

# Non-payment is an increasing problem for contractors

BY BOB REID  
Ontario Farmer

Stratford – “We are on pace for a six-fold increase in the number of adjudications this year,” said Ted Dreyer, a Kitchener lawyer speaking on the Construction Act at the recent Canadian Farm Builders Association conference held recently in Stratford.

The updated Construction Act came into effect in October of 2019. The new Act imposes short deadlines for owners, contractors, and subcontractors to give notice if they want to preserve their right to dispute an invoice.

The property owner has only 14 days to dispute an invoice from a contractor. A contractor who receives a notice from the owner has only seven days to deliver a notice of non-payment to its subcontractors and suppliers. If an owner or contractor lets one of these deadlines pass, then they must pay the invoice in question even if they might otherwise have a legitimate rea-



**Ted Dreyer: Adjudication rights expire when the contract work is complete so an extension of that right should be included when making a quote on a job**

son not to pay it.

A contractor or subcontractor who is not paid on time can enforce their right to payment through adjudication instead of going through the traditional court system. Adjudication is much less expensive and quicker than going to court.

“In adjudication, you typically get a decision in less than two months,” said Dreyer. “A

traditional lawsuit takes between three and five years to resolve.” And, unlike a traditional lawsuit, you do not need to have a lawyer represent you in an adjudication, although it might be a good idea for larger claims, he said.

While the Construction Act is good legislation, Dreyer said, contractors and subcontractors need to update their practices to take full advantage of it.

In a system where the obligation to pay is triggered by the delivery of a ‘proper invoice’, “99 per cent of the invoices that contractors are giving to owners are not properly prepared,” said Dreyer. The definition of ‘proper invoice’ in the Construction Act requires information that is not conventionally included by contractors in their invoices.

For example, a ‘proper invoice’ must include the name, title and telephone number of the particular person to whom the owner is to make payment.

“If you are invoicing the property owner the same way

that you have always done it, then you are probably doing it wrong,” said Dreyer.

Subcontractors need to update their practices too, Dreyer said. The timing of the subcontractor’s obligation to pay their own sub-subcontractors and suppliers runs from the day that the contractor delivers its invoice to the owner, said Dreyer, but the subcontractor does not necessarily know when the contractor delivered its invoice to the owner.

Dreyer suggested that subcontractors train their staff to call the contractor and ask it when the contractor delivered its invoice to the property owner. The Construction Act, Dreyer explained, requires the contractor, if asked, to tell its subcontractors when its invoice was delivered to the property owner.

The biggest problem with adjudication, Dreyer said, is that it is only available to a contractor or subcontractor until their contract work is

complete.

“That’s dumb,” said Dreyer. Most payment problems happen after the construction work is done, said Dreyer, because the owner no longer needs to pay the contractor to keep them working. Dreyer suggested that contractors and subcontractors include a term in their quotes extending their right to refer disputes to adjudication for several months after their work is complete.

Dreyer urged contractors and subcontractors to train their staff to be pro-active in gathering evidence related to a dispute. This includes taking and dating photographs, recording who took the photograph and where, obtaining names of witnesses and their contact information, gathering any relevant emails, and documenting salvage materials.

Costs need to be accurately tracked through time sheets, invoices and receipts. Subcontractors and workers need to be instructed to segregate their costs.

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