

# PROMPT PAYMENT & CONSTRUCTION LIEN ACT IN ALBERTA

The Effects on Condominiums, Their Boards, Property Managers, and Contractors



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The *Builders Lien Act* has governed construction law in Alberta since 2000. Over 2019 and 2020, it was updated and renamed the *Prompt Payment & Construction Lien Act*. The three most significant amendments are:

- **Changes to statutory holdback: release period increased** from 45 days to 60 days
- Introduction of a new **prompt payment scheme**
- Introduction of an **adjudication regime** (date TBD)



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**In determining whether your current construction project is affected by these changes, the date the procurement process started is important. For example, if a project was tendered after August 29, 2022, the statutory holdback release period for prompt payment changes apply.**

The introduction of a prompt payment and adjudication scheme is a major change that will affect the industry. The prompt payment framework introduced in Alberta is roughly based on existing legislation in the U.S. states, in effect in some for 40 years. The adjudication process will likely be based on the UK adjudication system, in place since 1996. Therefore, these changes are not new to construction in general, just new to Alberta.

Our first reaction to these changes may be to ask: “Why have they been made? What was wrong or broken with the old system?” The goal of the prompt payment framework is to tighten cash flow throughout the industry. The goal of the adjudication process is to give the framework teeth in that fight.

Commonly, in the old system, invoices were often not paid until 50 or 60 days after they had been submitted/certified.

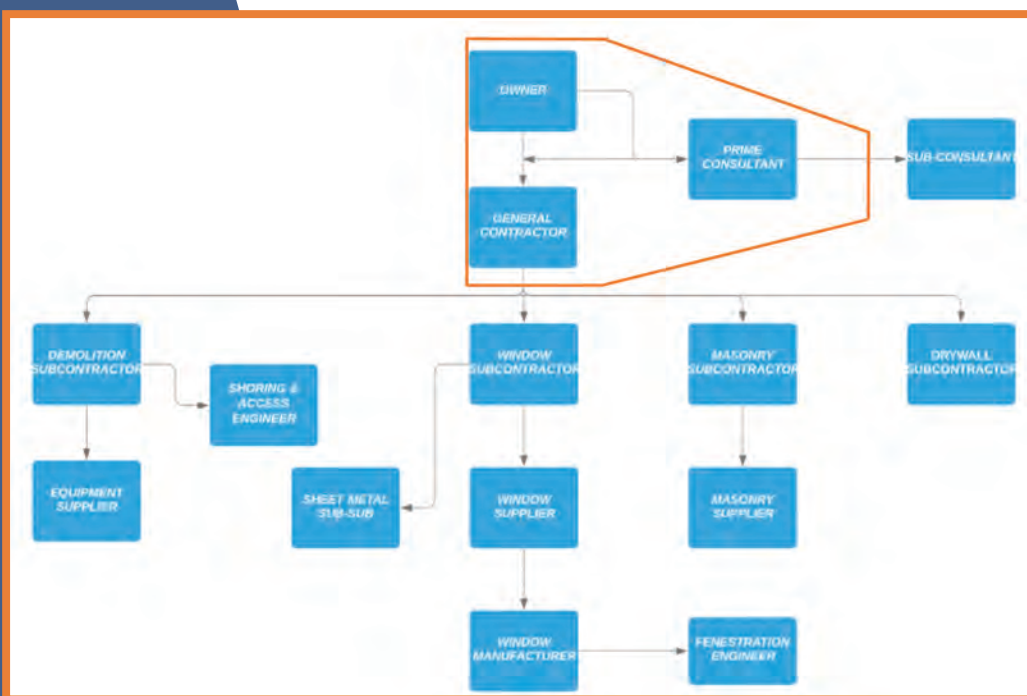
The construction industry deemed extensive payment delays unacceptable, and the law has been altered in order to ensure timely payment.

Delayed payment has most frequently been the result of slow processes or administrative delays, rather than extended disputes over costs. Contractors want to complete projects and get paid; owners want projects completed on time and without complication. The new prompt payment and adjudication scheme gives the contractor and sub-contractors a means of ensuring timely payment without resorting to drastic measures which benefit no-one one, i.e., terminating a contract for non-payment and walking off site. It also gives all parties, owners included, a way to resolve payment disputes relatively quickly and at a relatively low cost.

## TYPICAL CONSTRUCTION CHAIN

To outline why these changes are necessary and important for the industry at large, examining the big picture of the contractual relationships involved in a typical construction project is imperative. The diagram below shows the network of parties and contractual agreements in restoration project involving window and masonry wall replacement.

