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Federal Prompt Payment for Construction Work Act – Adjudication [part 2 of 2]

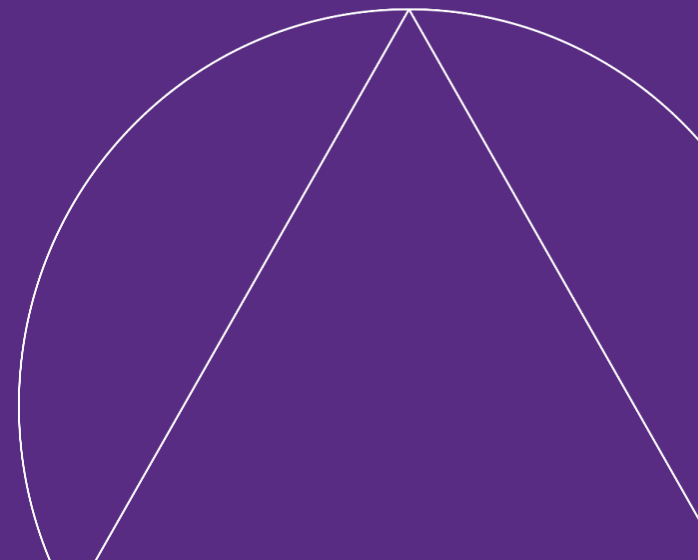
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Agenda

- What is adjudication?
- Overview of how adjudication works under the PPCWA
- What can and cannot be adjudicated?
- Adjudicators (appointment, certification, powers)
- The adjudication process
- Effect and enforceability of determinations
- Tips on navigating adjudications

