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Morning Recess Webinar Series

Construction Law Update

Part 2

Dražen Bulat

April 5, 2018



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**Expertise with drafting tenders, RFPs, RFQs,
contracts, etc. for procurement of
construction and other services**

April 5, 2018

Outline

- 1. Construction Lien Amendment Act –
How did we get here?**
- 2. October 1, 2019 Amendments to the
Construction Lien Act**
 - a) Prompt Payment Amendments**
 - b) Interim Adjudication Amendments**
- 3. Summary**

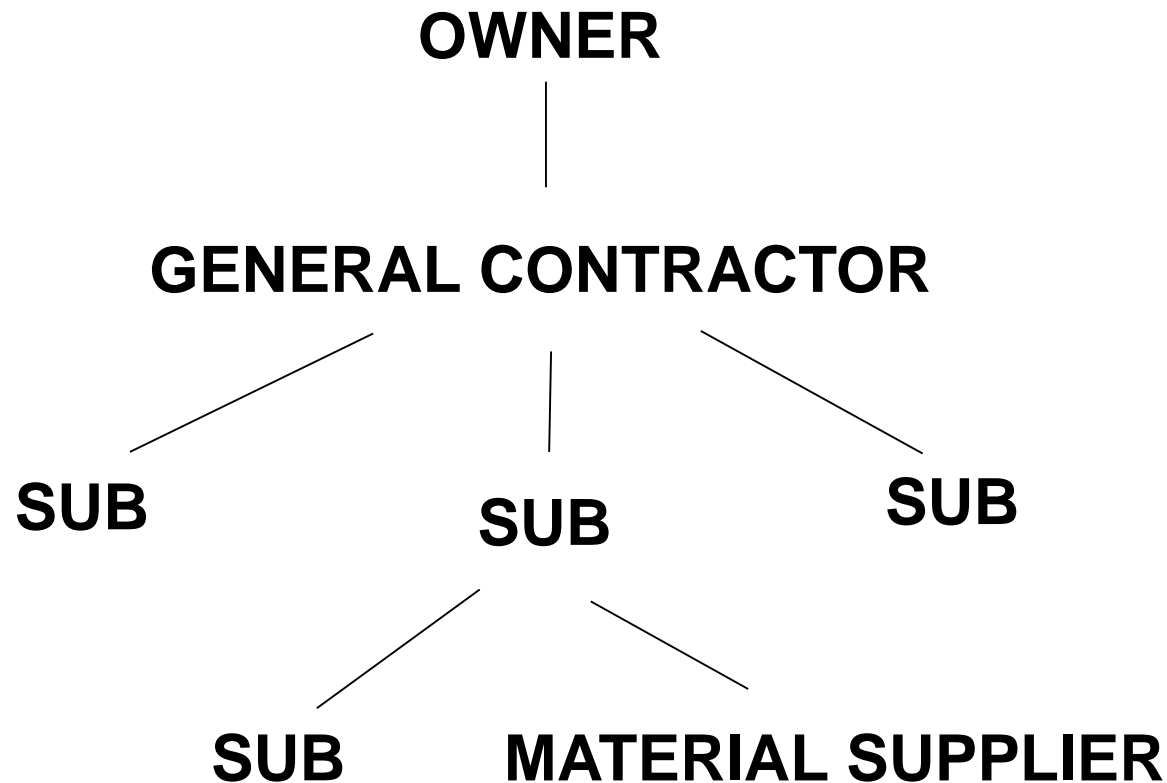


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A Brief History of the Construction Lien Act Or, How Did We Get Here?

April 5, 2018

CONSTRUCTION PYRAMID



The Past (pre-1873)

- **Subs have no right to claim vs Owner**
- **Only claim vs GC**
- **Risk: GC has no \$\$**
- **Owner benefits**
- ***Mechanics' Lien Act* enacted (1873)**
- **“mechanics’ lien” created – interest in land**

The Present – *Construction Lien Act*

- **In force 1983**
- **Person who supplies services or materials to “improvement” has lien vs interest of the “owner”**
- **Must reg Claim for Lien and start lawsuit**
- **Must be ready for trial within 2 years**
- **Problem: long time to get paid**

The Future – *Construction Act*

- **September 2016: Gov't releases report on recommended changes to the *Construction Lien Act***
- **May 2017: Bill 142 introduced**
- **December 12, 2017: Royal Assent**
- **Much more than amendment of the CLA**
- **Re-named: *Construction Act***

