



# **Adjudicate this!**

Practical Considerations for contractors for  
Prompt Payment & Adjudication after October 1, 2019

September 26, 2019  
**Verdi's Conference Centre**  
**Mississauga**

# Disclaimer

- This presentation and material does not constitute legal advice. Participants in this information session are advised to seek independent legal and commercial advice in respect of all matters presented and discussed.
- Material presented here is intended to provide high level and general context, and to highlight risks and issues for consideration by stakeholders. The information and presentation of this material does not and is not intended to constitute legal or business advice.
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# Agenda

7:30am Registration, breakfast & networking

8:25am **Welcome & Opening Remarks** – Clive Thurston

8:30am **Opening Keynote & Q&A** – Elinor Whitmore, ADR Chambers

9:00am **Introduction & “level set”** on Prompt Payment – Matt Ainley, GCAC

9:20am **Panel Discussion – case study - Live4Ever Long Term Care Extension**

Moderator: **Ray Bassett**, Travelers Canada (Toronto)

- General Contractor: **Paul Raboud**, Bird Construction (Mississauga)
- Trade Contractor: **John Rasenberg**, J.M.R. Electric Ltd. (Exeter)
- Owner: **Jackie Kennedy**, City of Toronto (Toronto)
- Consultant: **Eric Wildschut**, Jacobs (Toronto)

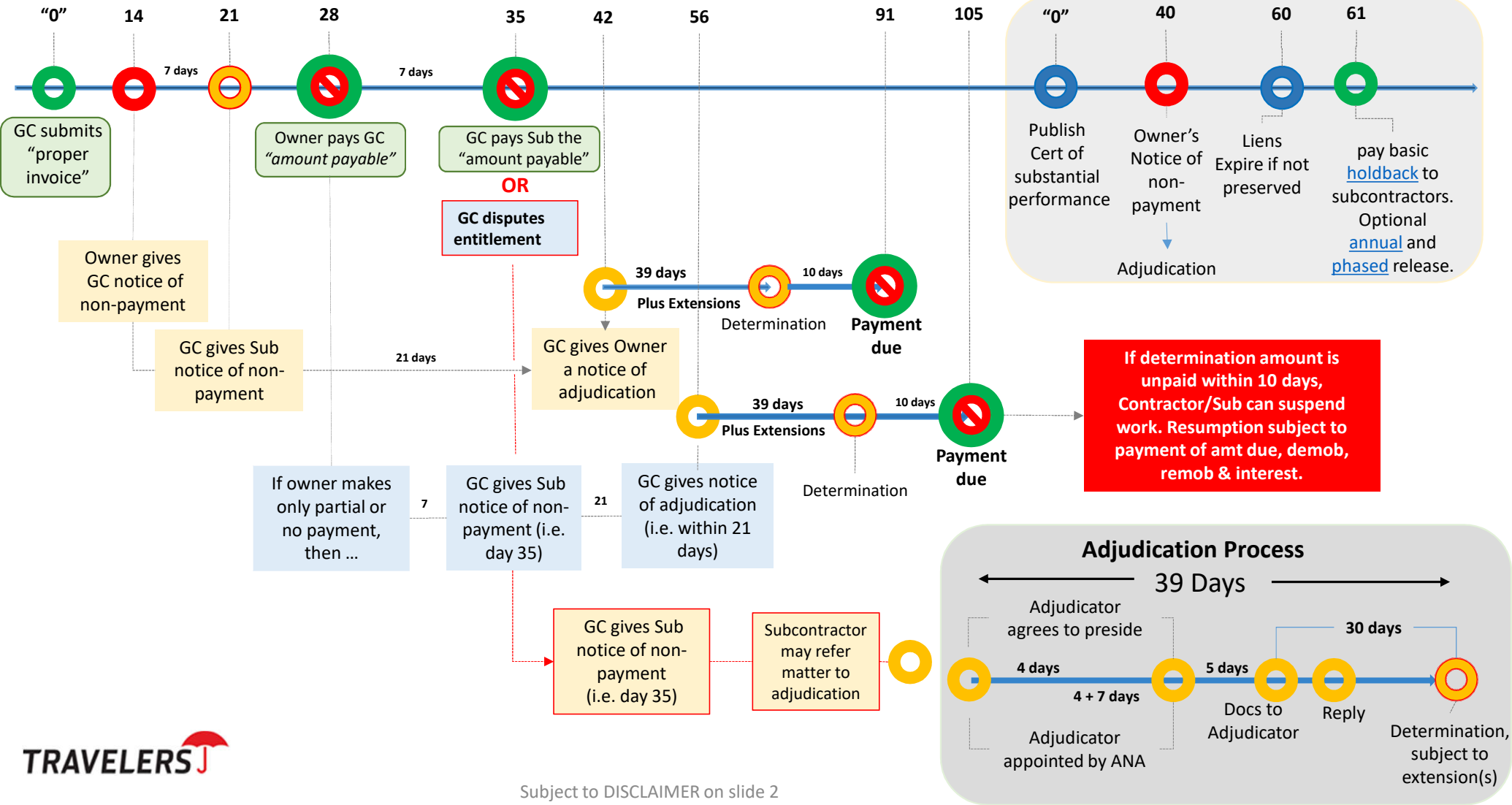
**Case Study - Part 1** – Mysteries of the Construction Act – mechanics of prompt payment

