



Prompt Payment and Adjudication – the New Construction Act

Presentation for GTSWCA

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Construction Act

Three Key Changes:

- Prompt Payment
- Adjudication
- Lien Modernization

Prompt Payment Regime

- new rules will require "prompt" payment of invoices submitted by the contractor
- designed to improve cashflow in industry
- regime applies to contracts procured and entered into *after October 1, 2019*
- applies to:
 - all construction projects (i.e. from home renovations to AFP/P3s)
 - cannot "contract out" of prompt payment

Prompt Payment Regime

- triggering event is the contractor giving the owner a “proper invoice”, i.e. a written bill or other request for payment
- requirements include:
 - name and address of contractor
 - invoice date and invoice period
 - authority under contract or elsewhere for supplying labour and material
 - amount payable and payment terms
 - name, title and contact information to whom payment to be sent
 - anything else “prescribed”

Prompt Payment Regime

Other Rules:

- giving an invoice cannot be conditional on payment certification
- giving an invoice can be conditional on testing and commissioning
- invoices can be corrected after submission, with owner's consent, and without changing date
- interest payable on overdue payments at higher of contract rate and *Courts of Justice Act*

Prompt Payment Regime

No Disputes or Payment Issues



Contractor submits "proper invoice" to Owner

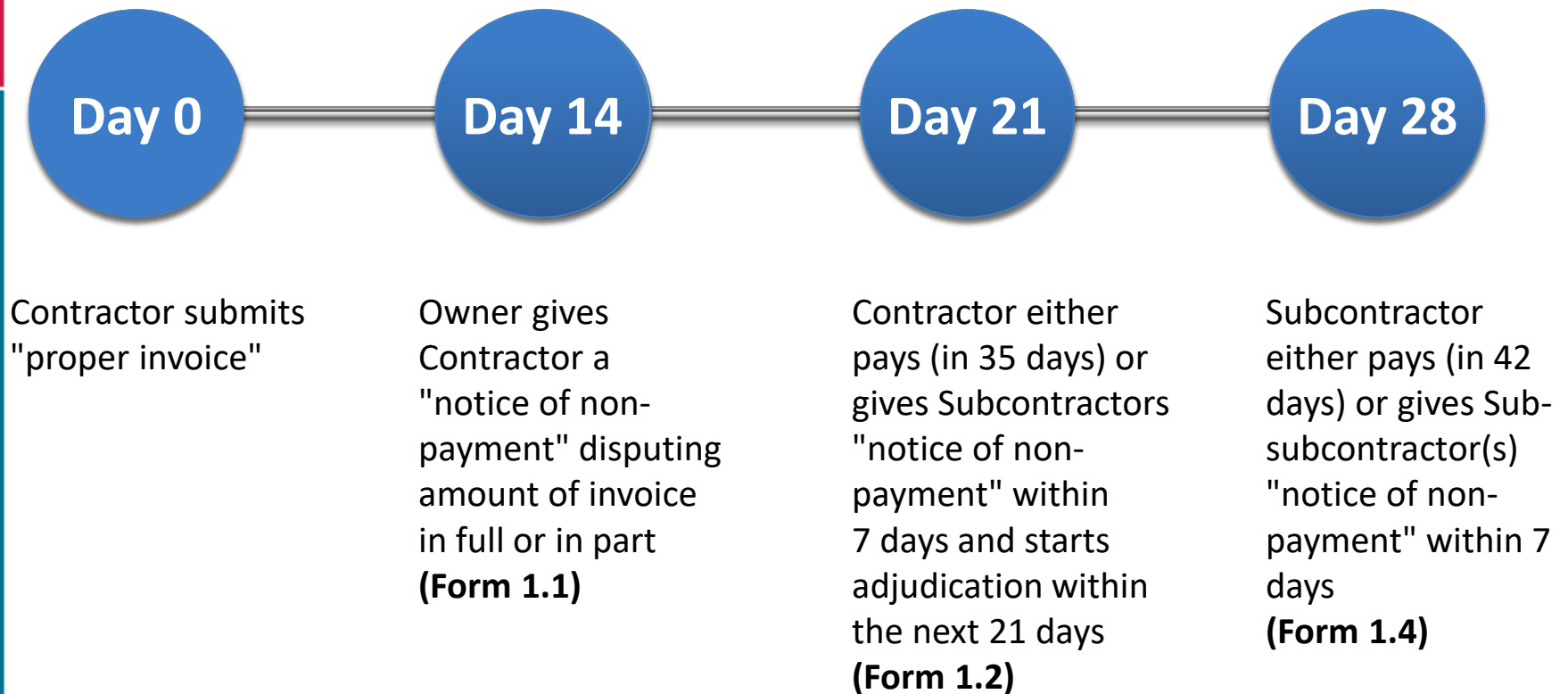
Owner pays Contractor amount payable (in full, less holdback)