Owners often see just one step of the payment process (payment from owner to general contractor) and deal



primarily with the three parties at the top of this construction chain (shown within the orange outline). However, a great deal of money changes hands below the level of the general contractor in the network of agreements between sub-contractors and suppliers involved in the actual work on site.

Looking at this diagram from the top down, if the owner delays payment to the general contractor by 10 days, that delay reverberates downwards through the chain. Reasonable (and required) administrative timelines at each link in the chain could result in those at the bottom waiting 30 to 40 days after an invoice due date to be paid; 20 to 30 day delays in paying the general contractor would further aggravate the problem: those on lower

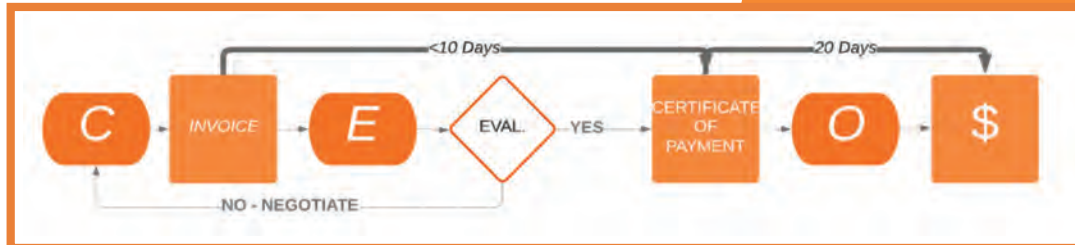
links of the chain could experience delayed payment approaching an unacceptable 70 days.

Looking at this diagram from the bottom up, a manufacturer will pressure a supplier for payment when his invoice is due, a supplier will then pressure a sub-contractor for payment when his invoice is due. Subsequently, that sub-contractor is going to pressure the general contractor for payment as soon as possible. All the pressure, both financial and otherwise, converges on the general contractor. The changes are intended to give contractors and sub-contractors a way to relieve cash flow pressure and ensure payment is made when it is rightfully due. Tightening cash flow throughout the chain will benefit the construction industry in general.

## EXAMPLES OF PAST PAYMENT SYSTEMS

The CCDC-2 Stipulated Price Contract is commonly used in the construction industry, and its terms are also used industry wide in purchase orders and contractor quotes. In the CCDC-2, the payment process works as follows:

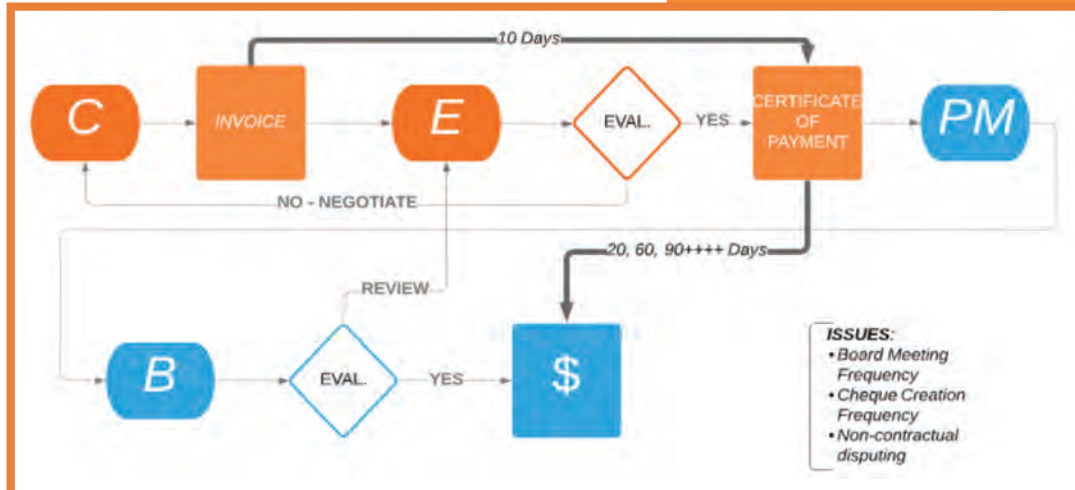
- Contractor submits an invoice to the consultant.
- Consultant has 10 days to review and, if approved, issue a certification of payment to the owner.
- Owner has 20 days to issue payment to the contractor, upon receipt of this certification of payment.



Common issues with the CCDC-2 payment process seen when dealing with condominium or managed building owners are:

- Board Meeting frequency
- Cheque creation frequency
- Non-contractual evaluation

Despite the consultant's review, an additional, non-contractual review by the Condo Board or Owner is often included as well. Coupled with administrative issues such as infrequent meetings and limited release of cheques this can result in payment taking 40-60 days.



