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**An Act to Amend *the Builders' Lien Act***  
**What You Need to Know**

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**Practicing in construction litigation  
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**The contents of this presentation do not constitute legal advice and are incomplete, as they are intended to be supplemented by the commentary given during the presentation.**

# Outline

- 1. How did we get here?**
- 2. Prompt Payment Amendments**
- 3. Interim Adjudication Amendments**
- 5. Crystal ball gazing**
- 6. Summary**

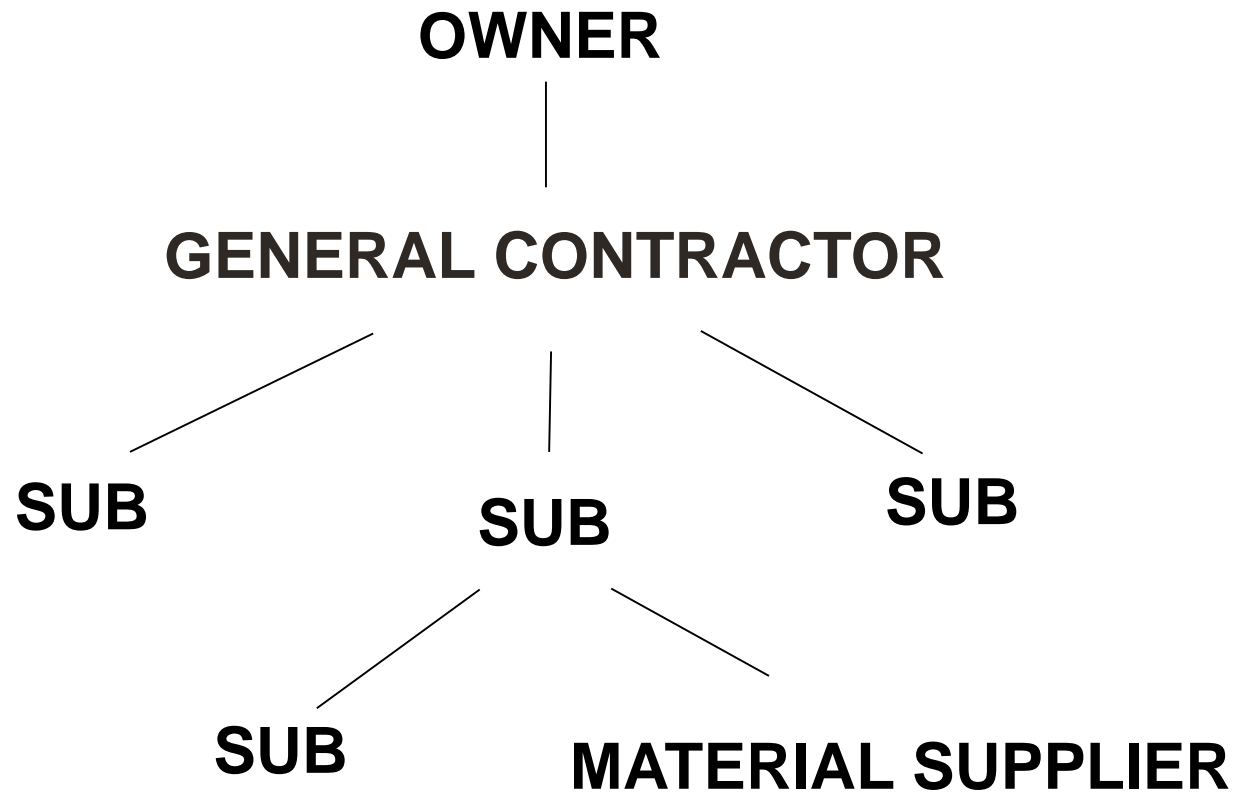


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# **A Brief History Or, How Did We Get Here?**

# CONSTRUCTION PYRAMID



# ***Builders' Lien Act***

- In force 1984
- Person who supplies services or materials to “improvement” has lien vs interest of the “owner”
- Generally must register “Claim for Lien” **within 40 days** of the completion of the work
- **Problem:** subcontractors were not receiving payment within a reasonable time for work that was satisfactorily completed
- The Saskatchewan Government engaged local industry stakeholders and conducted a review of the recent Ontario legislation amendments



# Bill No. 152

## November 2018 Saskatchewan introduced *The Builders' Lien (Prompt Payment) Amendment Act, 2018*

“...to better protect and define the rights and obligations of owners, developers, contractors and subcontractors...