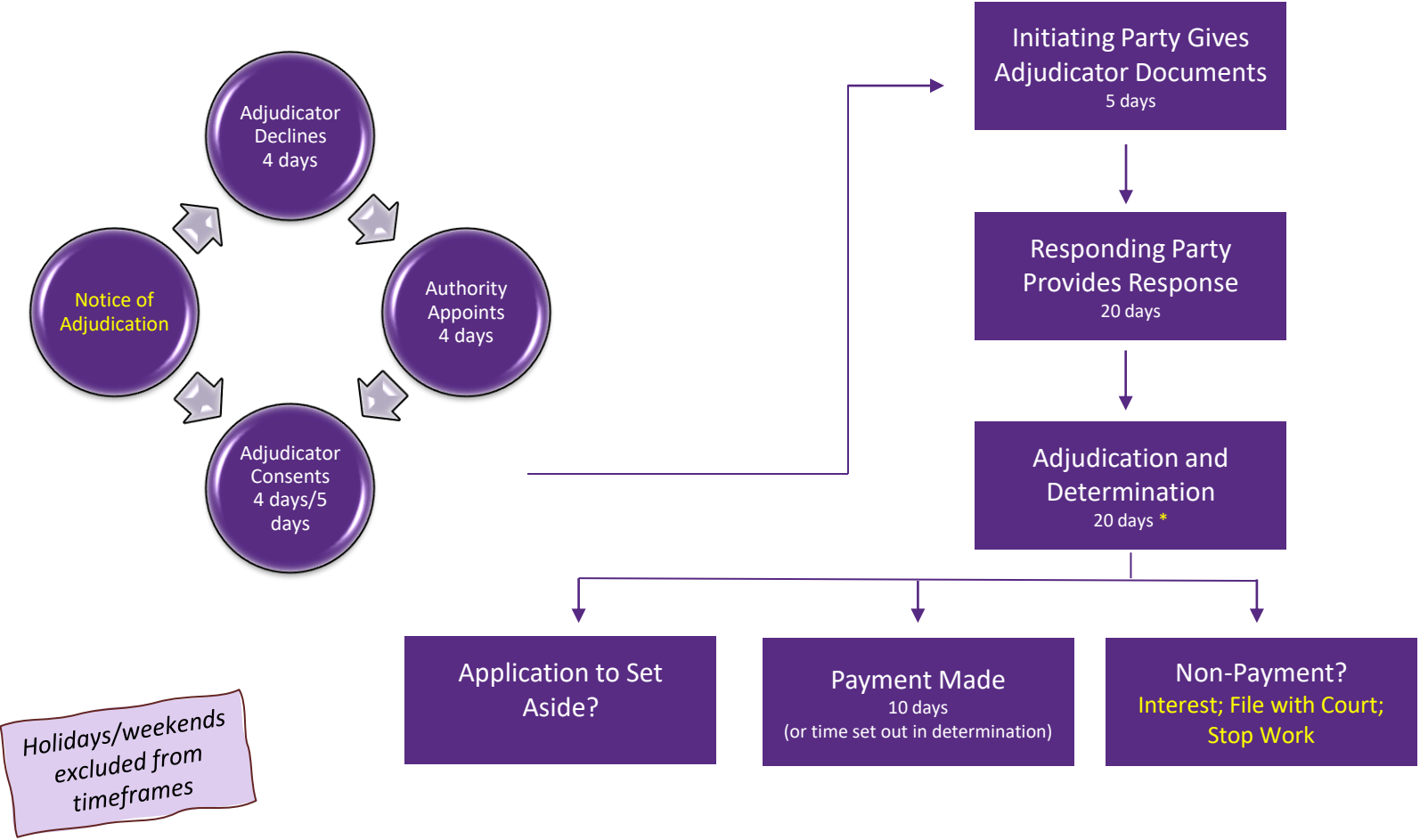


What is adjudication?

- A way of resolving payment disputes during a project
- It is optional not mandatory
- Intended to be a quick process
- The adjudicator is a construction professional
- The decision must be complied with until it is set aside by court order or arbitral award
- Each party shares the cost of the adjudication equally, subject to limited exceptions



Overview of How Adjudication Works under PPCWA:



What can be adjudicated?

Adjudication Regime in the Federal Act	Adjudication Regimes in the Designated Provinces
<ul style="list-style-type: none"> non-payment within the time limit provided under the Act or the shorter time limit in the contract 	<ul style="list-style-type: none"> valuation of services or materials provided (ON, AB, SA)
	<ul style="list-style-type: none"> payment under a contract, including in respect of a change order (ON, AB, SA)
	<ul style="list-style-type: none"> disputes that are the subject of a notice of non-payment (ON, AB, SA)
	<ul style="list-style-type: none"> amounts retained as set-off/lien fund (ON, AB)
	<ul style="list-style-type: none"> suspension/resumption costs of a contractor or subcontractor that suspended work due to non-payment of an adjudication determination (SA)
	<ul style="list-style-type: none"> non-payment of holdback (ON)
	<ul style="list-style-type: none"> failure to certify substantial performance (SA)
	<ul style="list-style-type: none"> any other matter agreed upon or prescribed (ON, AB, SA)



What is not to be adjudicated?

- An adjudicator is not required to determine a dispute in the following circumstances:
 - the dispute they were to determine has been consolidated with another dispute and another adjudication has been appointed
 - appointment revoked by agreement of the parties
 - they have a conflict of interest
 - it has been determined, to the satisfaction of the Adjudicator Authority, they are no longer able to adjudicate the dispute
- Only one “matter” may be addressed by an adjudication, subject to consolidation
- Related disputes that are the subject of separate adjudications can be consolidated if the parties agree



When can you adjudicate?

- A contractor or subcontractor must provide the other party with a notice of adjudication no later than the 21st day after the later of:
 - the day on which the contractor receives a certificate of completion
 - if any of its work is covered by the last proper invoice submitted, the expiry of the time limit under the Act for payment for that work

**On request, a contractor must inform a subcontractor in the subcontracting chain of the date the contractor received the certificate of completion*



Notice of Adjudication:

- No prescribed form
- Must include:
 - the names of the parties to the dispute;
 - a brief description of the dispute, including details of how and when it arose;
 - the amount requested to be paid;
 - the name of a proposed adjudicator; and
 - any other information prescribed by regulation.



