

Prompt Payment and Adjudication in Saskatchewan

Presentation for
Law Society of Saskatchewan

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Outline

1. **Background**
2. **Exemptions**
3. **Two Main Concepts**
 - a) **Proper Invoice**
 - b) **Adjudication**



Background

- Legislation in force in Saskatchewan effective March 1, 2022
- Applies to all contracts signed after March 1, 2022

Exemptions from Prompt Payment/Adjudication

- a) Mining/mineral resource contracts (other than oil or gas)
- a) Contracts with architects, engineers and land surveyors
- b) Contracts for improvements related to infrastructure for Saskpower

2 Basic Concepts in Prompt Payment/Adjudication

- a) Proper Invoice**
- b) Adjudication**

Proper Invoice

- The road to payment begins with the submission of a '**proper invoice**' from the Contractor to the Owner
- What makes an invoice '**proper**'?

Proper Invoice

‘Proper invoice’

- Written bill or other request for payment that contains:
 - Contractor’s name/business address
 - Invoice date and period of work
 - Reference to the authority for the work (eg contract number)
 - Description of work
 - Name, title and contact information of payee; and
 - Meets any other requirements in the Contract
 - Eg Stat Dec, WCB clearance

Proper Invoice

- But, cannot make prior certification or approval by payment certifier/Owner a condition for submission of proper invoice
 - Note: certification or approval after invoice given is acceptable
- Proper invoices given on a monthly basis unless Contract provides otherwise
- A 'proper invoice' can be revised if the Owner agrees, but the date cannot be changed

Dispute or Pay

- Submission of 'proper invoice' = **Day 1**
- Day 1 starts the series of payment deadlines and notices down the construction chain
- At each stage, party must decide to dispute or pay

Dispute or Pay

How do you 'dispute'?

- By serving a Notice of Non-Payment
 - Notice must specify amount in dispute and reasons for non-payment
 - Form of 'Notices' required by Act are found in the Regulations

Dispute or Pay

How do you 'dispute'?

- Regulations set out methods of serving a Notice of Non-Payment
 - Personal service
 - Email (to address set out in Contract)
 - Fax
 - Registered mail

Dispute or Pay

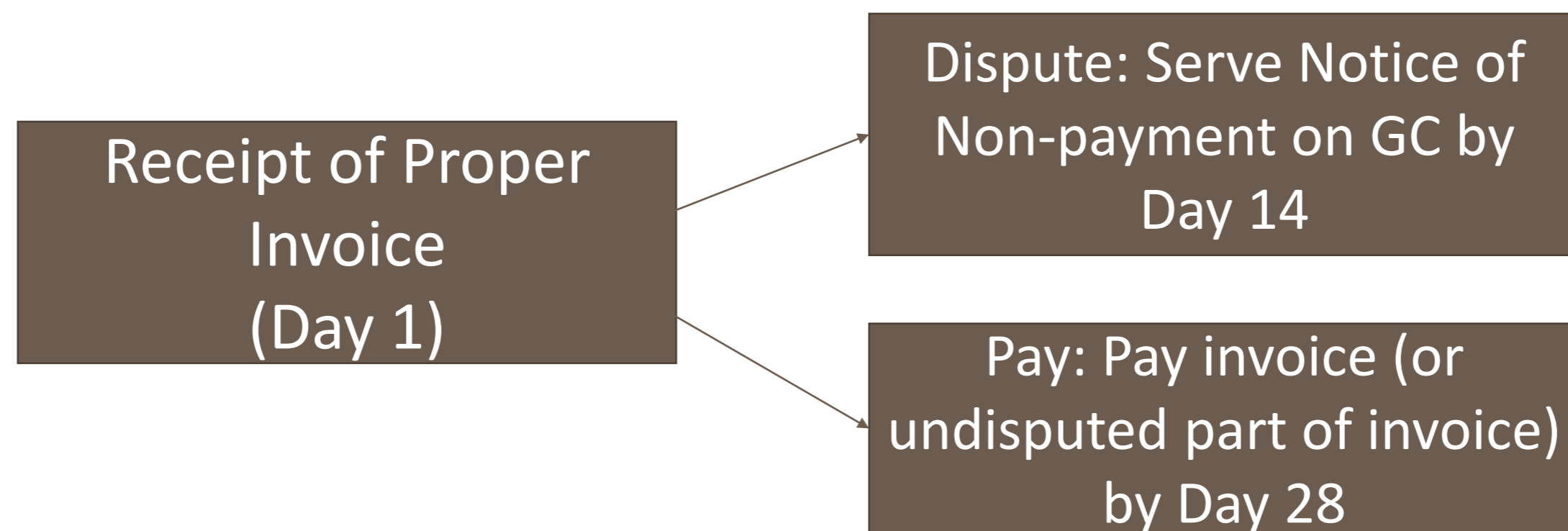
After Day 1, OWNER MUST:

- **Dispute** the invoice (or any portion of the invoice) by serving **Notice of Non-Payment by Day 14; or**

- **Pay** the invoice by **Day 28**
 - Eg: if only part of invoice in dispute, remaining part must be paid by Day 28

Dispute or Pay

OWNER – FLOWCHART:



Dispute or Pay

GENERAL CONTRACTOR - *PAID*:

- If paid by Owner, they must:
 1. Pay Subcontractor(s) within 7 days of receiving payment; or
 2. Serve Notice of **Non-Payment** on Subcontractor by **Day 35**

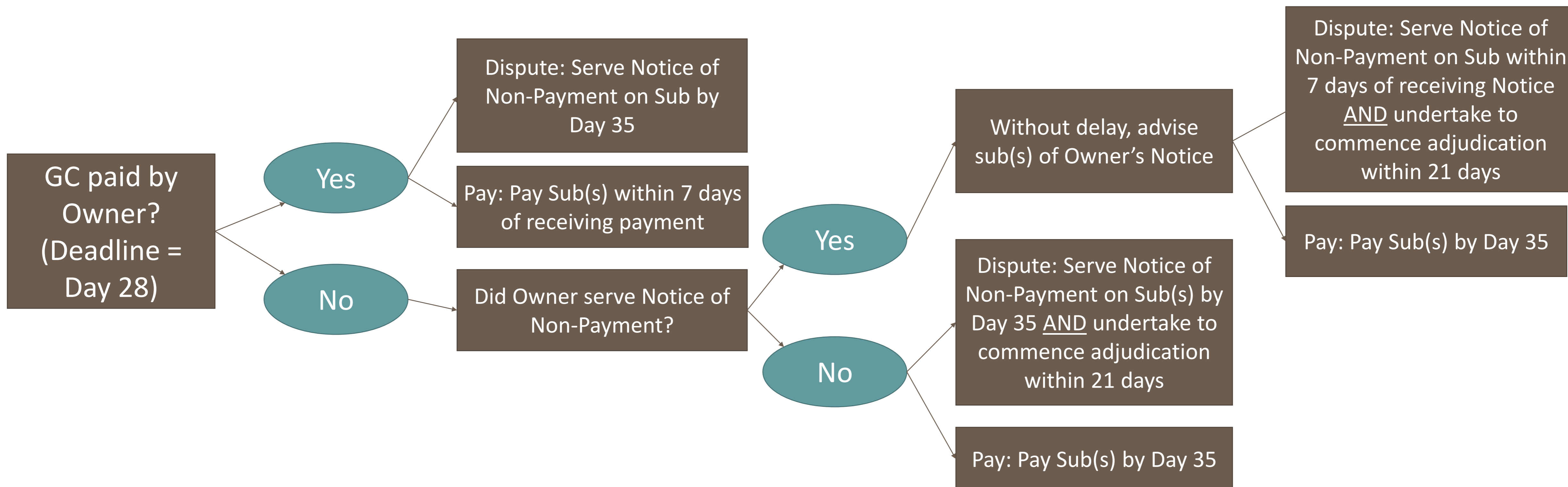
Dispute or Pay

GENERAL CONTRACTOR – *NOT PAID*:

- If not paid *and* Owner serves Notice of Non-Payment:
 1. **Without delay**, advise Subcontractor(s) of Notice; and
 2. Take the following action:
 - a. **Pay** Subcontractor(s) by **Day 35**; or
 - b. Serve Notice of **Non-Payment** on Subcontractor within **7 days** of receiving Owner's Notice and undertake to **commence adjudication within 21 days**

Dispute or Pay

GENERAL CONTRACTOR – FLOWCHART:



Dispute or Pay

SUBCONTRACTOR – *PAID*

- If paid by Contractor, they must:
 1. **Pay** Sub-subcontractor(s) within 7 days of receiving payment;
or
 2. **Serve Notice** of Non-Payment on Sub-subcontractor by **Day 42**

Dispute or Pay

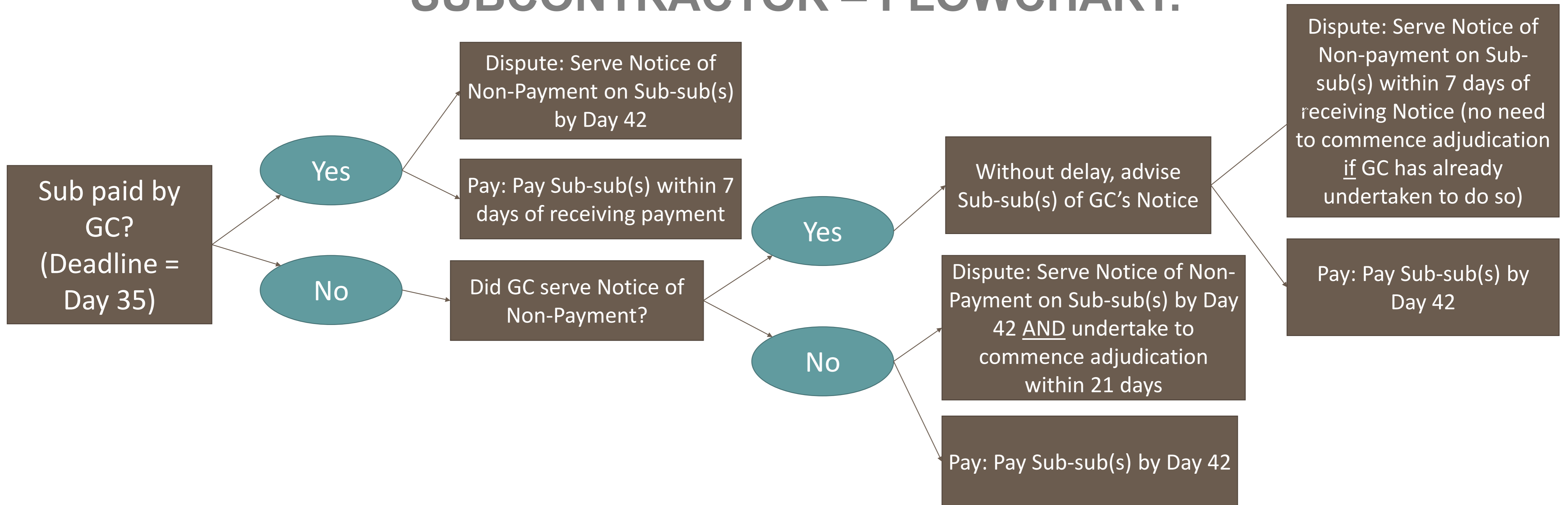
SUBCONTRACTOR – *NOT PAID*:

- If not paid *and* Contractor served Notice of Non-Payment:
 1. **Without delay**, advise Subcontractor(s) of Notice; and
 2. Take the following action:
 - a. **Pay** Sub-subcontractor(s) by **Day 42**; or
 - b. Serve Notice of **Non-Payment** on Sub-subcontractor within **7 days** of receiving Contractor's Notice

Note: *No need to commence adjudication if Contractor has already undertaken to do so.*

Dispute or Pay

SUBCONTRACTOR – FLOWCHART:



Dispute or Pay

BOTTOM LINE:

- **Cannot sit on your hands:** If contractor is relying on non-payment to justify non-payment down the chain, must ensure an adjudication is commenced
- **Part payments handled in same manner:** Must make part payment within timelines, but still handle unpaid portions within timelines for non-payment as well

Adjudication

What is adjudication?