By providing a more robust process and clearer guidelines, government hopes to reduce the number of payment delay cases that end up in court.”



# **Bill No. 152 – Amends current *Act***

## **Part I.1 Prompt Payment**

- New “Proper Invoice” delivery standards
- New detailed payment process establishing timelines for payment for construction projects

## **Part II. 1 Adjudication Scheme**

- Interim adjudication process for disputes to be used in addition to arbitration and litigation

## **Awaiting Regulations**

# The Future – *The Builders' Lien Act*

## Expected to come into force later in 2019

### Transition of contracts – s. 105.1

- 1) Contract entered into **before** amendment comes into force?
  - As if not in force (regardless of subcontract)
- 2) Improvement was made subject to a lease that was entered into **before** the amendment comes into force?
  - As if not in force
- 3) Entering into a contract or subcontract **on or after** the amendment comes into force?
  - Part I.1 (Prompt Payment) & Part II.1 (Adjudication) apply
- 4) An arbitration that was commenced **before** the amendment, may be continued as if s.85 (the current arbitration section) had not been repealed.



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# Prompt Payment Amendments

**New Part I.1 of the *The Builders' Lien Act***



# Prompt Payment Amendments

**Goal of amendments: strict timelines for payments to General Contractors and Subcontractors**

**New concept: “proper invoice” – must include:**

- a) The contractor’s name and address;
- b) Date and period of supply;
- c) The contract or other authority for supply;
- d) Description of what supplied;
- e) Amount payable and payment terms
- f) Any other info required by Regulations

**Note: not applicable to Subcontractor invoice to General Contractor**



# Prompt Payment Amendments

“proper invoice” to be issued monthly unless contract provides otherwise

“proper invoice” **can NOT** be conditional on prior certification by payment certifier or owners' prior approval

- Does not apply to a provision in a contract that provides for testing and commission of the improvement or of services or materials supplied under the contract

“proper invoice” can be reviewed by payment certifier or owner **after** “proper invoice” given

“proper invoice” can be revised by general contractor if owner agrees in advance **BUT** no change to date **AND** the invoice must continue to meet the requirements of a “proper invoice”



# Prompt Payment Amendments – Payments by Owner

Owner must pay “proper invoice” in full within **28 days** of receipt from the contractor

If owner disputes – must give notice of non-payment within **14 days** of receipt of “proper invoice”

- Must be in form specified by Regulations
- Must specify amount and reason not paid

Owner must pay **all amounts** not identified in non-payment notice within **28 days** of receipt

# Prompt Payment Amendments – Payments by General Contractor

General contractor must pay subcontractor **within 7 days** of payment by owner.

If owner gives notice of non-payment: General contractor must, **within 7 days**, give to each affected subcontractor:

- Copy of the owner's non-payment notice, **AND**
- A notice of non-payment :
  - Must be in form prescribed by Regulations
  - Must specify amount not being paid
  - Must undertake to refer matter to adjudication within 21 days



# Prompt Payment Amendments – Payments by General Contractor

If the owner has **paid less** than the full amount of the “proper invoice” to the general contractor, the subcontractor(s) are still entitled to prompt payment.

The general contractor has **35 days** to pay each subcontractor included in the “proper invoice”, unless the general contractor provides the subcontractor with a notice of non-payment.

General contractor may dispute payment - must give the subcontractor a notice of non-payment that sets out the **amount** in dispute and **why** it is not being paid.