Contractor pays Subcontractors amounts payable (7 days after payment received by Contractor)

Subcontractor pays Sub-subcontractors amounts payable (7 days after payment received by Subcontractor)

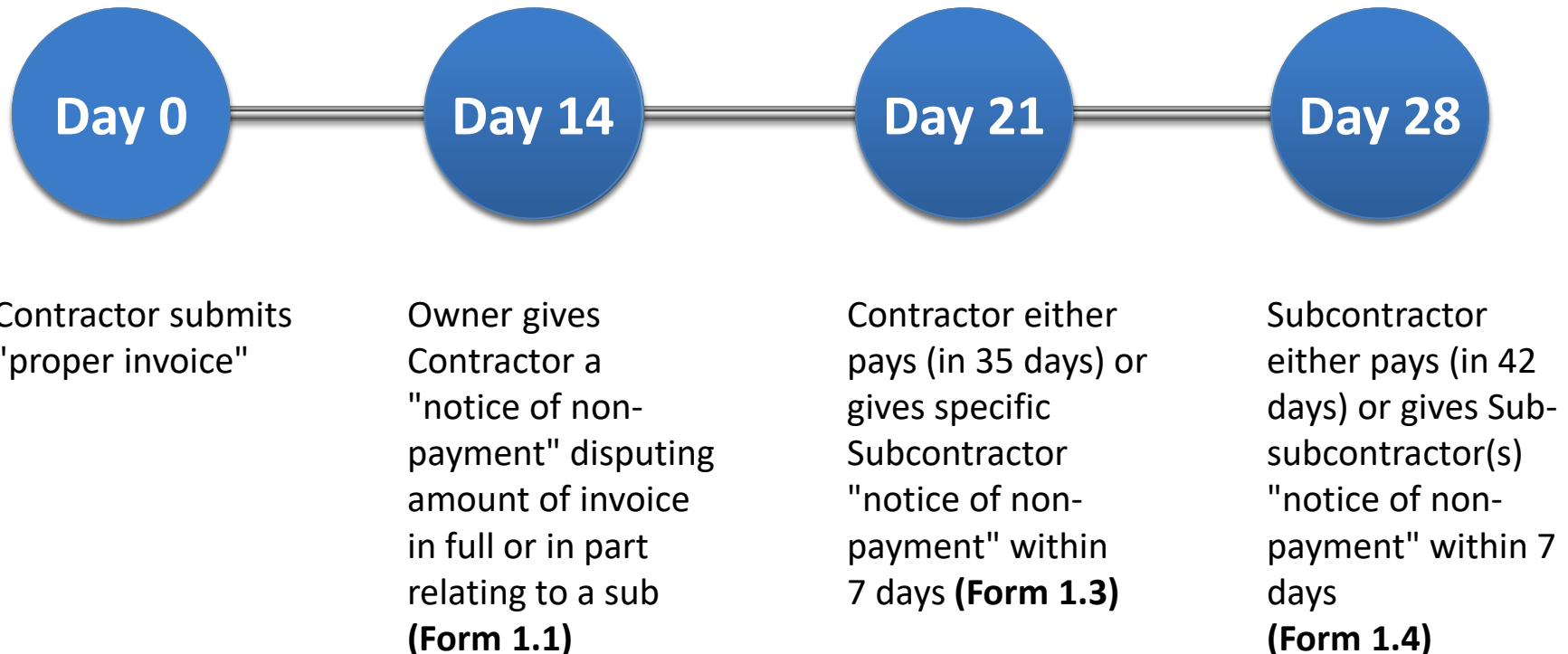
Prompt Payment Issues – Scenario 1A

General Dispute between Owner & Contractor



Prompt Payment Issues – Scenario 1B

Specific Dispute between Owner, Contractor and Sub