## EXAMPLE OF THE NEW PAYMENT SYSTEM

The new prompt payment framework is now law, meaning that it supersedes any contractual stipulations, and therefore cannot be contracted out of. Additionally, the Act explicitly states that the owner is required to meet the review timelines and cannot rely on a third-party review of the invoice. CCDC-2 payment terms will remain in use, but they will effectively be governed under, and must fit into, the new framework.



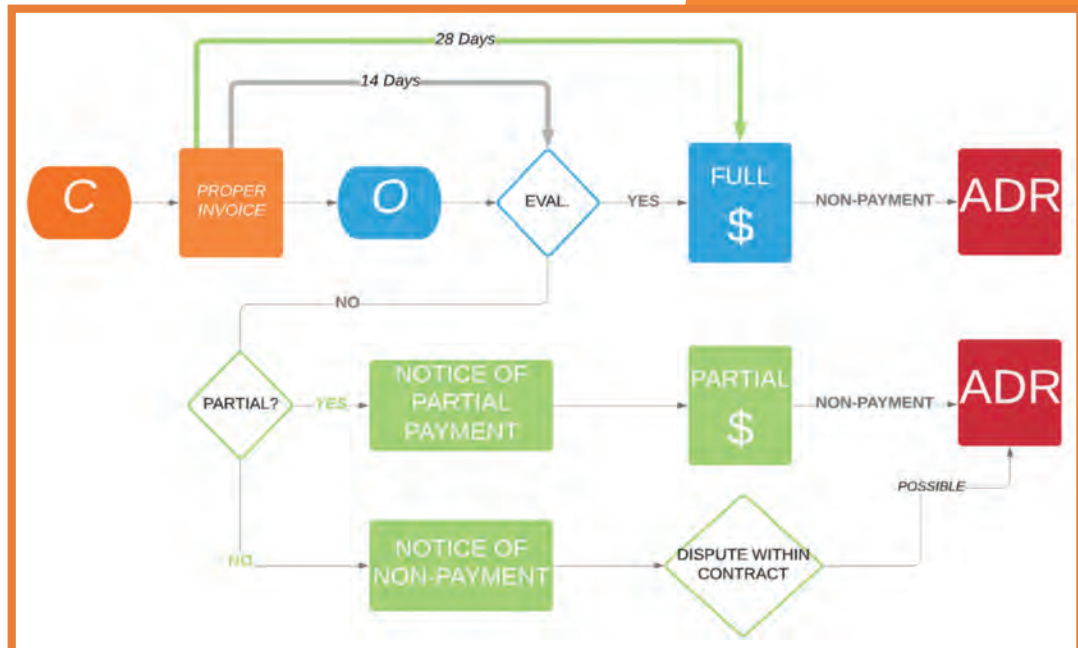


The new system is based on seven-day intervals. As it relates to the owner, the system works as follows:

- Contractor submits a proper invoice to the owner.
- Owner has 14 days to issue a notice of dispute.
- If no notice is issued, the owner must issue payment to the contractor in full on or before 28 days after the date of the submission of the proper invoice.
- Upon receipt of payment from the owner, the contractor must pay all sub-contractors and suppliers within 7 days.
- If the owner issues a notice of non-payment within 14 days following receipt of a proper invoice, or the contractor is not paid at the 28-day mark, the contractor must then notify all sub-contractors and suppliers of the non-payment within 7 days to advise them that they will not be paid when expected. If the contractor does not notify his sub-contractors within 7 days, they must pay all sub-contractors in full.

Partial payment must be made for the undisputed portions of the invoices, even if notices of non-payment have been made. If the owner disputes a portion of the proper invoice, he can state the reason, and then release partial payment. The timeline requirements for notices of partial payment are the same as those for non-payment.

If the owner does not provide a notice of non-payment, and 28 days pass without payment, the contractor can provide a notice to commence the adjudication process. In the case of non-compliance, where no notice has been provided by the owner, we expect that the adjudication process will render a determination, equivalent to a court order against the owner and payment to the contractor in full will be required, even if there are reasonable grounds to dispute the invoice.



## NOTICES OF DISPUTE

The notice of dispute is a very simple form, it must be used to notify non-payment, and must be sent by the owner to the contractor.

Taking a step back and recalling our construction chain, if the owner submits a notice of non-payment to the contractor, the contractor then has to notify all sub-contractors and suppliers within 7 days of the non or partial payment. (This can be done by cc'ing sub-contractors in the reply to the owner's notice). If the contractor does not notify the sub-contractors within 7 days, the contractor must pay all sub-contractors the value of their respective invoices. Clearly, under this new system an enormous amount of pressure can be placed on the contractor, and it is important to remember the overall construction chain, rather than focussing exclusively on owner-contractor agreements.