If payment to a subcontractor is not made because the owner is disputing payment to the contractor OR the contractor is disputing payment to the subcontractor, notice must be given to the subcontractor:

- within **7 days** of receiving the notice of non-payment from the owner **OR**
- before the **35 days** required for payment to a subcontractor



# Prompt Payment Amendments – Payments by Subcontractors etc.

- Subcontractors must pay their subcontractors / suppliers **within 7 days** of payment by general contractor
- If general contractor gives notice of non-payment: Subcontractor must give notice of non-payment to sub-subs / suppliers
- If non-payment: Subcontractors must pay their subcontractors **within 42 days** after the “proper invoice” was given.
- **NOTE:** If a payer fails to give notice of non-payment, payer must pay in full

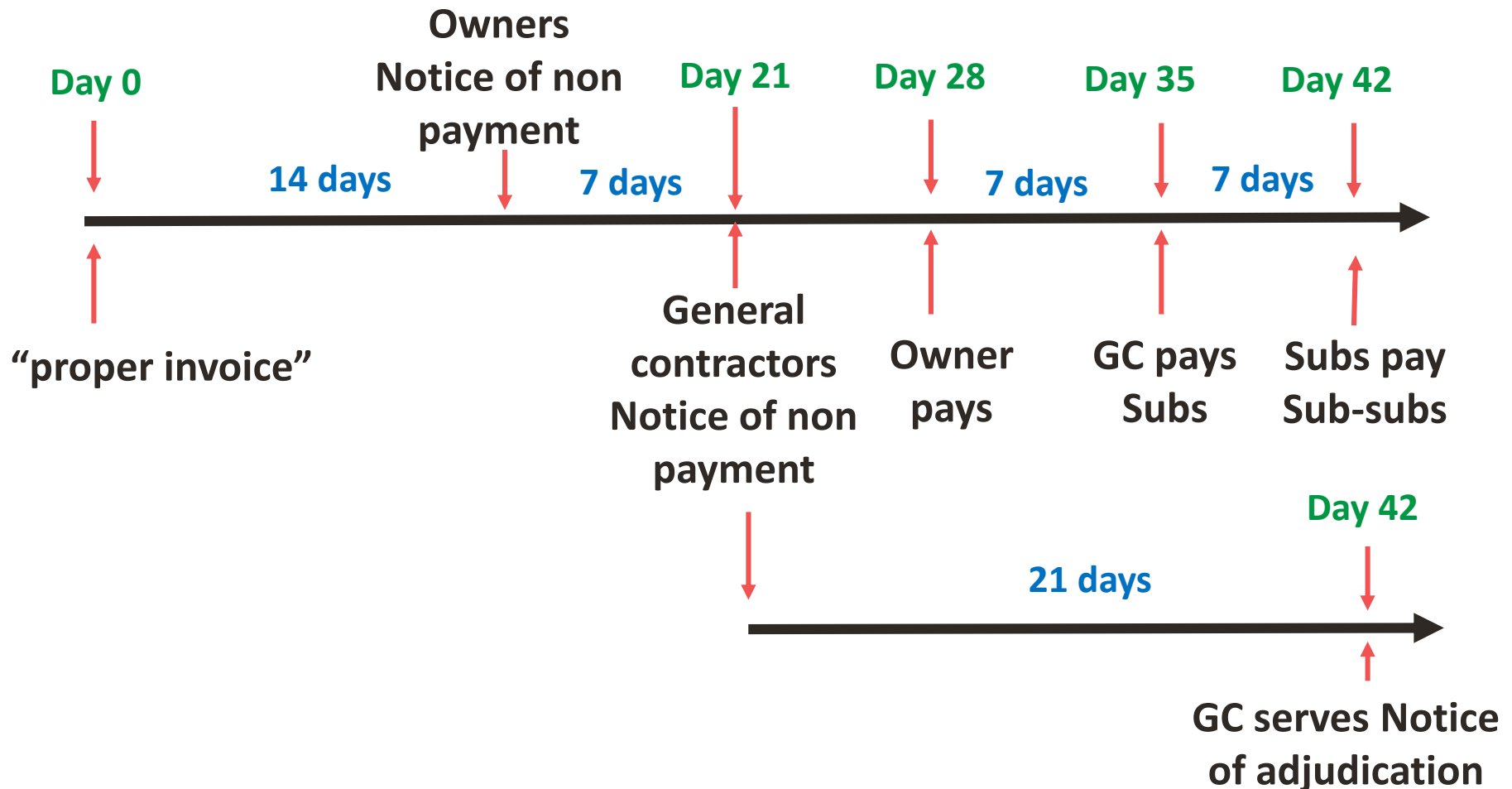
# Prompt Payment Amendments – Proportion of Payments