The Future – *Construction Act*

- **Current status:**
 - “Housekeeping” and non-substantive amendments now in force
 - Rest of amendments:
 - Amendments to lien and holdback rules: in force July 1, 2018
 - Prompt payment and adjudication amendments: in force October 1, 2019
 - Regs being developed



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Prompt Payment Amendments (in force October 1, 2019)

New Part I.1 of the *Construction Act*

April 5, 2018

Prompt Payment Amendments

- **Goal of amendments: strict timelines for pmts to GCs and Subs**
- **New concept: “proper invoice” – must include:**
 - **GC’s name and address**
 - **Date and period of supply**
 - **Description of what supplied**
 - **Amt payable and pmt terms**
 - **Details of where pmt to be sent**
 - **Any other info required by Regulations**

Prompt Payment Amendments

- **“proper invoice” to be issued monthly**
 - **Unless contract provides otherwise**
- **“proper invoice” can NOT be conditional on prior certification by pmt certifier or O’s prior approval**
- **“proper invoice” can be reviewed by pmt certifier or O after “proper invoice” given**
- **“proper invoice” can be revised by GC if O agrees in advance BUT no change to date**

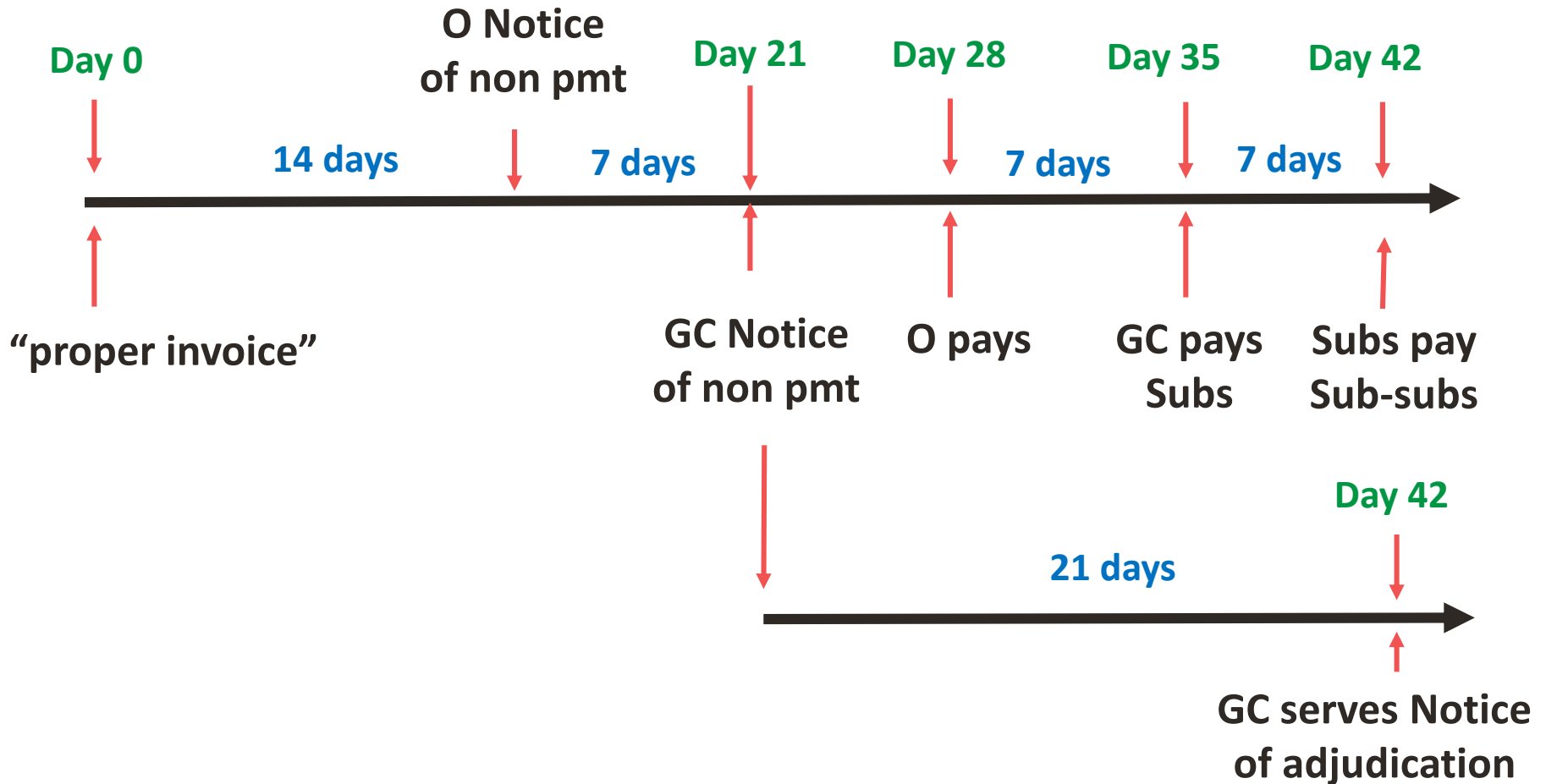
Prompt Payment Amendments – Payments by Owner

