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Navigating Non-Payment: Strategic Use of Legal Tools While Preserving Client Relationships

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Agenda

1. Protecting Yourself – What to Look Out For
2. Prompt Payment
3. Adjudication
4. Lien Claims
5. Trust Claims
6. Labour & Material Payment Bonds
7. Negotiating Amendments
8. Questions?

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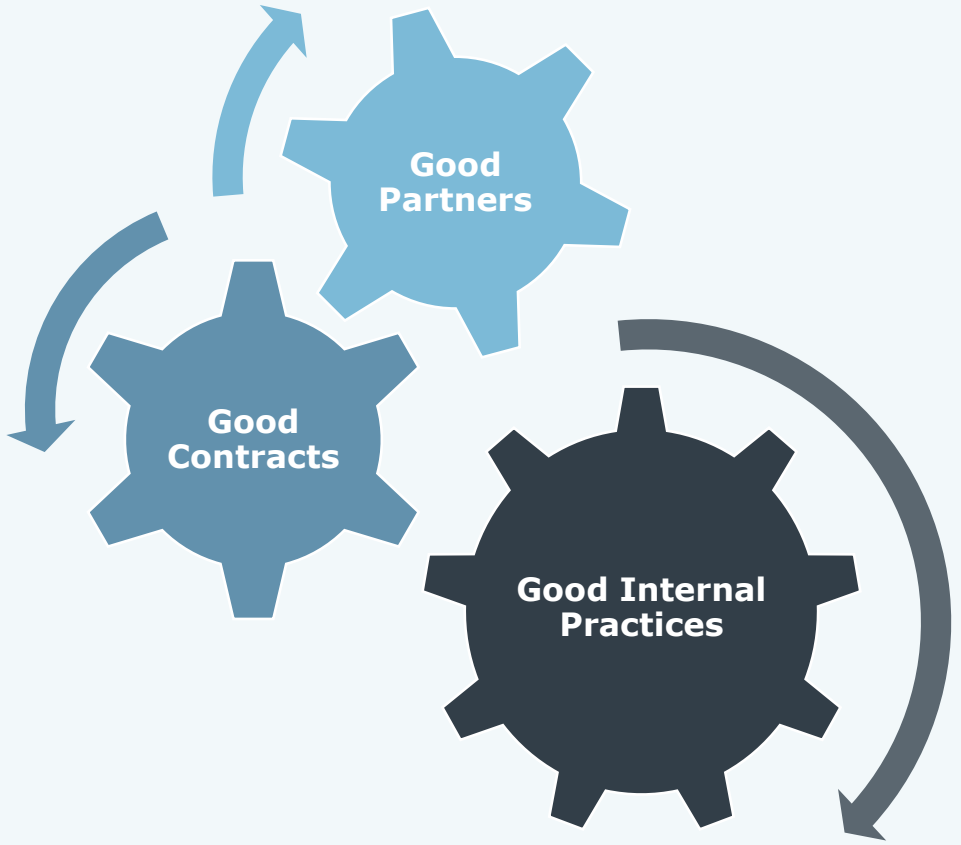
1. Protecting Yourself – What to Look Out For

Protecting Yourself: Know Your Client, Know Your Contract

- **Who are you working with, and what does that mean for your exposure?**
- **What does your contact actually say when payment stops?**
- **What can you do internally, *before* things escalate?**



Good Partners: Know Who You're Working With

- **Pre-engagement due diligence checklist**
  - Insolvency and litigation searches
  - Personal Property Registry (PPR) searches
  - Review of financial capacity (audited statements, bonding capacity, market analysis)
- **Track record and temperament**

The reality: you can't always choose your partner!

Good Contracts: Negotiate Protections Before You Need It

Provision	Description	CCDC 31 Provision
Audit Rights / Financial Capacity	Demand evidence of financial arrangements before signing and at any point during the contract; owner must disclose any material change in ability to pay.	GC 2.2.7–2.2.8
Legitimate Withholding / Set-Off	Only disputed amounts may be withheld; disputes must be flagged within 14 days of invoice receipt; undisputed amounts must be paid within 30 days.	A-5, s. 5.2
Notice of Non-Payment	Non-payment of fees and reimbursable expenses is an express owner default — serve Notice in Writing requiring correction; interest escalates from 2% to 4% over prime, compounded monthly.	A-5, s. 5.3
Instruments of Service as Leverage	Owner cannot use your work product if fees are unpaid; consultant is entitled to injunctive relief.	GC 5.2.8

Good Contracts: Negotiate Protections Before You Need It

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Termination — Non-Payment	If default is not corrected within 5 Working Days of Notice in Writing, consultant may suspend or terminate; entitled to all fees rendered plus demonstrable termination costs.	GC 5.1.9, 5.1.12
Termination — Insolvency	Immediate termination right upon bankruptcy, general assignment, or receivership — no cure period required.	GC 5.1.2

Good Internal Practices: Catch Problems Early

- **Before engagement**
  - Client risk review
  - Scope, fee, schedule, and resourcing discipline
- **During project delivery**
  - Monitor payment and project-distress signals
  - Preserve records and use available contractual and statutory remedies

2. Prompt Payment

Prompt Payment: When Does It Apply?

