

# Discussing the new Prompt Payment Legislation



**Law Society  
of Saskatchewan**

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# Topics Covered

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Prompt Payment Legislation: Internationally, in Canada, in Saskatchewan

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Key Points in Saskatchewan's Prompt Payment Legislation

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Adjudication

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Potential Hot Issues





# Prompt Payment Legislation

Internationally, in Canada, in Saskatchewan



# Prompt Payment Legislation Internationally

- First introduced in UK:  
*Housing Grants, Construction and Regeneration Act 1996*
- Other jurisdictions with prompt payment legislation
  - Australia
  - New Zealand
  - Ireland
  - United States
  - Singapore
  - Malaysia
  - Hong Kong



The Shard (London), 2012

# Prompt Payment Legislation in Canada

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CIBC Square (Toronto), 2019

- Ontario
  - Amendments to *Construction Lien Act* came into force October 1, 2019
- Federal
  - *Federal Prompt Payment for Construction Work Act* received royal assent in June 2019
  - Not yet in force

# Prompt Payment Legislation in Saskatchewan

- Amendments to *The Builders' Lien Act*, SS 1984-85-86, c B-7.1
  - Bill No. 152
  - Passed on May 2, 2019
- Regulations
  - OIC 411/2020
  - Filed on August 20, 2020



Jim Pattison Children's Hospital  
(Saskatoon), 2018



# Key Points in Saskatchewan's Prompt Payment Legislation

Exemptions, payment deadlines, proper invoices, notices of non-payment



# Exemptions

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Architects



Engineers



Land  
surveyors



Mines,  
minerals  
(except oil or  
gas)



Electrical  
infrastructure  
under *The  
Power  
Corporation  
Act*



# Payment Deadlines

## Owner

- Trigger: receipt of “proper invoice”
- Time: 28 days

## Contractor

- Trigger: receipt of payment from owner
- Time: 7 days

## Subcontractor

- Trigger: receipt of payment from contractor
- Time: 7 days

Etc.





# Proper Invoices

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- Must contain
  - Contractor's name and address
  - Date of invoice
  - Period during which services or materials supplied
  - Reference to contract or other authority under which services or materials supplied
  - Description of services or materials supplied
  - Amount payable for services or material supplied
  - Name, title, telephone number, and mailing address of person to whom payment is to be sent



# Proper Invoices

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- Given monthly – unless contract says otherwise
- Cannot be conditional on certification or approval

# Notice of Non-Payment: Owner to Contractor

- When owner disputes invoice
- Given within 14 days of receiving proper invoice
- Forms, service requirements in Regulations

"Form A.1  
[Subsection 5.4(2) of The Builders' Lien Act]

## Notice of Non-payment – Owner to Contractor

Name of owner: \_\_\_\_\_

Address: \_\_\_\_\_

Description of premises: \_\_\_\_\_

\_\_\_\_\_

Name of contractor: \_\_\_\_\_

Address: \_\_\_\_\_

The owner disputes the proper invoice dated \_\_\_\_\_, 20\_\_\_\_, submitted to the owner by the contractor with respect to the improvement.

The owner will not pay the following amount payable under the invoice:

*(Use A or B, whichever is applicable)*

A. The full amount of the proper invoice, being \$ \_\_\_\_\_.

B. A portion of the amount of the proper invoice, being \$ \_\_\_\_\_.

The reasons for non-payment are as follows:

Date: \_\_\_\_\_

*(Owner)*





# Notice of Non-Payment: Contractors and Sub-Contractors

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- Two types
  - Did not receive payment from level above
    - Must undertake to submit to adjudication within 21 days
  - Disputing entitlement to payment
- Deadlines, forms, service requirements in Regulations



# Adjudication in Saskatchewan

Administration and procedure



# Adjudication: What is it?

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- Summary, interim dispute resolution process
- Administered by “Adjudication Authority”
  - Minister of Justice or body appointed by Minister of Justice