## DEFINITION OF A “PROPER INVOICE”

As previously mentioned above, the contractor must submit a “proper invoice”; this is a new term defined in the *Act* as an invoice containing the following information:

1. Contractor’s name and address
2. Date of the invoice and period of service/supply of materials
3. Identification of authority of service/supply of materials (PO#, contract reference)
4. Description, including quantities, of service/supply of materials
5. Amount payable, and payment terms
6. Name and contact info of person to whom payment is to be sent
7. A statement indicating this is a proper invoice
8. Any other information required by the Agreement

If all of these terms are met, the 14-day and 28-day countdowns start. However, if one or more of the conditions are not met, the invoice could be declared improper and therefore the countdown would not start until the invoice had been corrected.

Note that Point 7 allows for requiring additional information to be submitted, as amended in the contract. This requires the owner to conduct an additional administrative review, but also opens up the possibility of stopping the clock on the countdown, if the invoice omits information stipulated in the contract.

If a proper invoice is sent by the contractor to the owner, it will trigger both the 14-day and 28-day countdown.

An invoice cannot be considered improper based on the invoice values alone. If only the amount invoiced is disputed, the new framework requires that partial payment be made within the designated timelines.

## ROLE OF THE CONSULTANT IN THE NEW FRAMEWORK

The consultant’s (or any payment certifier’s) role is not defined in the prompt payment section of the *Act*. The *Act* rightly focuses on the owner-contractor and contractor-sub-contractor agreements, because that is where the money changes hands on a project.

While many projects do not require consultants, they are often engaged to perform the contractual role of payment certifier. The new sections of the *Act* shift much of this responsibility onto the shoulders of the owner.

The new prompt payment section of the *Act* stipulates that a mandatory review by an external payment certifier cannot be “contracted in”:

- (3) Subject to subsection (4), a provision in a contract that makes the giving of a proper invoice conditional on the prior certification of a person or prior approval of the owner to give the invoice is of no force of effect.

In other words, the owner’s responsibility to comply with payment terms cannot be delegated to the consultant. The owner is ultimately responsible for complying with the new framework timelines, and submitting proper notices of non-payment. In general, the consultant’s role on a project will remain what is stipulated in the agreement, and consultants will remain able to assist and support owners in working with the new system.





## ADJUDICATION IN THE PROMPT PAYMENT FRAMEWORK

Adjudication is an alternative dispute resolution (ADR) process established under the *Construction Act* to deal with disputes respecting payment.

The framework around the adjudication scheme has not yet been created in Bill 37.

Generally speaking, when the project owner either (a) delivers a notice of non-payment to the contractor, or (b) fails to make payment on an invoice within 28 days, the contractor is permitted (and will most likely) begin the adjudication process.

The Adjudication process can be summarized as follows:

If payment is ordered, but not made within 10 days of the adjudicator's order, the contractor is permitted to suspend work until

- Payment is made in accordance with the adjudicator's order
- Interest on the payment amount is made
- Costs incurred by the contractor as a result of the suspension of work are paid



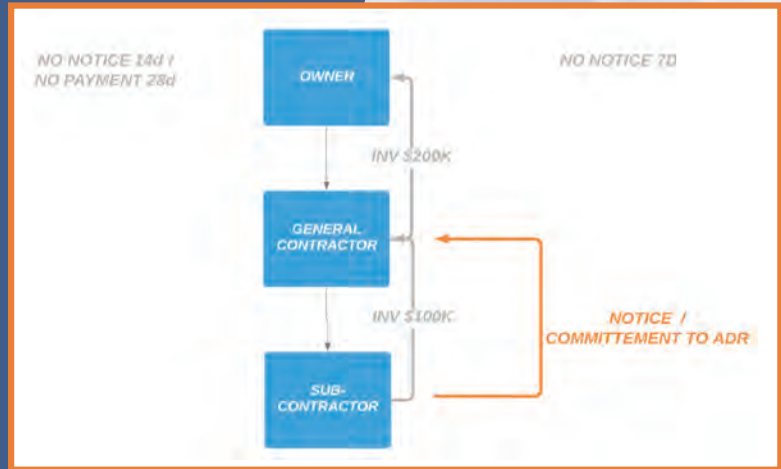


## WHY PROMPT PAYMENT CANNOT BE IGNORED

We know that many contractors have good working relationships with owner. However, if payments are missed without appropriate notice, contractors will have to commit to sending the issue to alternative dispute resolution (ADR) as their sub-contractors will demand it. If the contractor does not insist on prompt payment from the owner, their sub-contractors have the same rights to send their non-payment from the general contractor to ADR and likely be paid out the full value of their invoice.