- **When does it apply?**
  - The *Construction Act* applies when you supply "services" or "materials" to an "improvement" for an "owner"
- **The payment clock: 28 days**
  - The owner must make payment to the contractor within 28 days of receipt of a proper invoice, unless a Notice of Non-Payment is issued by day 14.
  - The contractor must then make payment to the subcontractor within 7 days of receipt of payment from the owner, unless a Notice of Non-Payment is issued.
- **Proper invoice: the trigger**
  - Payment timelines do not run until a proper invoice is received.
  - A contractor's invoice is deemed a proper invoice if the owner does not give written notice of a deficiency, and what is required to fix it, within 7 days of receiving the invoice

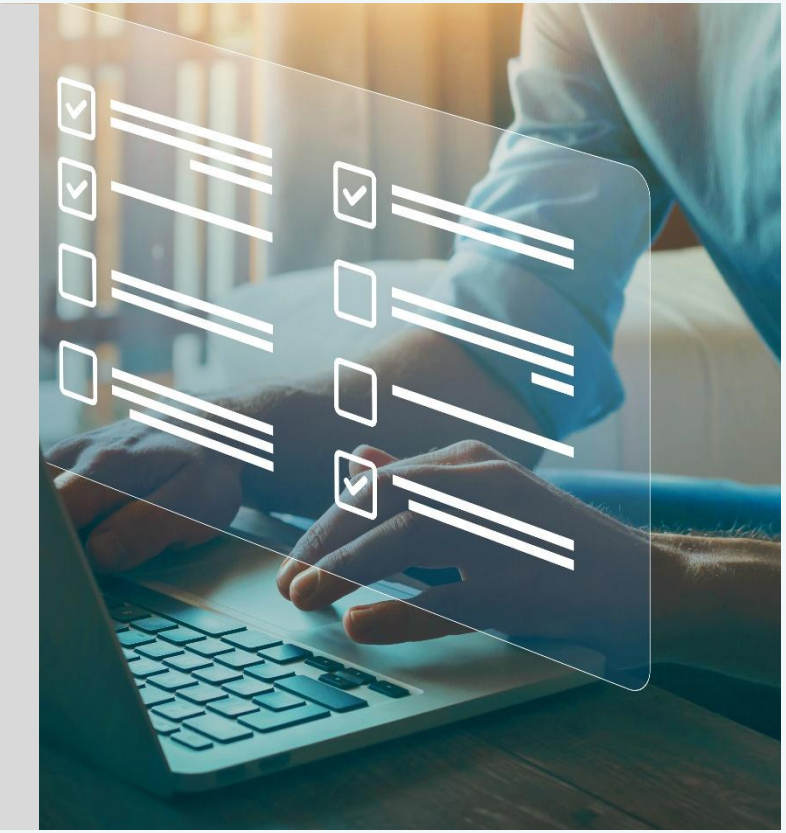
Prompt Payment: Notice of Non-Payment

- **When does it apply?**
  - Written notice issued by day 14 specifying the amount withheld and the reason.
  - Failure to issue notice = full invoice amount due within 28 days.
  - A vague or blanket notice does not satisfy the statutory requirement.
- **What it means for you**
  - Receipt of a Notice of Non-Payment triggers your right to refer to **adjudication**.
  - Adjudication is fast — interim binding decisions typically within 30 days.
  - Not available after contract completion — act without delay.
- **Practical steps**
  - Monitor unpaid invoices and follow up promptly — lien rights and limitation periods expire quickly.
  - Document all key communications.
  - If a subconsultant, and contract is flow through, be sure to review terms in prime contract

3. Adjudication

Adjudication: The Basics

- Statutory form of dispute resolution under *Construction Act*
  - Applies to contracts entered into on or after October 1, 2019
- Administered through ODACC
- Empowers **payees** – engineers, consultants, contractors, subcontractors – to advance non-payment issues quickly
- Decision is **interim binding**, payment of award due within **15 days**
- Enforceable like a court order – including by garnishment