Prompt Payment Issues – Scenario 2

Non-payment by Owner when due



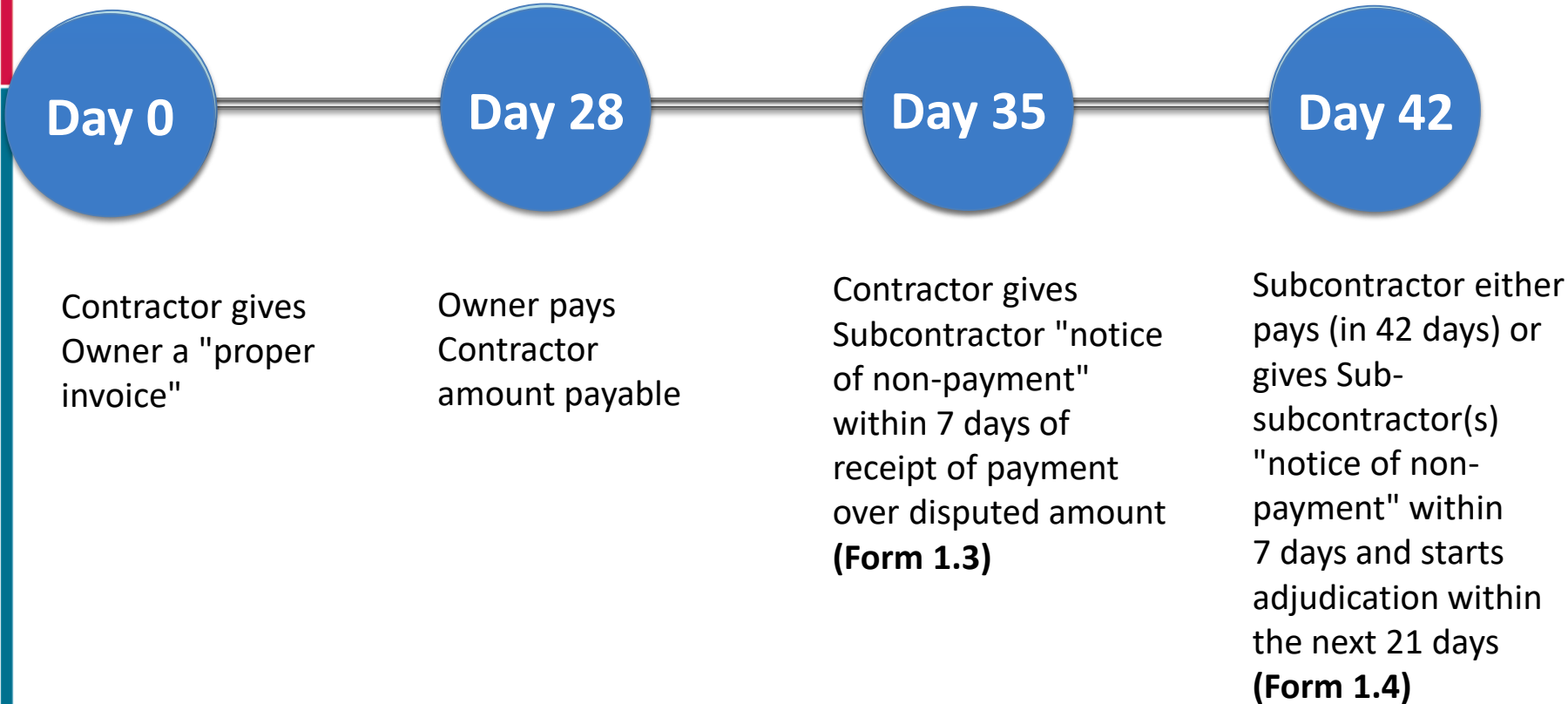
Contractor gives Owner a "proper invoice"

Owner does not pay Contractor and Owner does not give Contractor a "notice of non-payment"

Contractor either pays (in 35 days) or gives Subcontractors "notice of non-payment" and starts adjudication within the next 21 days or pays Subcontractors **(Form 1.2)**

