



Prompt Payment Compliance: Nine Things Condominium Managers Must Start Doing Today

By Justin Tudor, P.Eng.

Over 2018 and 2019, the *Construction Lien Act* was updated to the *Construction Act* with the following two most significant changes:



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- 1) the statutory Hold-back release period was increased from 45 days to 60 days; and

- 2) the introduction of a new prompt payment and Adjudication regime.

The most common problem with the old system was that invoices were often not paid until 50 or 60 days after being submitted/certified. This non-payment was often not due to excessive disputing of values but most frequently because of slow processes or administrative delays. The construction industry has deemed this

unacceptable, and the law has been altered to correct those issues.

The new regime gives the contractor and sub-contractors a method to ensure payment is made when it is rightfully due, without terminating the contract for non-payment and walking off-site (which benefits no one. Contractors want to complete the work and get paid, and owners and condominium managers wish to complete their projects on time without complication. It also gives all parties, owners and CMs included, a way to resolve payment disputes relatively quickly and at a lower cost.

Over the last two years, we've seen various condominium corporation construction projects bump up against these changes in the legislation. The best-prepared corporations have

accounted for the changes and are ready to address contractor invoice requests in a new fashion.

A typical contract used in the construction industry is the CCDC-2 Stipulated Price Contract. Additionally, the payment terms in the CCDC-2 contract are commonly seen throughout the industry in purchase orders and quotes directly from contractors. In this contract, the payment process works as follows:

1. the contractor submits an invoice to the consultant;
2. the consultant has ten days to review and, if approved, issue a certification of payment to the owner; and
3. upon receipt of this certification of payment, the owner has 20 days to issue payment to the contractor.

See image 1

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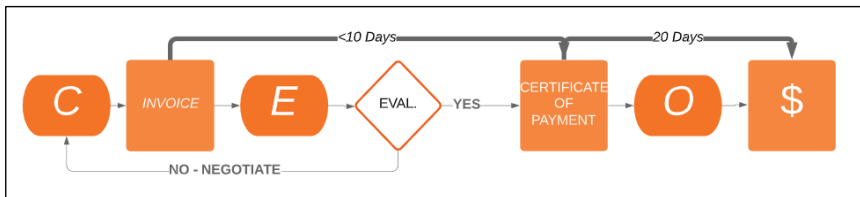


Image 1: Past Payment Certification Process (CCDC-2)

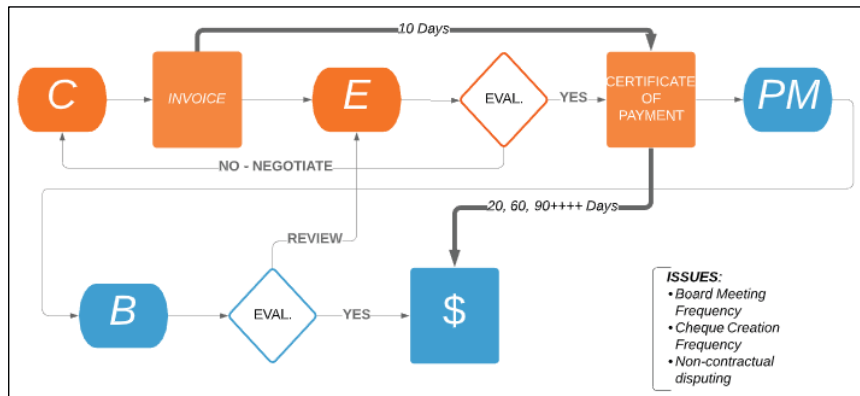


Image 2: Common Condominium Payment Process (CCDC-2)

We see common issues in this contractual payment process while dealing with condominium owners: board meeting frequency, cheque creation frequency, and non-contractual evaluation.

See image 2

This process often includes an additional, non-contractual review by the condominium board, despite the review by the consultant. This, coupled with administrative issues such as infrequent meetings and limited release of cheques, can cause payment to take 40-60 days.

The new prompt payment regime is now law, and as such, supersedes any contractual stipulations, and therefore, cannot be contracted out of. Additionally, there is explicit language in the Act that states that the owner's requirement is to meet the review timelines and cannot rely on the review of the invoice by a third party. The CCDC-2 payment terms will still exist, but they will effectively be governed and must conform with the new regime.

The new system is based on 7-day intervals. The system works as follows:

1. The contractor submits a proper invoice to the owner;
2. The owner has 14 days to issue a Notice of Non-Payment;

3. If a notice is not issued, the owner must pay the contractor in full on or before 28 days from the date of the submission;
4. Upon receipt of payment from the owner, the contractor must pay all sub-contractors and suppliers within 7 days; and
5. If the owner issues a Notice of Non-Payment within 14 days following receipt of a proper invoice, the contractor must 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 their sub-contractors within 7 days, they must pay them in full.

See image 3

Partial payment must be made for the undisputed portions of the invoices, despite the Notices of Non-Payment.

If the owner does not provide a Notice of Non-Payment, and 28 days pass without payment, the contractor can provide notice to commence the Adjudication Process. We expect that in the case of non-compliance where the owner provided no notice, following the Adjudication Process, the equivalent of a court order will be issued against the owner and

payment to the contractor in full will be required, even if there are reasonable grounds to dispute the invoice.

What Is A Proper Invoice?

Recall that we mentioned that the contractor must submit a 'proper' invoice above. This is a new term defined in the Act as an invoice containing the following information:

1. The contractor's name and address;
2. The date of the invoice and period of service/supply of materials;
3. An identification of authority of service/supply of materials (PO#, contract reference);
4. A description, including quantities, of service/supply of materials;
5. The amount payable and payment terms;
6. Name and contact info of person to whom payment is to be sent, and
7. 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 this countdown would not begin until the invoice is corrected.