This bottom up pressure is meant to ensure that contractors enforce prompt payment timelines on behalf of their sub-contractors.

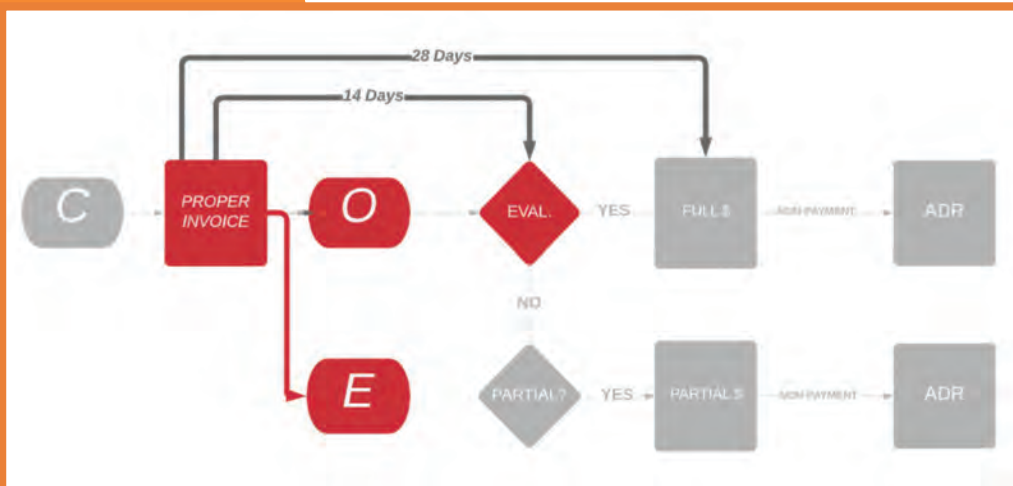
Contractors are expected to avoid leaving themselves liable for unfunded sub-contractor payments or exposure to ADR when the remedy is simply enforcing the payment terms of their agreements with owners.



## AREAS IN WHICH THE CCDC-2 CONTRACT AND THE NEW PROMPT PAYMENT LEGISLATION CONFLICT

The CCDC-2 agreement serves as a good basis for any type of construction project agreement entered into by a contractor and an owner who requires an independent consultant to review work and certify progress billings. The new Act conflicts with general conventions of this agreement in three key ways:

1. Consultant review is not accommodated
2. Less time to make or dispute payments
3. Owners responsible for notices of non-payment



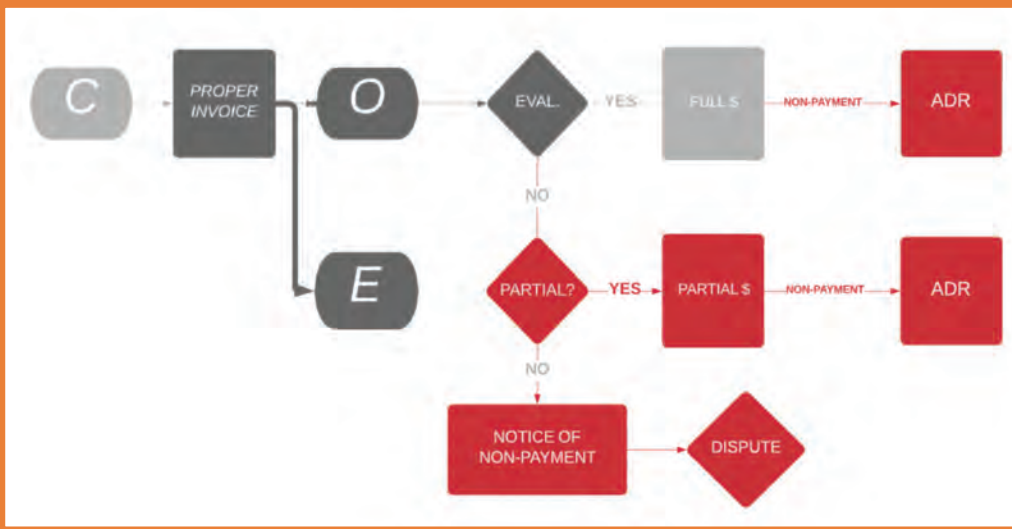
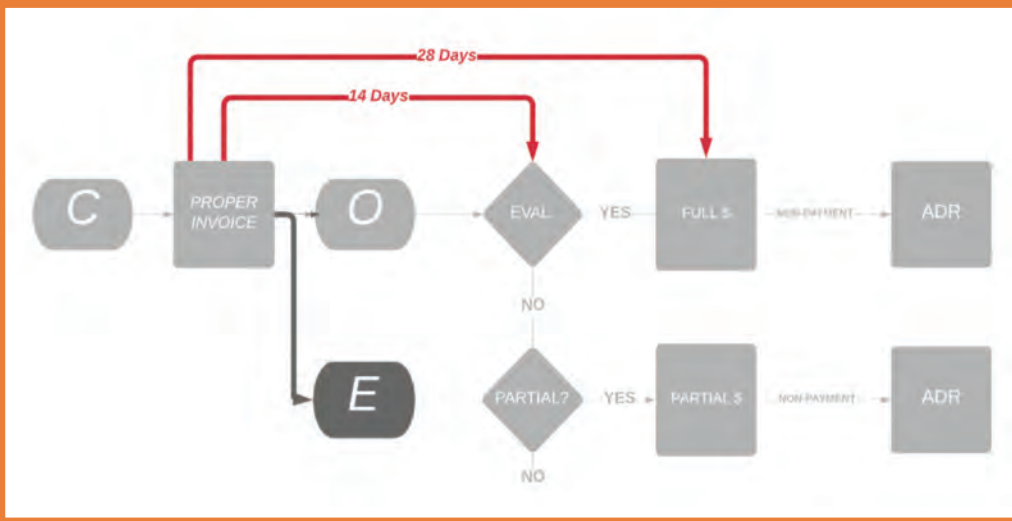
### 1. Consultant review is not accommodated