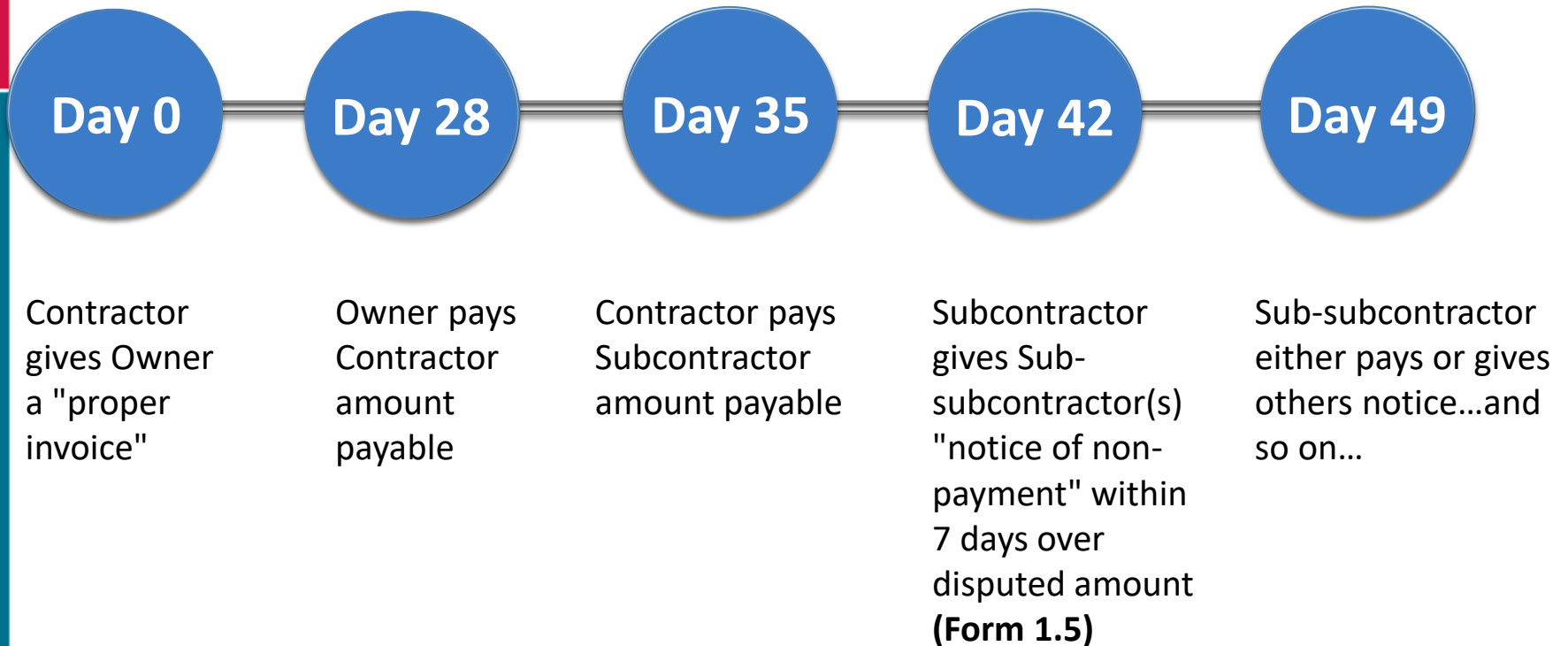
Prompt Payment Issues – Scenario 3

Dispute between Contractor & Subcontractor



Prompt Payment Issues – Scenario 4

Dispute between Subcontractor & Sub-subcontractor



Practical Implications

- transition rules:
 - applies to contracts procured and signed after October 1st, 2019
 - not retroactive in effect
 - subcontracts follow head contract rules regardless of date of subcontract
- need for education and training across organizations
- requires shift in mindset and approach to contracting and payment

Practical Implications

- new process requires:
 - organizational efficiency to process payments
 - electronic funds transfer, limited sign-offs
 - staffing and resources for tracking, management of forms
- greater involvement and pressure on payment certifiers, contract administrators
- revisiting contract language

Contract Changes

- add contract requirements for “proper invoice” to supplement CA requirements
- change orders
- require pre-invoice submission meetings and draft invoices
- define payment or billing periods
- set out invoice delivery requirements
- describe invoicing for change order work and extras
- include “non-waiver” clauses
- changes to consultant contracts
 - reviewing notices of non-payment in shortened time frames
 - preparing draft notices of non-payment