# Adjudication: Disputes Covered

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Payment



Issuance of certificate of  
substantial performance

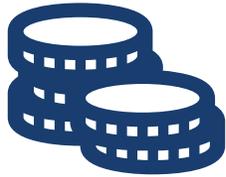


Anything else the parties  
agree to submit



# Adjudication: Qualifications of Adjudicators

Ten years' experience in construction as:



Accountant



Architect



Engineer



Quantity  
Surveyor



Project  
Manager



Arbitrator



Lawyer



Other





# Adjudication: Payment of Adjudicators

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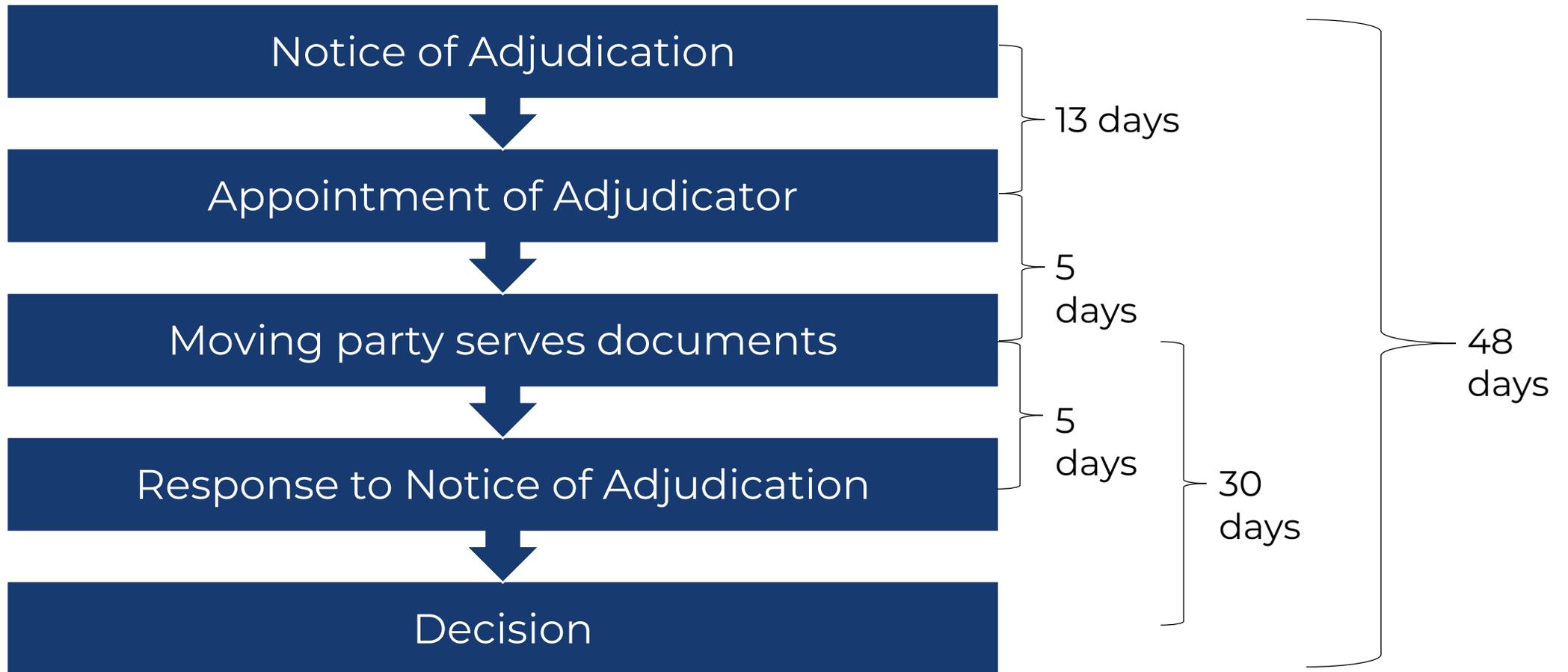
- Paid by parties
  - Split equally unless adjudicator rules otherwise (due to bad faith of party)
- Fees agreed between parties and adjudicator or set by Adjudication Authority

