



10 Things You Need to Know about Payment Procedures for Capital Repairs

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There are major changes to the old *Construction Lien Act* that will significantly affect Ontario condominiums.



Amendments have been passed that will modernize the Act, help ensure that businesses and workers get paid on time, and help ensure that payment disputes are addressed quickly. For condominiums, the biggest change will be in the payment provisions coming into effect October 1, 2019.

Here are 10 things that all boards and managers should know:

1. Capital repairs are now specifically included in the Act. Therefore, condos are not immune from the provisions of the Act.

2. You cannot contract out of the payment provisions in the new Act. Period. Neither can the contractor with any subcontractor or supplier.

3. All the prompt payment provi-

sions in the new Act get started once a “proper invoice” has been received. Then, corporations have 28 days to pay undisputed amounts. That’s not when the board meets again; not when the treasurer returns from Florida; and not when you cash in that term deposit. It’s 28 days. To now, contracts usually included supplementary conditions that extended the payment period. Since you cannot contract out of the Act, those will be void.

4. Disputed amounts can be withheld but you must provide notice within 14 days of the dispute specific amounts and publish a special notice. You must still pay the undisputed amounts within 28 days. If you and the contractor revise an invoice, the original date cannot be changed. The 28-day clock is still ticking.

5. The “proper invoice” goes to the condominium. Often, an invoice first went to the consultant for certification. If the “proper invoice” comes to the condominium first, you should immediately

pass it along to the consultant to review/certify. Since disputed amounts will likely be so deemed because the work is either incomplete or deficient, a smarter process would have a draft invoice reviewed before the contractor sends the “proper invoice.”

6. If you don’t comply with these provisions, your contractor can require a payment adjudication. Adjudicators (read “inquisitors”) can be chosen by agreement but only from those rostered by an Authorized Nominating Authority (ANA). They are paid by the parties. The adjudicator is someone experienced in the matter and can be chosen from approved engineers, architects, lawyers, etc., with 10-years’ subject matter expertise in construction. At the time of writing, the Attorney General has not selected the ANA.

7. Adjudicators can order payment amounts as well as payment of interest and adjudication costs if the adjudicator decides the payment denial or claim was frivolous, vexatious or an abuse of process.

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8. You can appeal an adjudicator's ruling with "leave" of the court – meaning that you had better have a good reason to appeal the decision other than that you don't agree with the finding. A good reason might be about the adjudication process or bias. The courts, in general, would rather that civil issues about payments and defects be handled outside the already overbooked courthouse. Experience in Great Britain has been that 90% of adjudicator findings are not appealed. The court does not have to tell you why it won't hear an appeal.

9. You will have to apply vigilant accounting to the payable amounts. The funds you hold back to comply with the lien provisions of the Act must be traceable by detailed records on all money in and out of the trust account. Those funds must be allocated to the project and not used for anything else like other capital expenses, operating or maintenance costs.

10. Your consultant may also need to step up their game. They must understand that the contractor has payment rights beyond that in the CCDC or other contract and that new expedited processes for certifying work are necessary. For example, it

may be prudent for the bid documents to include certain requirements for a "proper invoice" – possibly that specific milestones be achieved, certain supporting documents be provided, and certain verification testing be done. Those provisions could then be carried down through the payment pyramid.

There are several complicating issues that may affect how the payment provisions are interpreted by an adjudicator. For example, the effect of unapproved change orders, change directives, and site instructions that affect costs and the content of a proper invoice. It will make the process of payment and claims for payments far more interesting as this unfolds. ■

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