- Adjudication is a statutory interim **dispute resolution process**
 - Intended to be a swifter, more efficient and cost effective form of dispute resolution during a project
 - Disputes heard and decided by Adjudicators
 - Process overseen and administered by an appointed 'Authorized Nominating Authority'

Adjudication

Who is the Authorized Nominating Authority?

- Authorized Nominating Authority appointed in Saskatchewan is:

Saskatchewan Construction Dispute Resolution Office
(“SCDRO”)

- **E** | authority@scdro.ca
- **P** | (306) 525-0171
- **W** | www.scdro.ca

Adjudication

What does the SCDRO do?

- **Role of Nominating Authority in Saskatchewan**
 - Qualify adjudicators
 - Administrative role for facilitating appointment of adjudicators and hearing of adjudications
 - Develop and oversee adjudicator training programs
 - Establish and maintain publicly available registry of adjudicators

Adjudication

What does the SCDRO do?

- **Role of Nominating Authority in Saskatchewan**
 - Certification/code of conduct/complaints process for adjudicators
 - Ensuring body of adjudicators are representative of industry players and ensuring adjudication available throughout province
 - Setting fees (training/qualification, process, adjudicators)

Adjudication

What does the SCDRO do?

- **Role of Nominating Authority in Saskatchewan**
 - Public information website
 - Annual reporting obligations
 - **Note:** SCDRO has contracted ADR Institute of Saskatchewan to assume role of training, certification and oversight of adjudicators

Adjudication

When can you use adjudication?

- Adjudication must be used for disputes stemming from Notices of Non- Payment
- Can also be used for:
 - Valuation of services or materials
 - Determining payment/change orders/set-off issues
 - Determining substantial performance/ holdback issues
 - Demobilization/remobilization costs after stop work rights
 - Any other matters on agreement of parties

Adjudication

Who are the adjudicators?

- Individuals specially trained/certified in resolving disputes referred for adjudication under legislation
- Criteria for qualified adjudicators in regulations:
 - 10 years experience in construction industry
 - Completion of training course and payment of annual fees
 - Agreement to abide by Code of Conduct
 - NOT an undischarged bankrupt/convicted of indictable offense

Adjudication

What does the adjudicator do?

- Control the process of adjudication
 - Contract/Subcontract can specify procedures for adjudication as long as it complies with the Act
- Adjudicator has broad powers to gather and assess evidence and applicable law
 - E.g. verbal evidence, site inspections, retaining experts to assist in assessing evidence

Adjudication

How do you start an adjudication?

- Requesting party serves Notice of Adjudication on other party and on the SCDRO
- Filing fee will apply
 - \$500 for disputes under \$25K
 - \$1,000 for disputes over \$25K
- **Notice includes:**
 - Names, addresses
 - Brief description of the dispute
 - Remedy sought
 - Name of proposed adjudicator (optional)

Adjudication

How do you start an adjudication?

- Parties jointly select adjudicator
 - *Note: Cannot 'pre-agree' to adjudicator in Contract*
- If Adjudicator does not consent to act within 4 days after Notice given, party who gave Notice must request that SCDRO appoint one
- SCDRO must appoint Adjudicator within 7 days of request

Adjudication

How do you start an adjudication?

- Once appointed, requesting party has 5 days to give relevant documents to Adjudicator
 - Right of reply within 5 days of receiving documents
- Disputes can be **consolidated** into one adjudication if parties agree (or if Contractor requires)

Adjudication

When will the adjudicator make a decision?