Often the owner is simply not qualified to ensure that work has been completed to certify payment, but the role of the consultant as described in CCDC-2 contract must be redefined as his certification is no longer the gatekeeper to payment: the submission of the invoice is.

## 2. Less time to make or dispute payments

The CCDC-2 contract allows a consultant 10 calendar days to certify a payment, while the *Construction Act* allows an owner 14 calendar days to dispute a payment. Under the new *Act*, any time the consultant

might now spend reviewing a payment is taken from the 14 calendar days the owner is allotted to dispute a payment. For example, if a consultant certifies the payment on Thursday, the 10<sup>th</sup> of the month before a long weekend, taking 10 days to do so, as per the CCDC-2 contract. This would leave the property manager or owner less than one business day to review and issue notices of non-payment on Monday, the 14<sup>th</sup>.



## 3. Owners responsible for notices of non-payment

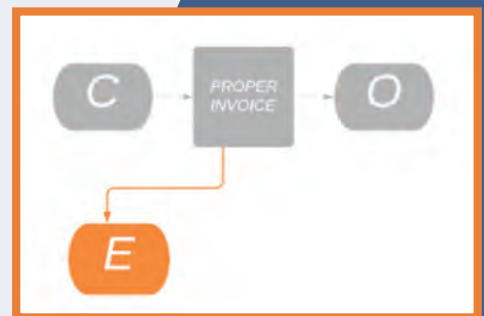
The CCDC-2 contract generally lays the responsibility for a task on the party in the best position to exercise it. As the *Act* does not make provisions for consultant participation, the responsibility for notices, disputes, and defence within the adjudication process falls upon the owner, who may not necessarily be the best party to perform these tasks.

## HOW CAN OWNERS AND CONSULTANTS BEST PREPARE?

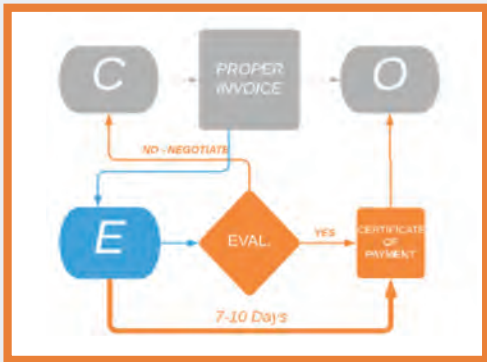
How the prompt payment framework will be implemented is uncertain. However, consultant invoice review requirements are not going away therefore, to educate and assist our clients, Keller Engineering has updated our processes in nine ways to ensure compliance with the new *Act*.

### 1. Modify contracts to require dual invoicing

Currently, contracts typically require that invoices be sent to the consultant. We have modified our contracts to define proper invoicing and require that contractors send them to both the consultant and the owner.





