant's proper invoice:

If the holder is in the role of a consultant to a design-builder or a subconsultant to a lead or prime consultant retained by the owner, the application of the prompt payment rules to the holder will depend on whether the design-builder or prime consultant gave a proper invoice to the owner and whether it included the services supplied by the holder.

If the holder has subconsultants of its own that it is required to pay under the prompt payment rules, then the holder may request from their client (who must respond "as soon as possible") confirmation of the date the client gave its proper invoice to the owner (CA [Section 6.6\(10\)](#)).

2. Notice of Nonpayment:

- a) Issuance of Notice:

If the client submitted a proper invoice to the owner that included the services supplied by the holder, then the client will owe payment obligations to the holder under the prompt payment rules unless it gives the holder a notice of non-payment.

The holder may receive two types of notices of non-payment from the client:

- i) one where the client wishes to rely on the owner's non-payment of their proper invoice as grounds for not paying the holder's invoice (form 1.2); or
- ii) one where the client disputes the holder's entitlement to payment for other reasons (form 1.3).

In the first scenario, the client's notice of non-payment must include an undertaking by them to refer the matter to interim adjudication with the owner within 21 days (CA [Section 6.5\(5\)\(a\)](#)). Refer to Practice Tip PT.10.5 for more information on construction dispute interim adjudication.

3. Payment:

- a) If the client's proper invoice was paid by the owner in accordance with the prompt payment rules (and provided it included the services performed by the holder), the client will be required to pay the holder within seven days of receiving payment from the owner unless it issues a notice of non-payment.
- b) The holder will, in turn, be required to make payment to its subconsultants or issue notices of non-payment accordingly.
- c) The rules for paying and disputing invoices of sub-subconsultants largely mirror the rules for paying or disputing invoices of subconsultants.

5. Prompt Payment Provisions in OAA Standard Contracts

The OAA standard form contracts contain various clauses of which holders should be aware that relate to prompt payment. Below is a summary of some of the relevant clauses using examples from the versions for use by architects:

1. Prompt payment provisions in OAA 600 contract:

- a) With respect to the OAA 600-2021A contract:
 - i) The contract has added definitions of "*Lien Legislation*" (which captures the prompt payment rules under the CA) as well as "*Proper Invoice*" (which aligns with the definition of "proper invoice" under the CA).
 - ii) A23 includes a field where the parties can insert what other information has to be included in the architect's "*Proper Invoice*" in addition to the minimum statutory requirements.
 - iii) The contract's payment terms, notably in A24 and GC12, require the client to pay the architect's proper invoices within 28 days, in alignment with the CA's prompt payment rules.
 - iv) Under the CA, if the contract does not specify an interest rate then the prejudgment interest A25 allows the parties to stipulate a rate of interest that applies to unpaid amounts. Note that the rate in the *Ontario Courts of Justice Act* applies (CA [Section 6.9](#)).
 - v) GC5.3 includes as part of the client's responsibilities the requirement to provide any legal, accounting, and insurance counselling services (including auditing services that the client may require to verify the contractor's applications for payment or an issue related to the prompt payment or adjudication provisions of the CA).
 - vi) GC10 provides the architect with the right to suspend services under certain conditions (listed in GC10) where the client has failed to pay the architect's proper invoice and failed to issue a notice of non-payment.
 - vii) In Schedule 2 of the contract, Section 2.1.1 includes a requirement for the architect to issue payment certificates within 10 days of receipt of the contractor's proper invoice. (This would amount to four days prior to when the owner has to issue its notice of non-payment to the contractor if it is going to dispute any portion of the proper invoice.)

2. Prompt payment provisions in OAA 800

- a) With respect to the OAA 800-2021A contract:
 - i) The contract has added definitions of "*Lien Legislation*" (which captures the prompt payment rules under the CA) as well as "*Proper Invoice*" (which aligns with the definition of "proper invoice" under the CA).
 - ii) The contract's payment terms, notably in A15, require the client to make payment of the architect's proper invoices within 28 days, in alignment with the CA's prompt payment rules.

3. Prompt payment provisions in OAA 900

a) With respect to the OAA 900-2021A contract:

- i) The contract's payment terms in A17 require the architect to pay the subconsultant within seven days of the architect's receipt of corresponding payment from the client, in accordance with the CA's prompt payment rules.
- ii) A14 of the contract requires the subconsultant's invoice to include all information and documentation the architect is required to include with its proper invoice under the prime contract.
- iii) A15 of the contract requires the subconsultant's invoice to be submitted at least five working days prior to the date the architect is required to submit its proper invoice under the prime contract.
- iv) In situations where the architect or client dispute all or part of the subconsultant's invoice, A16 obligates the architect to provide written notice in accordance with applicable "*Lien Legislation*" (which would include the CA's prompt payment rules).
- v) A17 allows the subconsultant to request confirmation from the architect as to when it included all or part of the amounts claimed in the subconsultant's invoice in the architect's payment application under the prime contract.

6. P3s and Other Procurements

Please note that different considerations and rules under the CA apply in the context of Public Private Partnership (P3), alternative financing and procurement (AFP) arrangements, and Integrated Project Delivery (IPD), which are beyond the scope of this Practice Tip.

References

Construction Act (CA), R.S.O., 1990, Chapter C.30.

[Ontario Court Forms – Construction Act](#)

OAA 600-2021

OAA 800-2021

OAA 900-2021

Practice Tip PT 10.5 *Construction Act* – Interim Adjudication

Canadian Handbook of Practice for Architects (CHOP)

The OAA does not provide legal, insurance or accounting advice. Readers are advised to consult their own legal, accounting or insurance representatives to obtain suitable professional advice in those regards.