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

Role Of The Consultant Within The New Regime

While many projects are completed that don't require a consultant, they are often engaged to perform the contractual role of payment certifier.

The new prompt payment section of the Act stipulates that a mandatory review by an external payment certifier cannot be "contracted in," meaning that you cannot place the owner's responsibility in payment terms on the consultant. It is the owner's ultimate responsibility to ensure conformance with the timelines of the new regime, as well as the submission of proper notices of non-payment.

6.13 (1) Proper invoices shall be given to an owner on a monthly basis unless the contract provides otherwise.

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2017, c. 24, s. 7.

6.13 (2) A provision in a contract that makes giving of a proper invoice conditional on the prior certification of a payment certifier or on the owner's prior approval is of no force or effect. 2017, c. 24, s. 7.

6.13 (3) For greater certainty, subsection (2) has no application to a provision in a contract that provides for the certification of a payment certifier or the owner's approval after a proper invoice is given. 2017, c. 24, s. 7.

Where CCDC-2 and the Prompt Payment Legislation Conflict

The CCDC-2 agreement serves as a good proxy for any type of construction project agreement that an owner enters into with a contractor whereby they look to an independent consultant to review the work or certify progress billings. The new regime conflicts with this commonly understood methodology in 3 key ways:

1. No clear space for Consultant review.
2. Less time to issue payments.
3. Owner-led requirements for notices of non-payment.

The owner or condominium manager is often not qualified to ensure works are completed to certify payment. The role of the consultant, as described in CCDC-2, now works adjacent to the legislation and must be redefined as their certification is no longer the gatekeeper to payment, the submission of the invoice is.

The CCDC-2 allows a consultant 10 calendar days to certify a payment. The legislation allows 14 days for an owner to dispute a payment. Envision a scenario where the consultant certifies the payment on Thursday, the 10th, before a long weekend. This would leave the property manager or owner with less than one day to review and issue notices of non-payment on Monday, the 14th.

The CCDC-2 generally lays the responsibility of a task with the party that is in the best position to control it. As the legislation does not make provisions for a Consultant, the responsibility for notices, disputes, and defence within the adjudication process is envisioned as Owner-led, who are not necessarily the best party to do so.

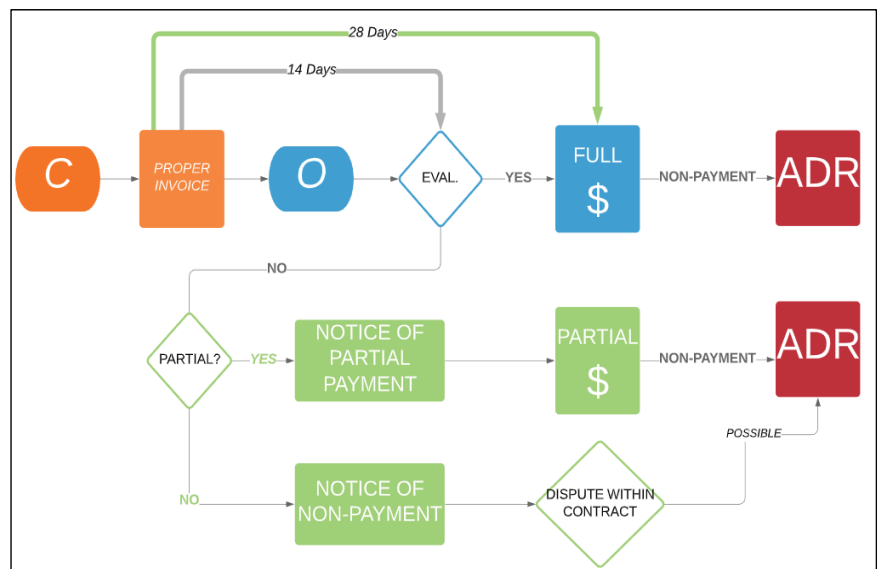


Image 3: New Construction Act Payment Process

How Can Property Managers Be Prepared?

1. Draft proper invoices should be submitted, reviewed, evaluated, disputed, and negotiated in a draft format prior to issuance to the condominium manager as a proper invoice;
2. Ensure the contractor knows that all invoices are to be sent to the owner and a consultant (if required) simultaneously;
3. Insist that all payment certifications be issued by consultants within 7 days;
4. Condominium managers must, or must insist consultants, notify all parties of the status of the invoice. If a manager knows an invoice is being evaluated, they can make an effort to ensure payment can be made within the windows, even before it is certified;
5. Improper invoices, in any form, must be promptly and clearly rejected;
6. Take advantage of the provision in the legislation, which allows for the inclusion of "any other information required by the agreement" to enforce monthly inclusion of standard documents such as WSIB clearance certificates,

statutory declarations, and schedule updates in proper invoices.

7. Be aware that in the event that a contractor sends a proper invoice to the condominium manager that the clock has started, whether or not they have reviewed it;
8. Ask the consultant to use the Certificate of Payment as a reminder to the condominium manager of the exact deadlines and procedures for providing notices of non-payment and due dates of payment itself; and
9. Make sure your board's and management company's procedures are set up to pay bills within 28 days of issuance.

We're still seeing non-proper invoices being submitted, and as such, it's likely that word isn't entirely out yet to all contractors. It's, therefore, more important than ever that condominium managers ensure their processes are air-tight before they are challenged. ■

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