DISCUSSION OF PROMPT PAYMENT

Construction Act

Three Key Changes:

- Prompt Payment
- **Adjudication**
- Lien Modernization

Adjudication

- new way of resolving project disputes in real time using an "adjudicator"
- adjudicator's "determination" is binding until court/arbitrator hears case or parties agree
- any contracting party can refer dispute to adjudication (owner, contractor, subcontractor, sub-subcontractor)
- adjudication is not mandatory, but necessary to avoid having to make prompt payments

Adjudication

- types of disputes that can be adjudicated:
 - valuation of services
 - payment (including COs or proposed COs)
 - notice of non-payment under “prompt payment”
 - claims for set-off (against trust funds or against lien)
 - payment or non-payment of holdback
 - other disputes the parties agree to adjudicate

Adjudication

General Rules:

- one dispute per adjudication, unless parties agree
- contractor can elect to consolidate contract and subcontract adjudications
- parties cannot choose adjudicator in contract
- fee of arbitrator as agreed by parties
- adjudicator's fee paid equally by parties
- parties pay own costs

Adjudication

Authorized Nominating Authority (ANA)

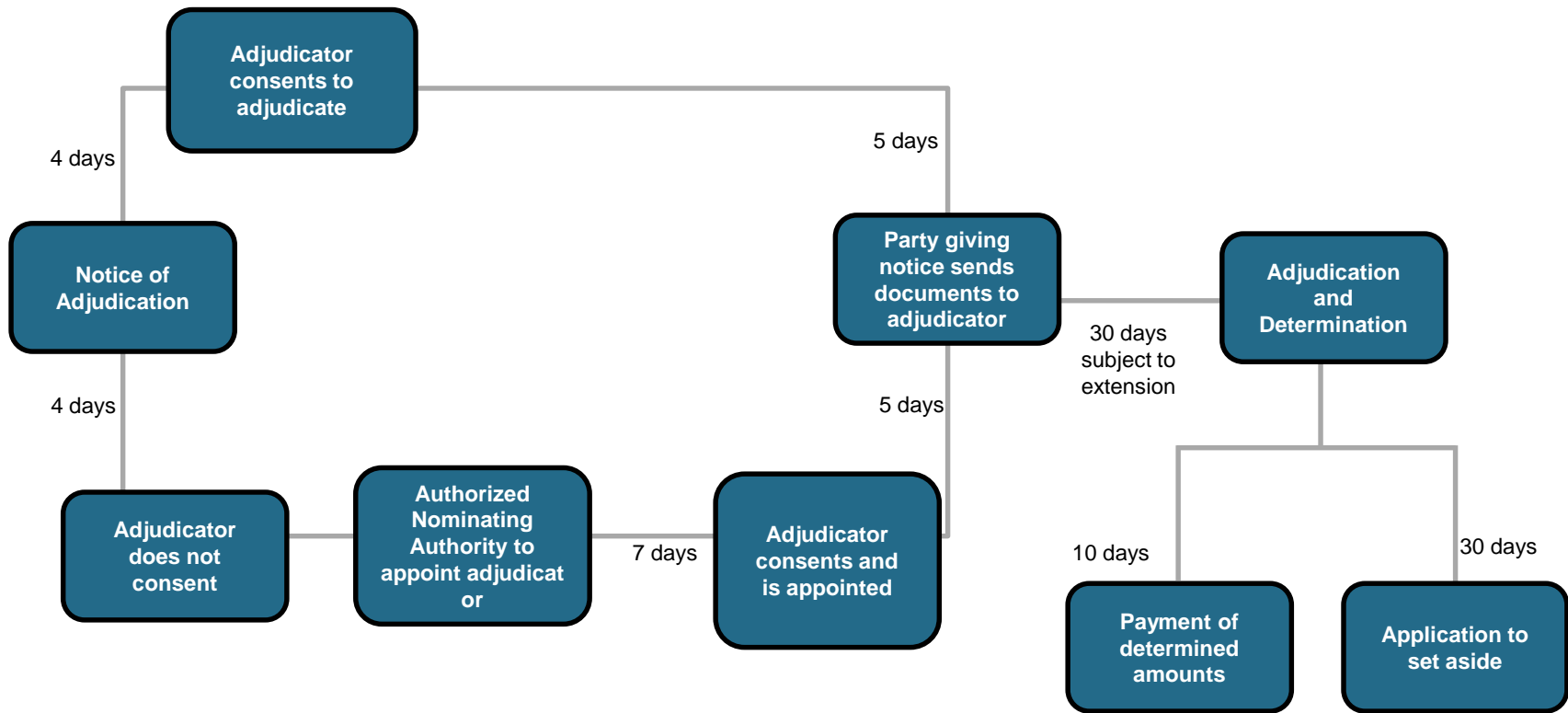
- authority governing adjudicators = Ontario Dispute Adjudication for Construction Contracts (“ODACC”)
- responsibilities:
 - develop training, educational materials
 - certify adjudicators
 - maintain registry of adjudicators
 - set fees
 - develop code of conduct, deal with complaints
 - annually report adjudication data