10:20am Networking Break

10:45am **Case Study – Part 2** – adjudication, avoiding disputes – practical takeaways

11:45am **Wrap up** – Practical Considerations & Takeaways - Matt Ainley & Ray Bassett

Prompt Payment & Adjudication Timeline



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# Case Study – Part 1

## Live 4Ever Long Term Care Extension

Tie-in of mechanical systems to existing systems – dispute over responsibility for tie in.

**March 20<sup>th</sup>** mechanical trade submits draft invoice for \$100k

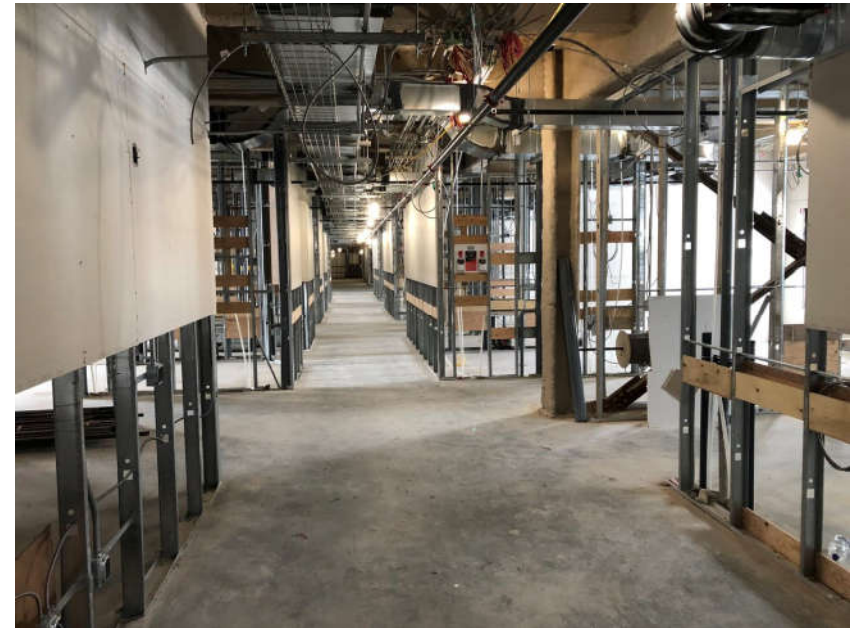
- includes \$25k for work related to tie in to existing building system
- GC reviews and says that work is inside the mechanical scope and that the \$25k will be disputed by the owner but includes the full \$100k in the GC invoice to the owner.

**April 1<sup>st</sup>** - GC submits proper invoice to owner for \$400k, including the \$100k from the mechanical trade.