# Adjudication: Adjudicator Fees in Ontario

Amount Claimed	Adjudicator Fee
Less than \$9,999	\$800
\$10,000 to \$24,999	\$1,000
\$25,000 to \$34,999	\$2,000
\$35,000 to \$49,999	\$3,000
\$50,000 to \$249,999	\$250/hour
\$250,000 to \$499,999	\$400/hour
\$500,000 to \$1 million	\$500/hour
Over \$1 million	\$750/hour



# Adjudication: the Process



# Adjudication: Notice of Adjudication

- When a party wants to submit dispute to adjudication
- Form in Regulations
- Service requirements same as *The Queen's Bench Rules*

"Form A.6  
[Section 21.3 of *The Builders' Lien Act*]  
Notice of Adjudication

TO: \_\_\_\_\_  
FROM: \_\_\_\_\_

TAKE NOTICE that pursuant to *The Builders' Lien Act* the following dispute is referred to the Authority for adjudication:  
(Check whichever is applicable)

A. non-payment of proper invoice by owner to contractor, described below; or  
 B. non-payment of proper invoice by contractor to subcontractor, described below; or  
 C. non-payment of proper invoice by subcontractor to subcontractor, described below; or  
 D. other – see subsection 21.21(1) of the Act.

(Description of the contract or subcontract and details of services or materials provided)

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

(Describe here the dispute to be referred, including details respecting how and when it arose)

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

(Nature of redress sought)

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Owner's name and address: \_\_\_\_\_  
Contractor's name and address: \_\_\_\_\_  
Subcontractor's name and address: \_\_\_\_\_  
Name of proposed adjudicator (if any): \_\_\_\_\_

Day/Month/Year \_\_\_\_\_ Signature of person making request \_\_\_\_\_  
Address for service of person making request: \_\_\_\_\_

# Adjudication: Appointment of Adjudicator

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- Can be jointly appointed by parties
  - But not in their contract
- Can be appointed by Adjudication Authority



# Adjudication: Moving Party Serves Documents

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- What the party who served Notice of Adjudication must serve on adjudicator:
  - Copy of Notice of Adjudication
  - Copy of contract or subcontract
  - Any documents they wish to rely on in adjudication
- Deadline: 5 days after adjudicator appointed

# Adjudication: Response to Notice of Adjudication

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- What the party who received the Notice of Adjudication may serve on the adjudicator:
  - “Response”
  - Any documents they wish to rely on in adjudication
- Deadline: 5 days after receiving moving party’s documents



# Adjudication: Decision

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- Deadline: 30 days after receiving moving party's documents
- In writing
- Enforced like court order
- Superseded by
  - Court decision
  - Arbitration decision
  - Agreement of parties



# Adjudication: Review of Decisions

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- No right to appeal
- Grounds to set aside
  - Party lacked legal capacity during adjudication
  - Contract or subcontract invalid or ceased to exist
  - Adjudicator decided issue not subject to adjudication
  - Adjudication conducted by someone other than an adjudicator
  - Prescribed procedures not followed
  - Reasonable apprehension of adjudicator bias
  - Decision resulted from fraud



# Potential Hot Issues



# Potential Hot Issues: Application to Federal Works

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- Provincial legislation vs. federal works and undertakings
  - Sections 91(29) and 92(10) of the *Constitution Act, 1867*
- Does it impair the purpose of the undertaking?



# Potential Hot Issues: Effect on Payment Certification

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- Amended Act, section 5.3:

(2) A provision in a contract that makes the 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.

(3) Subsection (2) does not apply 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.

(4) Subsection (2) does not apply to a provision in a contract that provides for testing and commissioning of the improvement or of services or materials supplied under the contract.





# Potential Hot Issues: Effect on Project Financing

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- Prompt payment legislation does not apply to lenders
- Owner could be required to pay contractor before lender pays draw
- Adjudication decision may conflict with lender's position



# Potential Hot Issues: Effect on Construction Litigation

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- Involvement of lawyers in adjudication process?
- Defusing or promoting disputes?
- Effect of adjudication decisions on future litigation?



# Conclusion