- O must pay “proper invoice” in full w/in 28 days of receipt
- If O disputes – must give notice of non-pmt within 14 days of receipt of “proper invoice”
 - Must be in form specified by Regulations
 - Must specify amt and reason not paid
- O must pay all amts not identified in non-pmt notice
- GC must pay subs w/in 7 days of pmt by O

Prompt Payment Amendments – Payments by GC

- **If O gives notice of non-pmt: GC must, w/in 7 days, give to each affected Sub:**
 - **Copy of O's non-pmt notice, AND**
 - **GC's notice of non-pmt:**
 - **Must be in form prescribed by Regulations**
 - **Must specify amt not being paid**
 - **Must undertake to refer matter to adjudication w/in 21 days**
- **If GC fails to give notice: must pay Subs within 35 days of “proper invoice”**

Prompt Payment Flowchart



Prompt Payment Amendments – Thinking Out Loud

- **Certification of “proper invoice” must be completed < 14 days after receipt**
 - **To allow for issuance of notice of non-pmt**
 - **But: be ready for adjudication**
- **Ensure funding available w/in 28 days**



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Interim Adjudication Amendments (in force October 1, 2019)

New Part II.1 of the *Construction Act*

April 5, 2018

Interim Adjudication Amendments

- **Goal of amendments:**
 - Expedite resolution of disputes
 - Minimize disruptions to project
- **Authorized Nominating Authority:**
 - Trains adjudicators
 - Qualifies adj's
 - Appoints adj's when parties don't agree

Interim Adjudication Amendments

- **Disputes to be adjudicated:**
 - Valuation of services / materials provided
 - Payments, incl COs, CCOs
 - Disputes from notices of non-pmt
 - Set off claims
 - Pmt / non-pmt of holdback
 - Any other matters that parties agree or as per Regs
- Available even where matter in lit / arb
- Parties can create own procedure (in contract) as long as comply w Act
 - Otherwise procedure in Act and Regs governs

Interim Adjudication Amendments

Adjudication Procedure – Step 1

- **Notice of Adjudication issued:**
 - **Brief description of dispute**
 - **Nature of relief sought**
 - **Name of proposed adjudicator (can NOT be specified in contract / subcontract)**
- **If parties \neq agree on adj, Authority appoints w/in 7 days of request**

Interim Adjudication Amendments

Adjudication Procedure – Step 2

- **Within 5 days after adjudicator appointed, applicant serves:**
 - **Original notice**
 - **Copy of contract / subcontract**
 - **Documents to be relied upon during adjudication**
- **Adjudicator has broad powers, including:**
 - **Issue directions re conduct of adjudication**
 - **Visit site and conduct inspection**
 - **Obtain assistance of experts**
 - **Any other powers granted by Regulations**

Interim Adjudication Amendments

Adjudication Procedure – Step 3

- **Adjudicator issues determination w/in 30 days after receiving docs**
 - **Can be extended upon adj's request (up to 14 days) or agreement of parties**
- **Binding on parties until decision of Ct or arb**
- **Can be filed w Ct and enforced as Ct order**
- **Limited ability for judicial review (w leave) where fraud, bias, etc.**

Interim Adjudication Amendments

Adjudication Procedure – Costs

- **Costs of Adjudication:**
 - Adjudicator’s fees shared, subj to s. 13.17
 - Each party bears own costs, subj to s. 13.17
 - **Section 13.17:**