Adjudication: Broadened Scope Under Bill 216

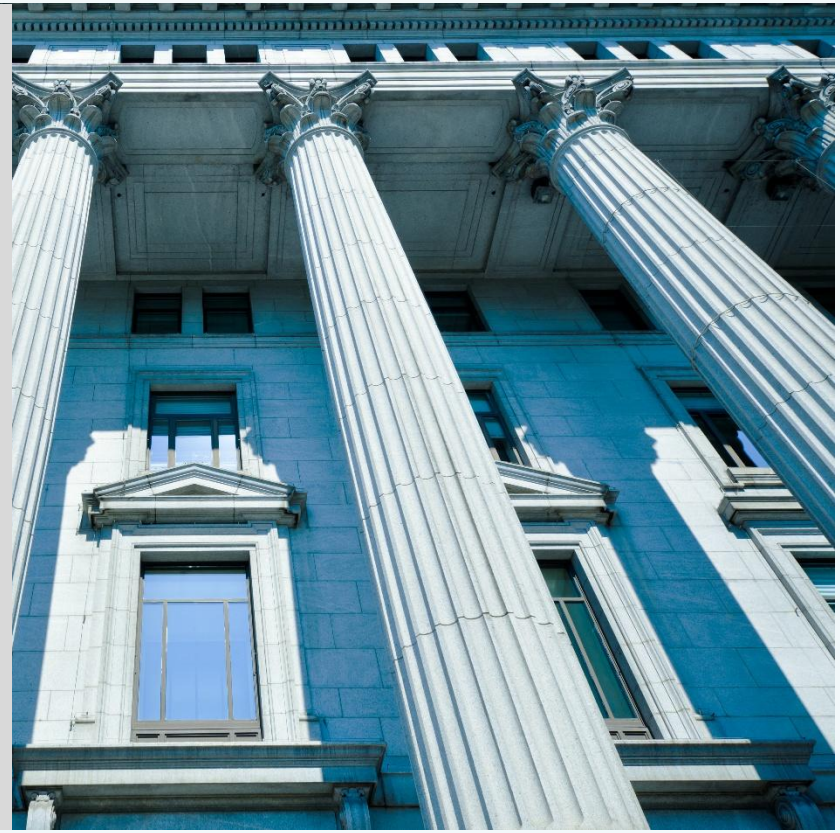
- **Previously, adjudication was limited to four categories:**
  1. Valuation of services or materials
  2. Payment or non-payment of amounts owing under contract
  3. Amounts retained as set-off
  4. Payment or non-payment of holdback
- **Bill 216 (Ontario Regulation 264/25): adjudication is now available for "any prescribed matter or any matter agreed to by the parties," including:**
  - Payment/non-payment in respect of a change order
  - Disputes that are the subject of a notice of non-payment
  - Amounts retained as set-off by trustee or lien set-off
  - Scope of work, requests for price changes, or schedule extensions – if reasonably necessary to resolve the dispute
- Adjudication now available **after** completion: up to **90 days** post-completion, abandonment, or termination.

Adjudication: Recent Procedural Changes

- Adjudicators can now determine their own jurisdiction, correct errors in determinations
- Adjudicators are **no longer restricted to the ODACC roster** – private adjudicators may be used, if ODACC-qualified.
- Notices of adjudication must include **any previous adjudication determinations** under the same contract or subcontract
- Determinations will be made **public** (parties may request anonymization).

Adjudication: Strategic Considerations

- Adjudication is best suited for **discrete, well-defined** payment disputes.
- The speed/cost trade-off: if the award is contested, costs escalate quickly.
- **"interim binding"** challenge: how much do you want to spend enforcing something that may later be revisited?
  - The more complex the dispute, the more you should consider arbitration or a construction lien claim.



4. Lien Claims

Liens for Design Services – Existing Provisions

Under the pre-2026 *Construction Act*

- A person who supplies services to an improvement has a lien for the price of those services (Section 14(1))

- "supply of services" means any work done or service performed upon or in respect of an improvement, and includes, (b) where the making of the planned improvement is not commenced, the supply of a design, plan, drawing or specification that in itself enhances the value of the owner's interest in the land. (Section 1 – Definitions)

New Section 14(4)

New Section 14(4) provides as follows:

"If an owner retains a holdback in respect of the supply of a design, plan, drawing or specification for the making of a planned improvement that is not commenced, subsection (1) is deemed to apply with respect to the supply of the design, plan, drawing or specification, unless the owner proves that the value of the owner's interest in land has not been enhanced."