This applies to both GC → SC **AND** SC → SC

If non-payment, if more than one subcontractor is entitled to payment, payment must be made as follows:

- a) if the amount not paid by the owner is **specific** to services or materials supplied by a particular subcontractor or subcontractors:
  - i. the **remaining** subcontractors must be paid; **and**
  - ii. any amount paid by the owner with respect to the subcontractor or subcontractors who are implicated in the dispute must be paid to them on a proportionate basis, as applicable;
- b) in any other case, subcontractors must be paid on a **proportionate** basis.

# Prompt Payment Flowchart



# Prompt Payment Amendments – Thinking Out Loud – Owners

- Ensure funding available w/in 28 days
- Certification of “proper invoice” must be completed < 14 days after receipt
  - To allow for (possible) revision of invoice
  - To allow for issuance of notice of non-payment
  - But: be ready for adjudication

Q: What if give notice of non-payment >14days after “proper invoice”?

Q: What do you need from your Consultants?



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# Interim Adjudication Amendments

**New Part II.1 of the *The Builders' Lien Act***



# Interim Adjudication Amendments

## Goal of Amendments:

- Expedite resolution of disputes
- Minimize disruptions to project

## Authorized Nominating Authority:

- Trains adjudicators
- Qualifies adjudicator's
- Appoints adjudicator's when parties don't agree

## Who is an Adjudicator?

- Listed in the registry;
- Agreed to by the parties; or
- Appointed by the Authority

# Interim Adjudication Amendments

Disputes to be adjudicated:

- **Valuation** of services / materials provided under the contract
- **Payments**, including charge order (approved or unapproved) or proposed change order
- **Disputes** from notices of non-payment as per Part I.1
- **Set-off** claims
- Disputes respecting **costs** from adjudication process
- **Failure or refusal to certify** substantial performance pursuant to s. 41 of the *Act*
- **Any other matters** that parties agree or as per Regulations

# Interim Adjudication Amendments

Available to owners, general contractors, and subcontractors

Available even where matter being litigated / arbitrated unless it has been determined

Parties can create own procedure (in contract) as long as comply with *Act*

- Otherwise procedure in *Act* and Regulations governs

Notice of adjudication may not be given **after a contract or subcontract is completed**, unless both parties agree

Generally address one matter unless the parties and the adjudicator agree otherwise

If the parties do not agreed to a consolidated adjudication, the contractor may, require that the disputes be consolidated



# Interim Adjudication Amendments

## Adjudication Procedure – Step 1

Notice of Adjudication issued must include:

- Names and addresses of the parties
- Brief description of dispute (how and when)
- Nature of relief sought
- **May** include name of proposed adjudicator

If parties agree on adjudicator, notice to the adjudicator must be sent and they must consent to adjudicate **within 4 days** of the notice

If parties  $\neq$  agree on adjudicator, Authority appoints **within 7 days** of request

If contract or subcontract names a person as an adjudicator  
→ is of no force or effect

# Interim Adjudication Amendments

## Adjudication Procedure – Step 2

**Within 5 days** after adjudicator appointed, applicant serves:

- Copy of the original notice;
- Copy of contract / subcontract; and
- Documents to be relied upon during adjudication

Adjudicator has **broad powers**, including:

- Issue directions respecting conduct of adjudication
- Ascertain the relevant facts and law, including making inquiries without the parties being present
- Draw inferences based on the conduct of the parties
- Visit site and conduct inspection
- Obtain assistance of experts
- Exercise any other power of an adjudicator that may be specified in the contract or subcontract
- Any other powers granted by Regulations