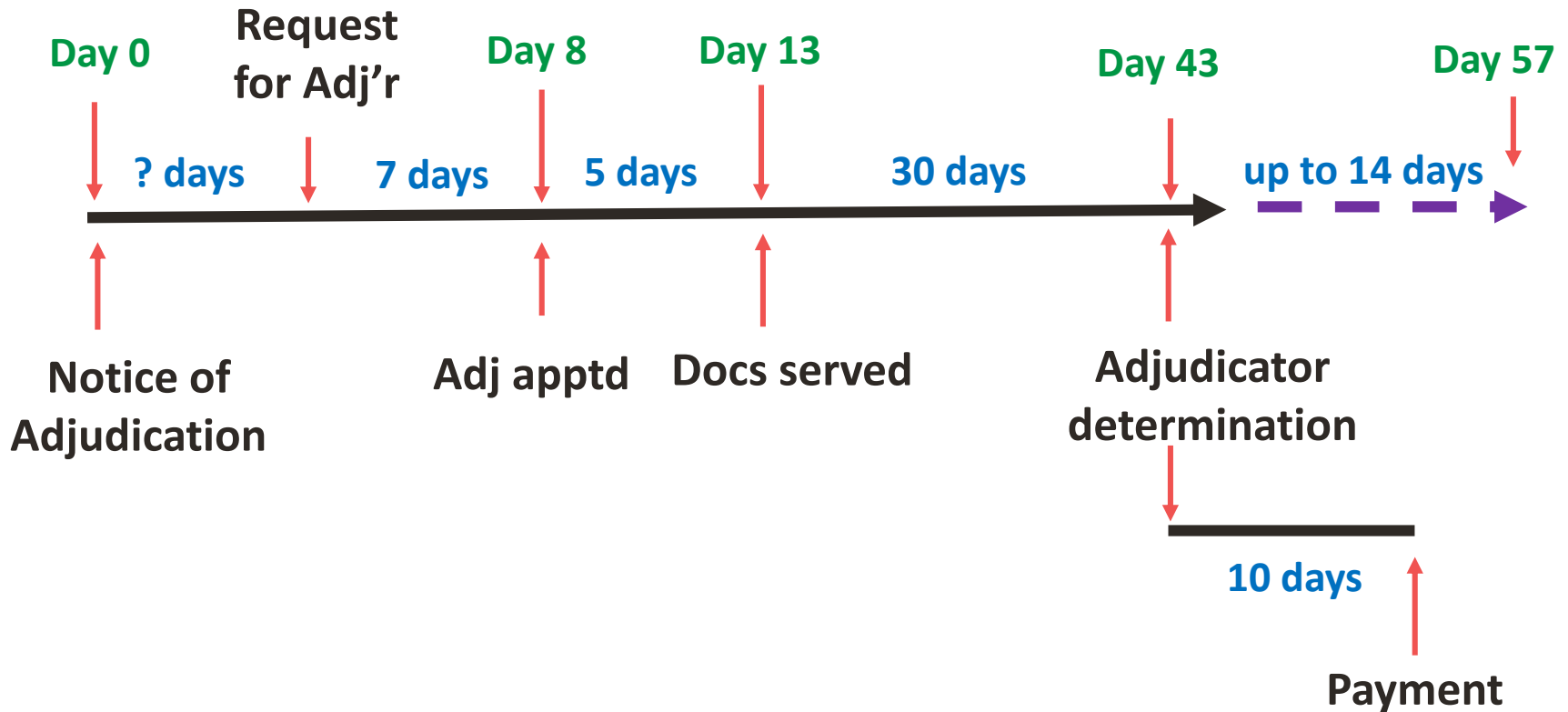
“If an adjudicator determines that a party ... has acted in respect of the improvement in a manner that is frivolous, vexatious, an abuse of process or other than in good faith, the adjudicator may provide ... that the party be required to pay some or all of the other party’s costs, any part of the [adjudicator’s] fee ... or both.”

Interim Adjudication Amendments

Adjudication Procedure – Payment

- **If determination requires a party to pay:**
 - **Must pay w/in 10 days after determination**
 - **If O fails to pay:**
 - **GC can suspend work until O pays:**
 - **Amt payable under determination, plus**
 - **Interest, plus**
 - **GC's costs of suspending work; AND**
 - **O must pay GC's costs incurred as result of resumption of work**

Adjudication Flowchart



Interim Adjudication Amendments

Thinking Out Loud

- **Must have resources ready and available to respond to adjudication notice**
 - **Must keep up to date records**
- **Possible risk: GC / Subs will overstate invoices and then adjudicate – nothing to lose**
- **Failure to comply w determination ≠ option**
 - **Enforceable as Ct Order**
 - **GC can walk off project**
- **Watch out for Sn. 13.17 (good faith)**



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Summary

April 5, 2018

Summary

- **Lots of changes coming**
- **New Act & Regs = new way of doing things**
- **Need to develop new processes to deal with:**
 - **Invoicing issues (review; certification; approval)**
 - **Payment (w/in 28 days)**
 - **Adjudication**
- **Need to revise contracts**
- **Conduct on project now relevant**

Questions



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