

**PB-34****PROMPT PAYMENT AND CONSTRUCTION LIEN ACT****SUMMARY**

This Practice Bulletin addresses the transition of the Builders' Lien Act to the *Prompt Payment and Construction Lien Act*, as it will affect the construction industry and the role of the architect. The amended Act can be found at the following link:

[Prompt Payment and Construction Lien Act](#)

**BACKGROUND**

The *Prompt Payment and Construction Lien Act* (Act) came into force on August 29, 2022, and is an amendment to the former *Builders' Lien Act*. Some of the new provisions of the Act will have a significant impact on architectural practice.

The purpose of the revisions to this Act are to set out deadlines for payment throughout the construction industry, and to provide an alternative to the courts to resolve disputes in relation to payment under a contract or subcontract throughout the course of a project.,

**APPLICABLE LEGISLATION**

- ▶ Prompt Payment and Construction Lien Act, RSA 2000, c P-26.4
- ▶ Order in Council O.C. 052/2022

**WHO DOES IT APPLY TO**

The legislation applies to anyone who is performing work, including services, or furnishing goods or materials, with respect to an improvement in land. All construction sectors are included in the legislation, from home builders to large oil and gas projects, regardless of delivery model or method, or type of contract. Owners, developers, and consultants, including architects and professional engineers, that provide consulting services with respect to an improvement are included in the legislation.

**WHO DOES IT NOT APPLY TO**

The legislation does not apply to those involved with the following:

- ▶ Federal government projects
- ▶ Provincial government projects governed by the *Public Works Act*
- ▶ Public private partnership projects involving the provincial government

**WHAT HAS NOT CHANGED**

The legislation remains as a remedy for an entity that has made an "improvement" to a property that has not been paid. The ability for that entity to issue a lien on the property as a means to getting paid remains as per the old legislation.

## WHAT IS NEW

The two major changes to the Act are:

1. There is a mandated payment cycle that determines payment deadlines for Contractors and Sub-Contractors.
2. The introduction to a dispute resolution process that is an alternative to the Courts.

The legislation requires the contractor to provide a proper invoice to the owner every 31 days, regardless of the amount (even if zero). The period is mandatory and can only be shortened by agreement, not extended. The owner then has 28 days to pay the invoice. Once the contractor has received payment, they have seven (7) days to pay their subcontractors. Once the sub-contractor is paid, they have seven (7) days to pay sub-sub-contractors or suppliers.

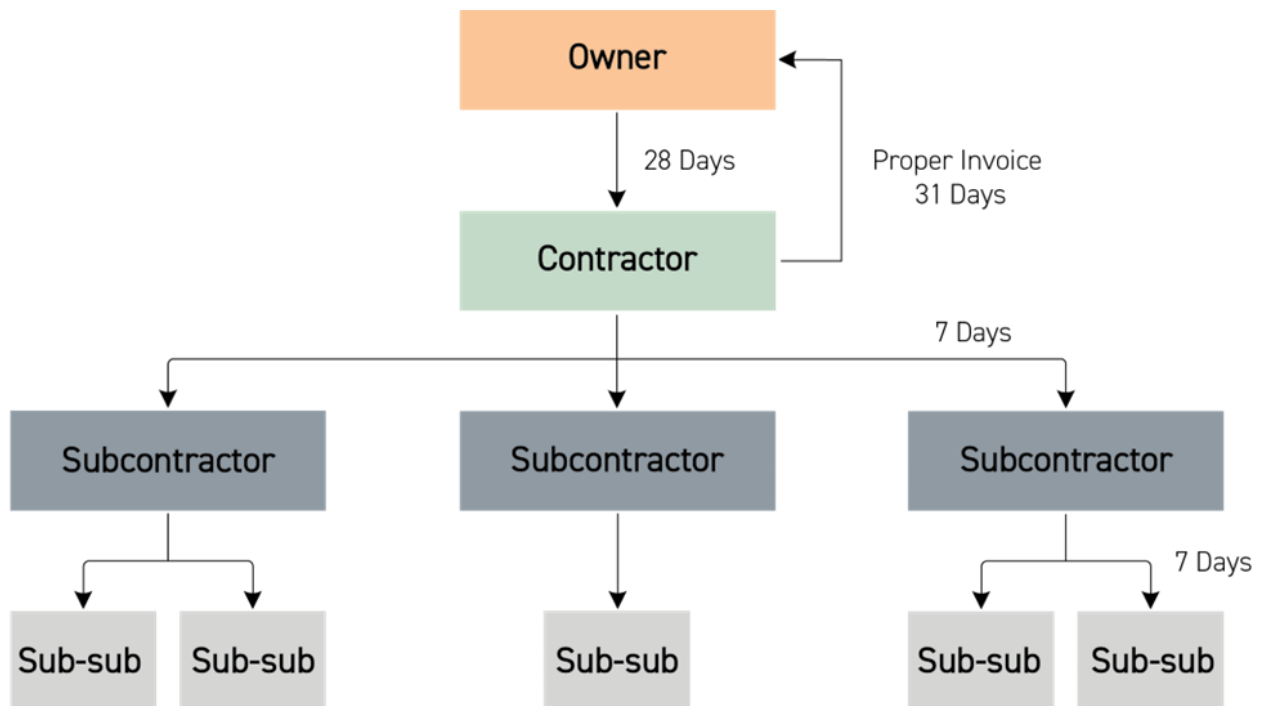
If the Owner does not intend to pay all or a portion of a proper invoice, they have 14 days to file a “Form 1 – Owner’s Notice of Dispute,” as required by the General Regulation under the Act. The Act further defines protocols and should be referenced in full.