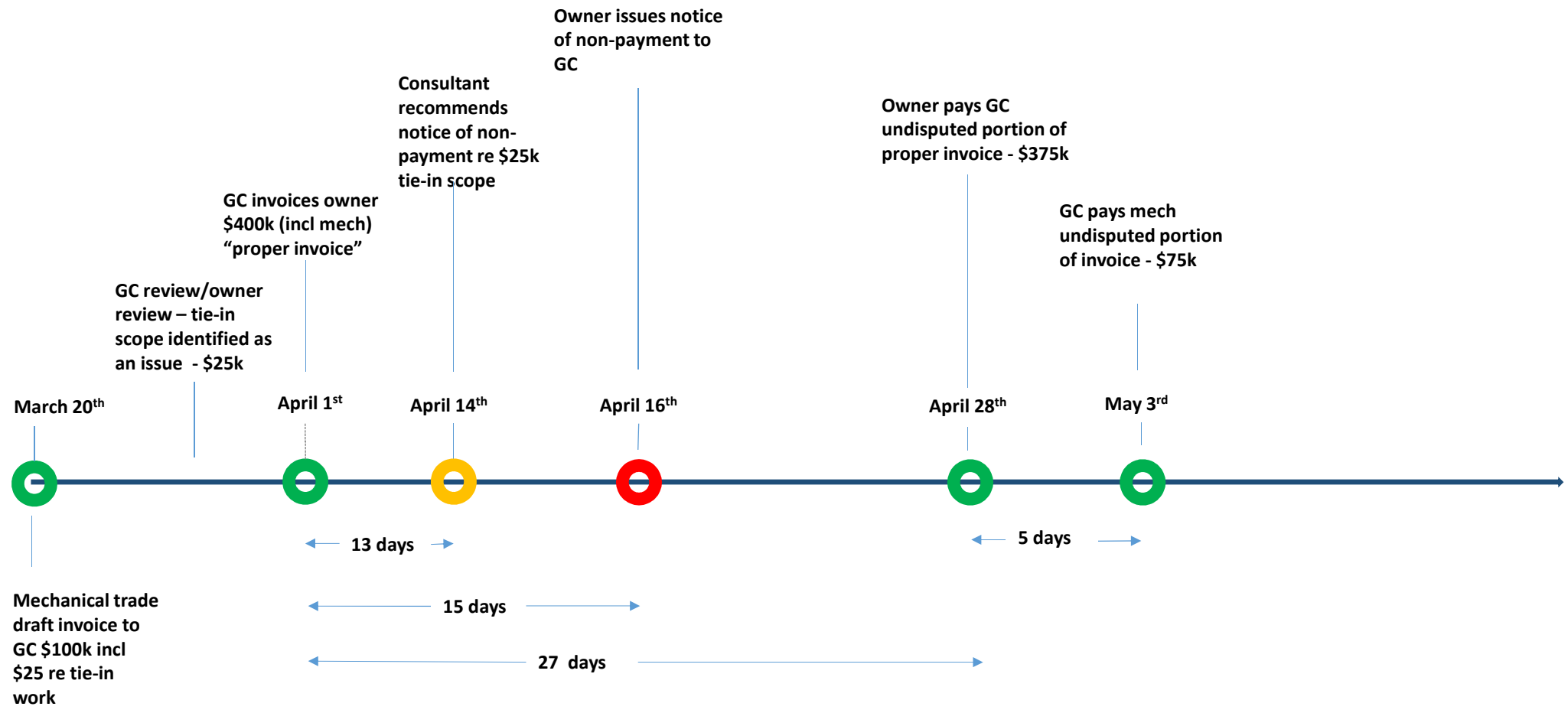
**April 16<sup>th</sup>** - owner's consultant issues a Notice of non-payment re the \$25k.