# Interim Adjudication Amendments

## Adjudication Procedure – Step 3

Adjudicator issues determination **within 30 days** after receiving docs

- Can be extended upon adjudicator's request with consent from parties (up to 14 days) or agreement of parties

**Binding** on parties until Order from Court or decision from arbitrator

Can be filed with Court and **enforced** as Court order

**Limited ability** for judicial review (with leave) where fraud, bias, etc.



# Interim Adjudication Amendments

## Adjudication Procedure – Costs

### Costs of Adjudication:

- Adjudicator's fees shared, subject to s. 21.61
- Each party bears own costs, subject to s. 21.61
- Section 21.61:  
“If an adjudicator determines that a party ... has acted in a manner that is frivolous, vexatious, an abuse of process **or other than in good faith**, the adjudicator may provide ... that the party be required to pay some or all of the other party's **costs**, any part of the [adjudicator's] fee ... or both.”



# Interim Adjudication Amendments

## Adjudication Procedure – Set Aside

A party to the adjudication, **within 30 days** of the determination, may apply to the court to set aside the determination on the following grounds:

- a) a party was legally **incapacitated**
- b) the contract or subcontract is **invalid** or has ceased to exist;
- c) the determination dealt with a matter that may not be the **subject of adjudication** pursuant to this Part, or with a matter entirely unrelated to the subject of the adjudication;
- d) the adjudication was conducted by **someone other than an adjudicator**;
- e) the procedures did not **comply with the procedures** in the *Act*;
- f) there is a **reasonable apprehension of bias** on the part of the adjudicator;
- g) the determination was made as a **result of fraud**;
- h) any other prescribed ground.

If a determination is set aside, any amounts paid in compliance must be returned.

If set aside because invalid or ceased to exist, the matter may not participate in another adjudication



# Interim Adjudication Amendments

## Adjudication Procedure – Payment

A requirement to pay an amount is subject to any requirement to retain a holdback

If determination requires a party to pay:

- Must pay **within 10 days** after determination
- Otherwise general contractor or subcontractor can suspend work until payment of:
  - Amount payable under determination, **PLUS**
  - Interest, **PLUS**
  - General contractor's or subcontractor's costs of suspending work; **PLUS**
  - General contractor's or subcontractor's costs of resuming work



# Interim Adjudication Amendments

## Adjudication Procedure – Enforcement

A successful party may file the determination with the court to be enforced as an Order **within 2 years** of the date of the determination

The successful party must notify the unsuccessful party **within 10 days** of filing the enforcement