- **Transition:** New Section 14(4) does not apply if the owner retained the holdback in respect of the supply of a design, plan, drawing or specification before the day the amendments are proclaimed into force (Section 87.4(3)).

Lien Claims: Practical Steps and Deadlines

- **Lien must be:**
  - Preserved with **60 days** (formerly **45 days**) of applicable statutory trigger (last supply of services or materials, substantial performance, termination, abandonment)
  - Perfected by commencing a court action within **90 days** of the last day the lien could have been preserved.
- **Section 37 set-down requirement**: a perfected lien expires after **2 years** unless an order for trial or set-down occurs by then.
- Notice of termination must be published within **7 days** of contract termination; lien expiry period runs from date of first notice published.

5. Trust Claims

Trust Claims: The Basics and Recent Changes

- Breach of trust can lead to personal liability
  - A powerful pressure point: threat of personal liability accelerates payment.

- Trust attaches to monies payable at every level of the pyramid:
  - Owner → Contractor/Prime Consultant → Subcontractors/Subconsultants

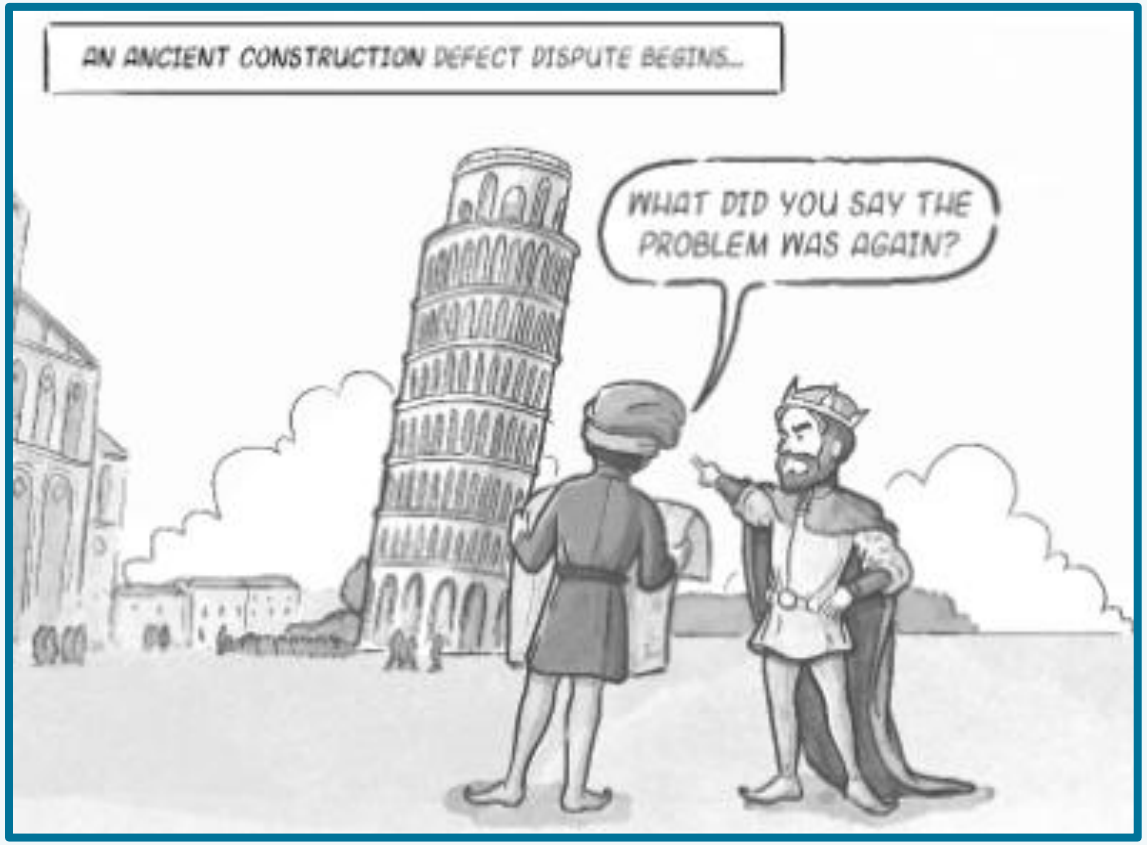
What's new

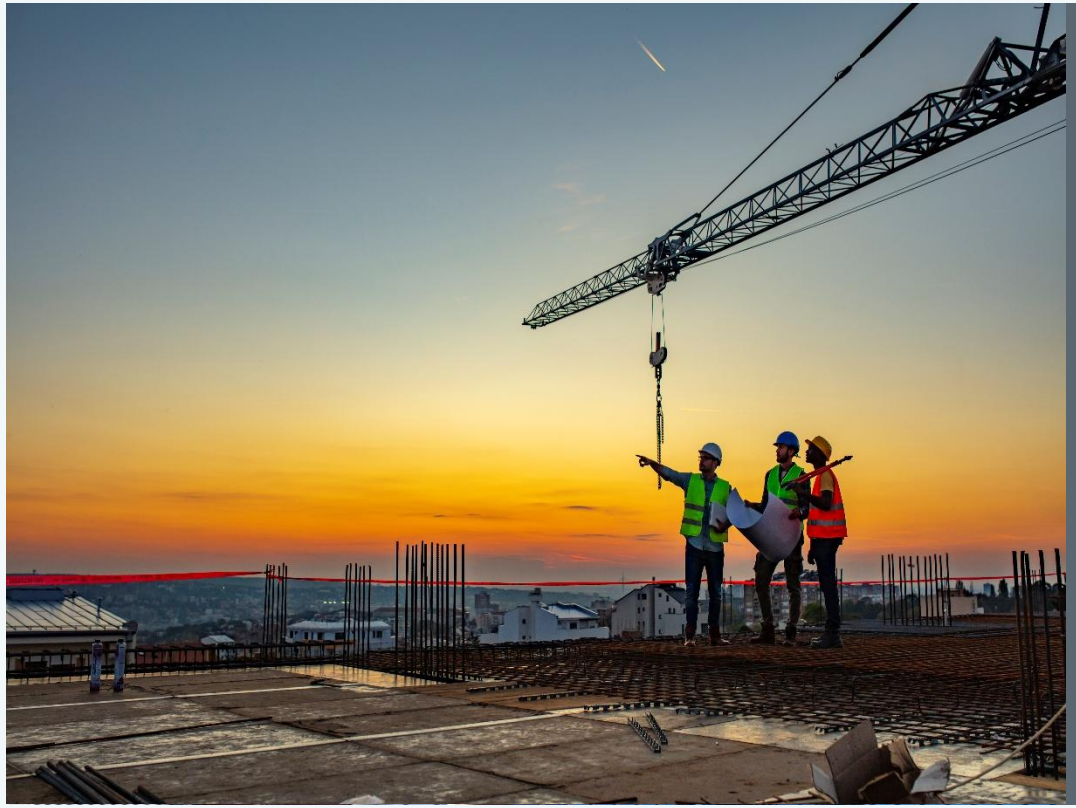
- Parties may now bring lien claims and breach of trust claims together in single action
- Proper payment discharges the trust to the extent paid
- Holdback funds are deemed trust funds under the Construction Act

6. Arbitration

Arbitration

- Private – less formal than litigation; parties choose the arbitrator and the process.
- Generally faster than court; **limited rights of appeal**.
- Best suited for: complex multi-party disputes, disputes involving confidential technical issues, matters requiring specialized expertise.
- Governed by your contract – check the dispute resolution clause.