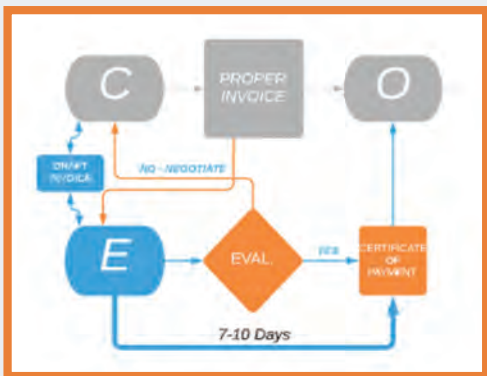
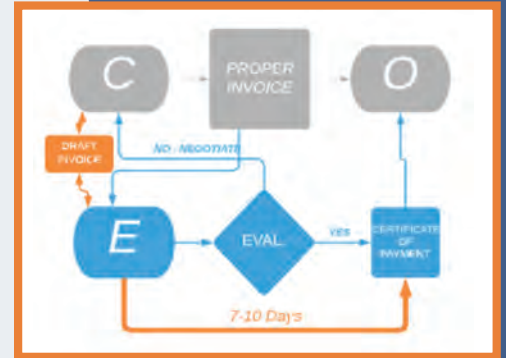


## 2. Incorporate consultant review into new payment timelines

Consultants must perform their reviews and evaluations of proper invoices within 7 days to ensure the owner has sufficient time to issue a notice of non-payment.

## 3. Encourage draft invoice review

It will be in all parties' best interest to ensure that proper invoices are reviewed, evaluated, disputed, and negotiated in a draft format prior to issuance to the owner. This tactic will further shorten the official review period and ease the flow of payment. This is not a novel approach; however, it has never been more useful.



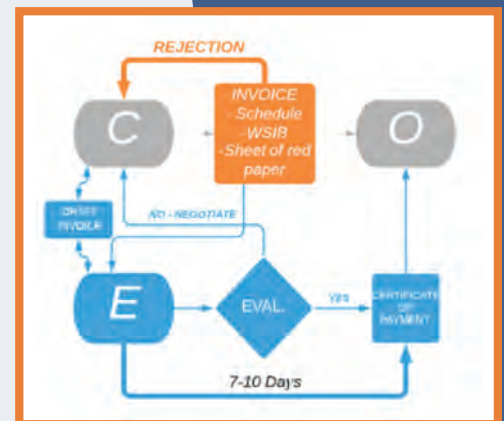
## 4. Institute invoice status notification process

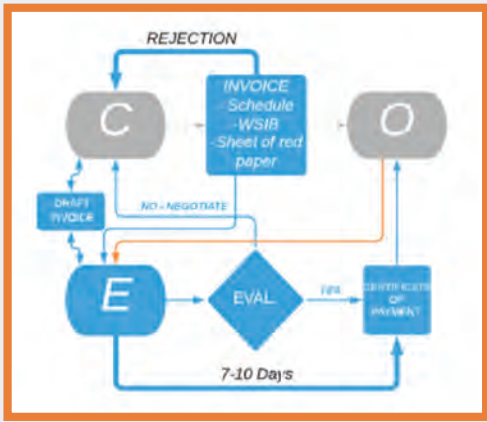
If a proper invoice has been received, rejected, or is being evaluated, consultants should notify all parties of the status of the invoice. If an owner knows that an invoice is being evaluated, he can make effort to ensure that it is possible to make payment within the prescribed time windows, even before it is certified. Conversely, contractors should be clearly and promptly advised if their invoices are not proper and have therefore been rejected.

## 5. Institute rigorous proper invoice review

Improper invoices, in any form, must be promptly and clearly rejected by the consultant. Given the sensitivity of the timelines, any invoice that does not meet the legislative standard cannot be allowed to start the clocks of review and payment.

Furthermore, consultants should take advantage of the reasonable provision in the Act allowing for inclusion of "Any other information required by the agreement" to enforce regular inclusion of standard documents such as WSIB clearance certificates and statutory declarations. In particular projects, this requirement could be extended to include schedule updates and status reports. If these requirements are tied to the acceptance of an invoice as proper, contractors will be compelled to ensure they are met.



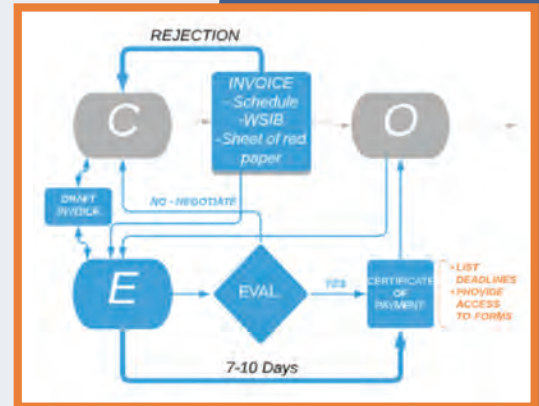


## 6. Remind owners of requirement to send invoices to consultant

If a contractor sends a proper invoice directly to an owner, without including the consultant, the Act stipulates that the review clock has started. Owners must be reminded on every project that if they receive an invoice, and if they are relying on a consultant to review that invoice, they must ensure that it has also been provided to the Consultant or do so immediately.