The lien period has been extended from 45 days to 60 days. The exceptions to this rule are:

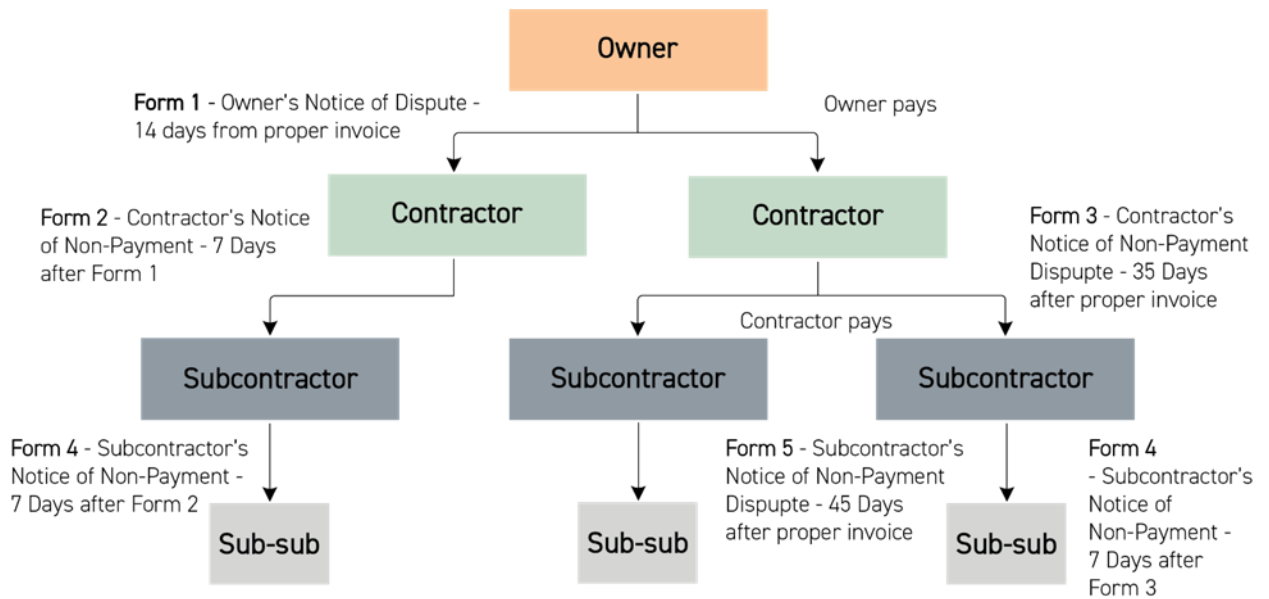
1. Oil and gas well sites, and
2. The manufacturer and supply of ready-mix concrete which are 90 days.

These changes extend the period in which a party can register a lien.

The prompt payment cycle, with no disputes, is illustrated below:



The prompt payment cycle, with disputed payments, is illustrated below:



Note that you can substitute "Contractor" with "Consultant" and "subcontractor" with "subconsultant."

## Non-Payment

If a payment is disputed, the following forms need to be used:

- ▶ 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

## Adjudication

Adjudication involves the appointment of a certified adjudicator to determine a payment dispute between the parties. It is intended to be a fast-track process with predetermined dates to submit written submissions and supporting documents. The adjudication renders a decision, a written determination, and corresponding order, within 30 days of receiving the parties' written submissions and supporting documents.

## IMPLICATION FOR CONSULTANTS

The new legislation mandates that clients create a holdback on the fees they are paying consultants. Impacts of the new legislation are not yet fully understood and may require greater clarity to define when a consultant's work is considered substantially performed. Furthermore, there may be impacts upon the progressive release of holdback for consultants at each stage, schematic design, detailed design, contract documents, tender and contract administration. By definition, the work at each stage is ready for its intended purpose as the project progresses to the next stage.

A precondition to payment requires a statutory declaration as well as WCB clearance. This is a new requirement for consultants.

It should be noted that “pay when paid” clauses are no longer permitted.

## RECOMMENDATIONS

Firms should develop comprehensive review processes to determine the applicability and consistent application of the *Prompt Payment and Construction Lien Act* to professional services contracts.

Where the Act applies, firms should ensure that the pricing of their services includes the carrying costs of financing the statutory 10 percent holdback which the Act prescribes.

Progressive holdback is allowed. It is recommended that contract clauses specifically identify the mechanisms to allow this to occur and that those clauses are consistent with the Act.

Finally, contracts and subcontracts for professional services should be carefully reviewed to ensure they align with the prompt payment and adjudication provisions of the Act. As a matter of law, the Act will take precedence in the event of any inconsistency between it and the contract, and alignment will avoid misunderstandings.

## NOTES

This practice bulletin should be read in conjunction with Practice Bulletin *PB-13 Substantial Performance*.

**Approved by Council: November 24, 2022**

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