7. Labour & Material Payment Bonds

Labour & Material Payment Bonds

- **Three-party contract: owner/obligee + contractor/principal + surety.**
  - Payment bonds guarantee the contractor's obligation to pay those providing labour and materials.
    - Engineers and consultants may qualify as claimants when retained downstream of the bonded contractor and their services fall within the bond wording.
  - Notice and limitation periods apply – act quickly.

- **Typical claim steps:**
  1. Written notice to surety
  2. Surety requests supporting documents and contractor's position
  3. Investigation
  4. Written coverage position

8. Negotiating Amendments

Negotiating Amendments: The Options

Three negotiating tools:

1. Project Standstill: pause services while funding or other project issues are resolved; define status, duration and restart terms

2. Tolling agreement: temporarily pause limitation periods while parties attempt to negotiate; preserve all rights without forcing a premature claim.

3. Contract amendment: restructure payment and performance obligations to reflect changed circumstances and risk allocation.

Key principle: additional time or flexibility should be exchanged for additional protection

What to Negotiate: Specific Terms

- **If giving the payer time:**
  - Defined instalment schedule and milestones
  - Interest on deferred amounts
  - Security for payment
- **If compromising fees:**
  - Conditional "haircut"
  - No release until payment is received
  - Full amount reinstated upon default
- **If remaining available:**
  - Monthly standby fee
  - Defined availability period and capacity
  - Remobilization notice, schedule and rates
- **Protective terms:**
  - Acknowledgment of amounts owing
  - Reservation of rights and no waiver
  - Default, acceleration and sunset provisions

Thank You

Q&A

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