## 7. Build client timeline and responsibility reminders into standard documents

The consultant must use the certificate of payment as a reminder to the owner of the exact deadlines and procedures for providing notices of non-payment and due dates of payment.



## SAMPLE CERTIFICATE OF PAYMENT

Please find enclosed Progress Billing No. 2 (Invoice No. 05-0000) in the amount of \$70,000.00 GST included, the billing breakdown, WSIB certificate, and Statutory Declaration from ABC Construction Ltd. for the work carried out to date at the above noted project. We have received the invoice and the work, and recommend that payment be made in the amount of **\$70,000.00**.

We have received the proper invoice on January 29, 2021. For any disputes regarding payment of the proper invoice, a notice of non-payment must be completed and submitted by the Owner to the Contractor no later than February 12, 2021.

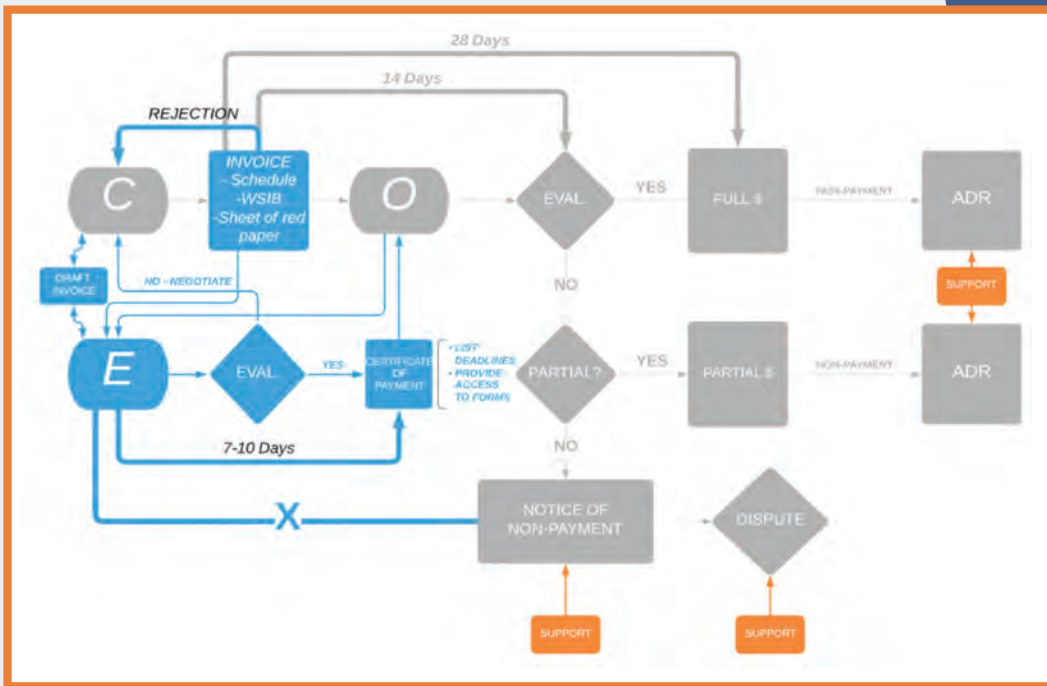
The notice must be submitted on a proper form which is available at <https://albertacourts.ca/qb/areas-of-law/civil/forms/word-forms> and specify the following:

1. The amount of proper invoice that is not being paid; and
2. The reason for non-payment.

Otherwise, full payment is required no later than February 26, 2021.

## 8. Support clients as required in adjudication/ADR process

Although we don't know exactly how the adjudication process will be implemented over the coming years, owners and contractors will look to consultants for support and assistance while they navigate these areas.



## 9. Educate and inform parties involved

The Act obviously involves new and complex issues that will fundamentally change important aspects of construction in Alberta. At Keller Engineering we feel strongly that for the next several years, all parties should be informed and reminded of the expectations and requirements of this new framework. Through presentations and information packages we will ensure that the clients and contractors with whom we work are prepared for a new era.

Questions: [info@kellerengineering.com](mailto:info@kellerengineering.com)