- Adjudicator to render written decision, with reasons, within 30 days after receiving relevant documents
 - Adjudicator may request additional 14 days on consent of all parties
 - Parties may, on consent of Adjudicator, extend for a further period by written agreement

Adjudication

When will the adjudicator make a decision?

- Deadline to lien under the Act is also extended until later of:
 - Standard lien deadlines under section 49; and
 - 45 days after the Adjudicator has received the documents from the party who commenced the adjudication process.

Adjudication

When will the adjudicator make a decision?

- If Adjudicator fails to render decision on time:
 - Any decision rendered after deadline is of **no force or effect**
 - Return materials to SCDRO
 - Parties may request new adjudicator
 - Adjudicator is barred from acting on same dispute again
- Adjudicator may also withdraw at any time if they discover **conflict**, or decide they are **not able** or **competent** to conduct adjudication

Adjudication

What happens if we settle before a decision is made?

- Parties can agree to terminate adjudication any time after Notice of Adjudication but before Adjudicator's written decision
- Must pay Adjudicator's fees even if terminated

Adjudication

How do you enforce an adjudicator decision?

- Decision is binding and enforceable until dispute finally determined by court or arbitration (limited exceptions to this)
- Parties can accept decision as final
- ***Note:** U.K. experience with adjudication is that high percentage of parties accept decision of Adjudicator as final*

Adjudication

How do you enforce an adjudicator decision?

- Amount owing under an adjudicator's decision must be paid within **10 days** after decision communicated to parties
- Adjudicator's decision can be registered as Order of Court
- Once registered, Adjudicator's order has same effect as an Order made by a Court
- Registering party must serve written notice on other party within **10 days** after registration

Adjudication

How do you enforce an adjudicator decision?

- If adjudicator's decision is filed with the Court, any related requirement to make payment down the chain is **deferred** pending the outcome of the enforcement
 - I.e. Pay when paid

Adjudication

What if I'm not satisfied with the decision?

Adjudicator's determination can be set aside by Court if:

- A party participated in the process while under legal incapacity
- Contract/Subcontract invalid or ceased to exist
- Determination dealt with a matter not permitted by adjudication or unrelated to subject of the adjudication
- Adjudication conducted by someone other than an adjudicator

Adjudication

What if I'm not satisfied with the decision?

Adjudicator's determination can be set aside by Court if:

- Procedures did not comply with those in the Act
- Reasonable apprehension of bias by Adjudicator
- Determination made as a result of fraud
- Any other prescribed grounds

Adjudication

What if I'm not satisfied with the decision?

- But, application to set aside does NOT operate as a stay of the determination unless Court orders otherwise

Adjudication

Who pays for the adjudication?

- Parties bear their own costs of adjudication
- **Adjudicator's fees**
 - Parties can agree to Adjudicator's fees, or SCDRO can set fee (in accordance with Regulations) on Adjudicator's request
 - Adjudicator's fee paid equally by parties to adjudication
 - Fees of experts retained by Adjudicator split by parties, or as directed by Adjudicator as is reasonable and proportionate

Adjudication

Who pays for the adjudication?

- Exception:
 - Adjudicator can award partial or full costs against a party if they determine that the party has acted in a manner that is **frivolous, vexatious, or an abuse of process or other than in good faith**

Adjudication

SCDRO Current Fee Schedule for Adjudicators

Fee Type	Adjudicator Fee Amount
Disputes less than \$10K	\$800
Disputes between \$10K - \$24,999	\$1,000
Disputes between \$25K - \$34,999	\$2,000
Disputes between \$35K - \$49,999	\$3,000
Disputes between \$50K - \$249,999	Hourly rate of \$250
Disputes between \$250K - \$499,999	Hourly rate of \$400
Disputes above \$500K	Hourly rate of \$500

Stop Work

- If payor fails to pay amount required by Adjudicator within **10 days**, payee can stop work until paid:
 - Amount owing
 - Interest
 - Reasonable costs as a result of work suspension
- Payee also entitled to start up costs once work resumes



Questions/Discussion?

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