**April 28<sup>th</sup>** owner pays GC \$375k (i.e. \$400 - \$25).

**May 4<sup>th</sup>** GC pays mechanical trade \$75k

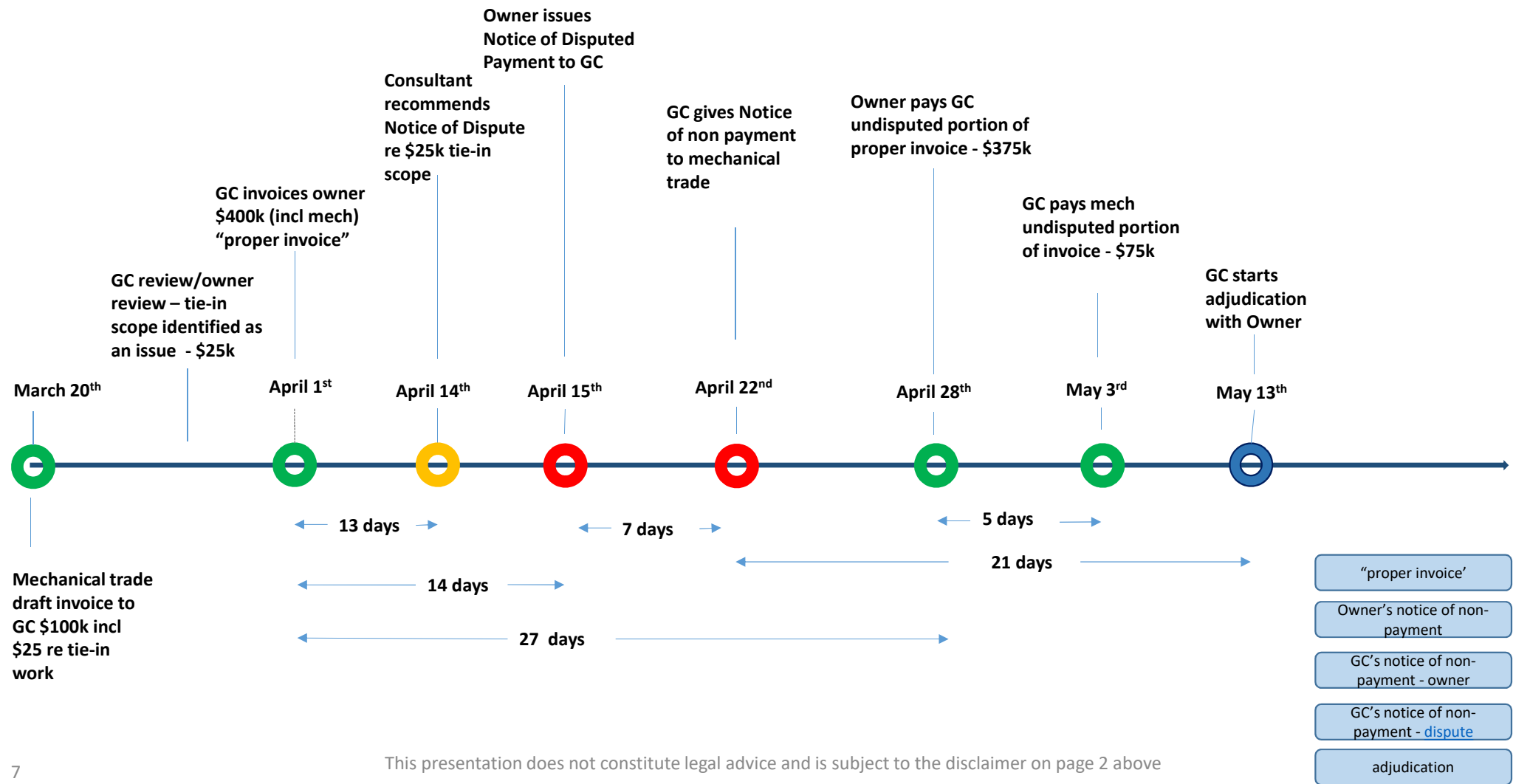


Scenario 1 – This is what happened



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Scenario 1 – This is what should have happened



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# Practical Considerations – Prompt Payment

## What you need to do now to adapt

1. Confirm what rules apply – did procurement start < or > Oct 1, 2019?
2. Agree on a “billing procedure” with the owner (and consultant)
  - How will progress of the work be evaluated before a proper invoice is given (?) – cannot require pre-approval;
  - For each contract agree on the specific additional requirements for a proper invoice;
  - For each contract agree on the specific additional document and other conditions for payment;
  - Agree a process to revise a proper invoice to reflect agreed adjustments
3. Start tracking:
  - Date of proper invoice for all contracts monthly;
  - 14<sup>th</sup> day after proper invoice – was a notice of non-payment given by the owner?
  - Date payment received from owner – payment to subcontractors due 7 days later (subject to a notice of non-payment);
  - Date any early subcontract is certified complete – holdback retained for that subcontract may be released;

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# Practical Considerations – Adjudication

## What you need to do now to adapt

4. “Pick your partners” - avoiding disputes and adjudication will still depend on working with good partners
  - Working with reputable and responsible business partners;
  - Communicate – early and often – be pro-active;
  - Manage relationships for success – “we all want to avoid adjudication!”
5. Early Warning System – don’t get ambushed
  - For larger firms, use a dispute “log” – be aware of and manage disputes that are escalating
  - Be pro-active in resolving disputes that are not worth adjudicating
6. Have a plan to manage adjudications – don’t run these off the side of your desk!
  - Decide what issues & values are worth adjudicating – don’t let emotion rule
  - Have a person or team in the company that know the process and can run “point”
  - Decide how you will back fill on a project if a key team member has to respond to an adjudication – be sure the project isn’t held ransom