Appointment of Adjudicators

- Must be selected from the list of adjudicators maintained by the Adjudicator Authority (CanDACC)
- Initiating party proposes an adjudicator in its notice of adjudication
- If parties cannot jointly appoint an adjudicator, either party can request the Adjudicator Authority to appoint an adjudicator for them
- Selection of adjudicator cannot be restricted by contract



Adjudicators: Certification and Eligibility Criteria

- Individuals certified by the Adjudicator Authority
- Must meet the following eligibility criteria:
 - they must be an accredited member in good standing with the Adjudicator Authority
 - they must have at least 10 years of relevant working experience in the construction industry
 - they must not have been convicted of an indictable offence in Canada or of a comparable offence outside of Canada
 - they must not be an undischarged bankrupt
 - they must have the appropriate level of security clearance to address the dispute



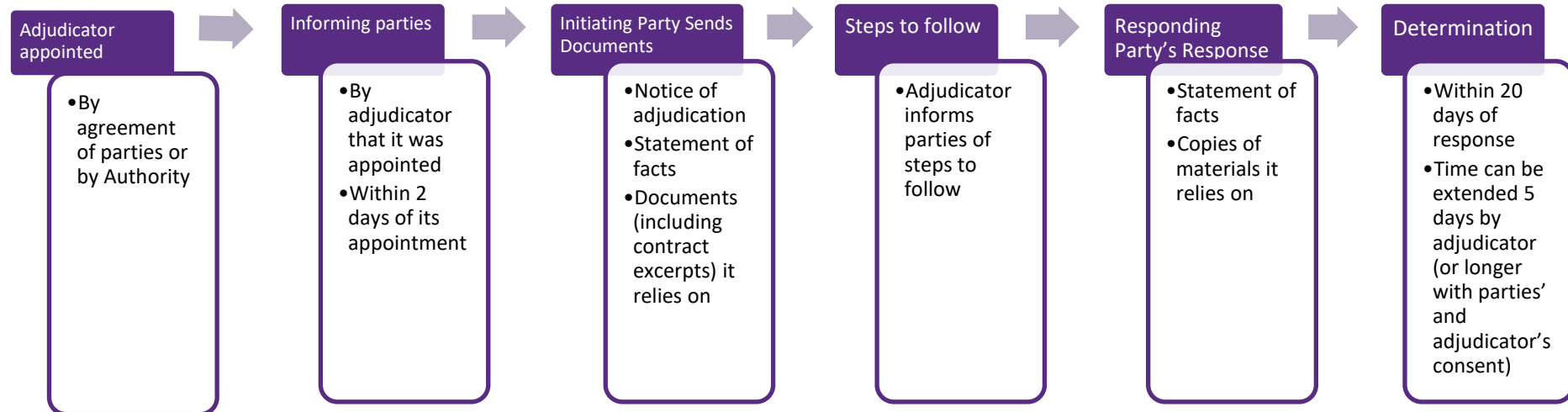
Adjudicator's powers, duties and functions

Adjudicator's have the following powers, duties and functions:

- a) determine matters in the dispute in an impartial and independent manner
- b) not have any conflicts of interest in the dispute or with the parties
- c) ascertain the relevant facts and law
- d) issue directions respecting the scheduling of the conduct of the adjudication;
- e) issue directions respecting any restrictions on the length of written or oral submissions;
- f) request that any party provide any documents supporting or supplementing the notice of adjudication
- g) meet and question any of the parties and their representatives
- h) on consent of the parties and subject to any third-party consents, make any site visits or inspections
- i) on consent of the parties and subject to any third-party consents, carry out any tests or experiments
- j) on consent of the parties, appoint any experts or assessors necessary to better determine any fact or issue in the dispute
- k) draw inferences based on the conduct of the parties prior to and during the adjudication; and
- l) issue any other directions so as to promote the expeditious resolution of the adjudication
- m) *if a party does not comply with a request or direction issued by the adjudicator, the adjudicator can continue the adjudication in the absence of that party and make a decision on the basis of any available information or evidence



The Adjudication Process:



Effect and Enforceability of Determinations:

- An adjudicator's determination is binding on the parties unless:
 - the parties come to a written agreement; or
 - the determination is set aside by a court order or arbitral award
- Implications for contract dispute resolution provisions?
- Adjudication determinations can be filed with a federal or provincial court (as applicable)
 - Must be done within 2 years of determination
 - May be enforced as an order of the court



Tips on Navigating an Adjudication

- Get ready in advance
- Consider what type of adjudicator would be best for your dispute
- Adding terms in contracts and subcontracts
- Implications of not paying adjudication determination before trying to have it set aside?



Questions?

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