Adjudication

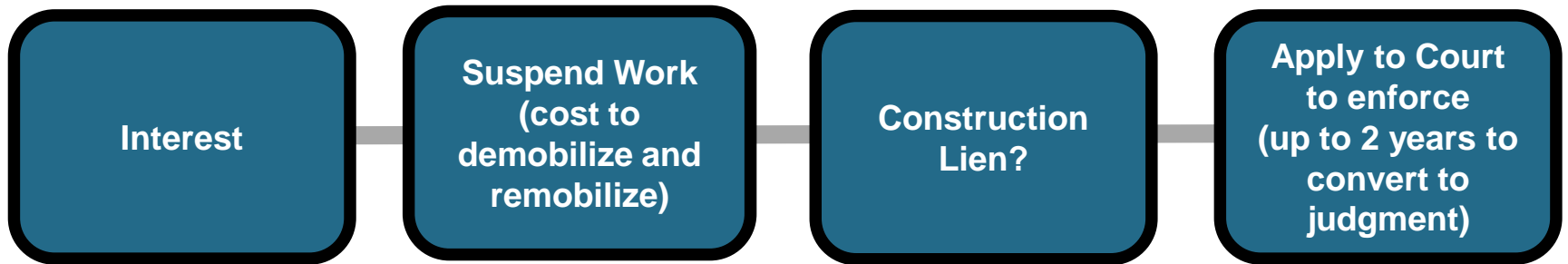
Adjudication Process

- adjudicator will usually deal with issue in writing
- adjudicator can hire experts, conduct site visits
- process essentially inquisitorial, not adversarial
- determination issued in writing with reasons
- any contractual provisions between parties must be consistent with rules
- will it be “rough justice”?

Adjudication Process



Remedies for Non-Payment of Adjudicator's Determination within 10 days



Practical Implications

- review or set up method of keeping track of issues and dates
- enhance document management system
- consider how to keep staff on site while also preparing for and managing adjudications
- consider how to simplify complex disputes
- maintain list of good adjudicators – evaluate experiences
- role of lawyers?

Contract Changes

- revisit dispute resolution provisions
- define adjudication procedures
- change consultant contracts to include expanded contract administration services, including adjudication support
- distinguish between “claims” and “disputes”
- disclosure of documents producing during adjudication?
- provide for confidentiality



DISCUSSION OF ADJUDICATION

Construction Act

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Lien Periods

Preservation

- deadline to register or serve lien increases from 45 days to **60 days**

Perfection

- deadline to start lien action increases from 90 days (45+45) to **150 days (60+90)**