# Practical Considerations – Adjudication

## What you need to do now to adapt

6. Cont/... Have a plan to manage adjudications – don't run these off the side of your desk!
  - Have a list of adjudicators on the ADR Chambers roster that you would agree to;
  - Identify claims & scheduling consultants – meet them and get an understanding how to use them in this fast track process where you can;
  - Put a construction (not commercial) lawyer on retainer to help respond to an adjudication if necessary;
7. Re-fresh your subcontract forms
  - Make them compliant with the Act – consider a standard form of notice of non-payment on subcontracts
  - Consider including a compliant but alternative adjudication process – consider implications if you are bound to an owner's compliant but alternative adjudication process (i.e. City of Toronto)
8. Re-fresh project management procedures
  - Track key dates & events
  - Keep correspondence & notices up to date and accessible – don't pay your lawyer to fix bad record keeping
  - Provide project management with check list of key timelines, key events
  - Be sure project teams know when to escalate a dispute – act before you have to re-act

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## Action Plan:

1. Confirm what rules apply – did procurement start before or after Oct 1, 2019?
2. Agree on a “billing procedure” with the owner (and consultant)
3. Start tracking!
4. Pick your partners
5. Early warning system
6. Have a plan
7. Re-fresh subcontracts and PO's
8. Re-fresh project management processes

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# Resources and help?



The law:

**Construction Act, R.S.O. 1990, c. C.30**

[www.ontario.ca/laws/statute/90c30](http://www.ontario.ca/laws/statute/90c30)

Includes Statute & regulations. Forms are at  
<http://ontariocourtforms.on.ca/en/construction-lien-act-forms/>

## Ontario General Contractors Association

Clive Thurston, President

[Clive@ogca.ca](mailto:Clive@ogca.ca)

[www.OGCA.ca](http://www.OGCA.ca)

## General Contractors Alliance of Canada

Matt Ainley, Chair

[Mattdainley@gmail.com](mailto:Mattdainley@gmail.com)

[www.gcacan.ca](http://www.gcacan.ca)

## Travelers Canada

Devon Maltby

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[dmaltby@Travelers.com](mailto:dmaltby@Travelers.com)

Andrew O'Brien

Director, Surety Risk

[ajobrien@Travelers.com](mailto:ajobrien@Travelers.com)

**And for extra copies of the Travelers “booklet”**

## Canadian Construction Association

Rod Gilbert, Vice President

[rgilbert@cca-acc.com](mailto:rgilbert@cca-acc.com)

[www.cca-acc.com/advocacy/prompt-payment/](http://www.cca-acc.com/advocacy/prompt-payment/)

## ADR Chambers

Elinor Whitmore

[elinor@adr.ca](mailto:elinor@adr.ca)

[www.adrchambers.com](http://www.adrchambers.com) and [www.sfhgroup.com](http://www.sfhgroup.com)

Coming soon

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December 4, 2:30 to 4 PM the OGCA will be presenting Best Practices for Addressing Adjudication and Prompt Payment at Construct Canada



## A HANDBOOK FOR EXECUTIVES CONSTRUCTION ACT OF ONTARIO

### PART II

PROVISIONS IMPLEMENTED – OCTOBER 1, 2019



ISSUED [Date]

## Appendices

- “proper invoice”
- Form 1.1 – Owner’s notice of non-payment to prime contractor
- Form 2.1 – Prime contractor’s notice of non-payment to subcontractor because of non-payment by the owner (with or without notice)
- Form 2.3 – Prime contractor’s notice of non-payment to subcontractor because of a dispute directly between subcontractor and prime contractor
- Scope of the adjudication

# proper invoice – think “compliant”

## 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 6.3 (2) [prior approval prohibited]**, 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.*

### Case study

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

Name of owner: .....

Address: .....

Description of premises:

Name of contractor: .....

Address: .....

Address for service, if known .....

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:

Case study

Date: .....  
.....  
(owner)



**FORM 1.2**  
**CONTRACTOR NOTICE OF NON-PAYMENT WHERE OWNER DOES NOT PAY**  
**(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 giving this notice of non-payment to the subcontractor.

A copy of the Notice of Non-Payment under Subsection 6.4(2) of the Act is enclosed.

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

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**FORM 1.3**  
**CONTRACTOR NOTICE OF NON-PAYMENT IF DISPUTE (SUBSECTION 6.5(6) 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 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)

Subject to DISCLAIMER on slide 2

# Adjudication – construction dispute interim adjudication

**13.5 (1)** *Subject to subsection (3) [not after completion of a contract or subcontract] , 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. Payment of a holdback under section 26.1 or 26.2.*
- 6. Non-payment of holdback under section 27.1.*
- 7. Any other matter that the parties to the adjudication agree to, or that may be prescribed.*