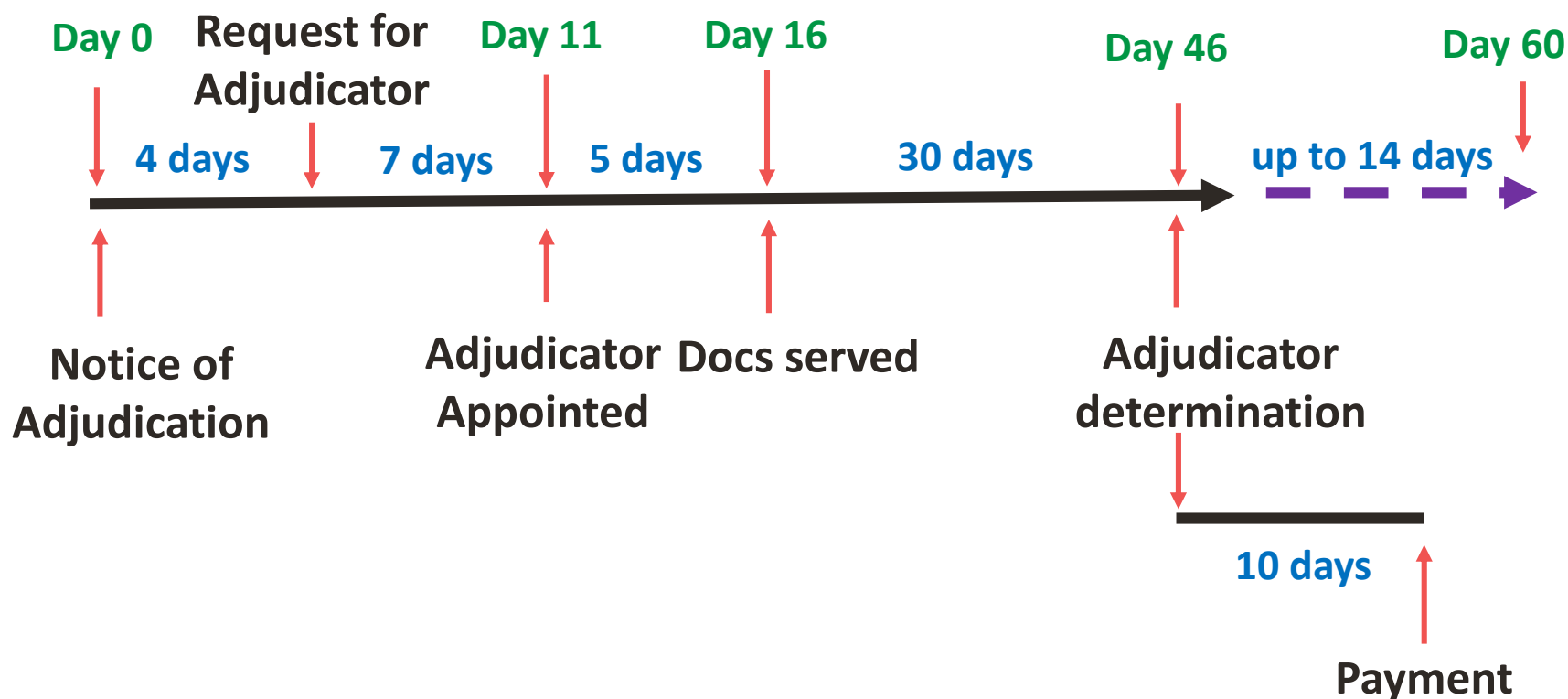
# Interim Adjudication Amendments

## Adjudication Procedure – Substantial Performance

- If an adjudicator makes a determination before the certification or declaration of substantial performance of a contract:
  - The amount determined to be payable will be **added** to the contract or the subcontract price in substantial performance; and
  - Any amount that was over paid will be **deducted** from the contract price in determining substantial performance
- However, this does not apply if the adjudicator's determination is set aside



# Adjudication Flowchart





# Interim Adjudication Amendments

## Thinking Out Loud – Owners

- Must have resources ready and available to respond to adjudication notice
  - Must keep up to date records
- Failure to comply with determination ≠ option
  - Enforceable as Court Order
  - General contractor can walk off project
- Watch out for s.21.61 (good faith)



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# **Crystal Ball Gazing Or, Where Do We Go From Here?**

# Crystal Ball Gazing

## Predictions:

- There will be teething pains
- Lot of contracts signed before coming into force of *Act*
- Lot of adjudications – at least for a few years



# Crystal Ball Gazing

Owners will have to **amend Standard Contracts** (CCDC now considering amending contracts)

- Different definitions of “proper invoice”

Owners will likely **amend Consultant agreements**:

- To deal with prompt payment issues
- To deal / assist with adjudication issues

**Q:** What consequences of failing to give notice of non-payment?

**Q:** What consequences of failing to set out all reasons for non-payment?

# Crystal Ball Gazing

## Adjudication:

- Sacrifice correctness for speed?
- How realistic that parties will re-litigate?
- How can add 3<sup>rd</sup> parties to adjudication, eg. Consultant?

**Could see large number of adjudications –  
what impact on project?**

# Summary

## **BIG changes coming**

**Amended Act & Regulations = new way of doing things**

## **Need to develop new processes to deal with:**

- Invoicing (review; certification; approval)
- Payment (w/in 28 days)
- Adjudication

**Owners: Need to revise contracts**

**Conduct on project now relevant**

# Questions





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