Holdback

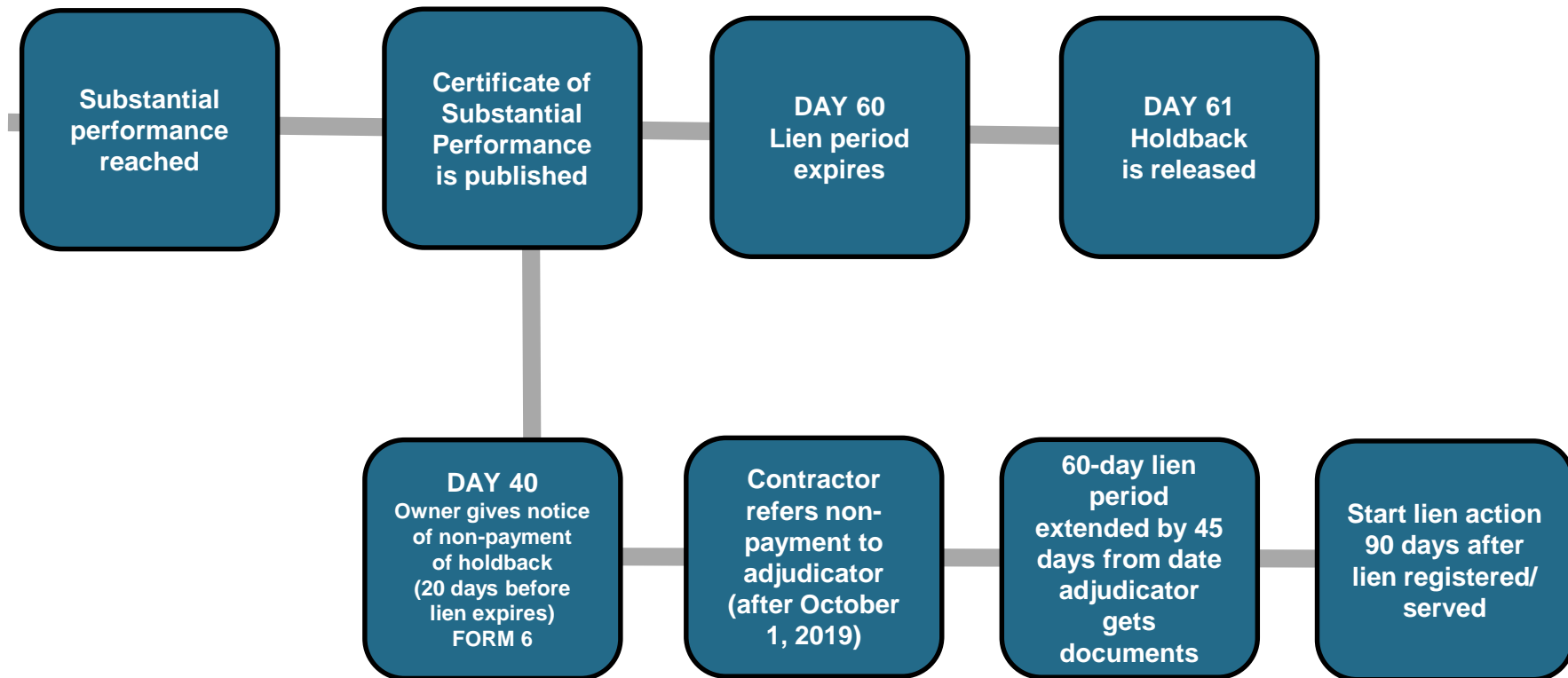
Mandatory Release

- rule is release of holdback is mandatory
- owner can only retain holdback if notice of non-payment is published within 20 days of due date with reasons for non-payment

Annual or Phased Release

- holdback may be released on an annual or phased basis by agreement
- available for project >\$10M (no threshold for design contracts)

Holdback & Construction Lien Periods



Lien Claims

"Capital Repair"

- liens clearly defined to be for capital repair only, not maintenance

Delay Costs

- liens can include the "hard costs" incurred for construction delays

Municipal Liens

- liening municipal projects – not against property but delivered to clerk of municipality

Holdback

Security for Holdback

- possible to post security for holdback by
 - letter of credit
 - "demand-worded holdback repayment bond"
- in place of cash retention

Notices

New Notices

- new prescribed form for “written notice of lien” (Form 1)
- notice of termination (Form 8)
 - will affect ongoing trade subcontracts too
 - must be published
 - no rules for timing of publication, who publishes
- notice of non-payment of holdback (Form 6)

Other Changes

Publication of Notices

- future of notice of publication not necessarily be Daily Commercial News *newspaper*
- still must be published in "trade newspaper" but could also be electronic
- other electronic papers are starting to publish notices
- lead to confusion?

Other Changes

Trust Funds Requirements

- funds from different projects can be deposited in mixed trust account
- must be carefully tracked with written records

Compulsory Bonding

- performance and labour and material payment bonding on all public contracts over \$500K



QUESTIONS?

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