



Prompt Payment and Adjudication – the New Construction Act

Sealant and Waterproofing Association

Faren Bogach - Partner, WeirFoulds LLP

Caitlin Steven - Associate, WeirFoulds LLP

February 25, 2020

The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice. Pay Prompt is separate entity from WeirFoulds LLP

WeirFoulds^{LLP}



Construction Act

Two Key Changes:

- Prompt Payment
- Adjudication



Prompt Payment Regime

- new rules will require "prompt" payment of invoices submitted by the contractor
- subcontracts follow head contract rules regardless of date of subcontract
- 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”

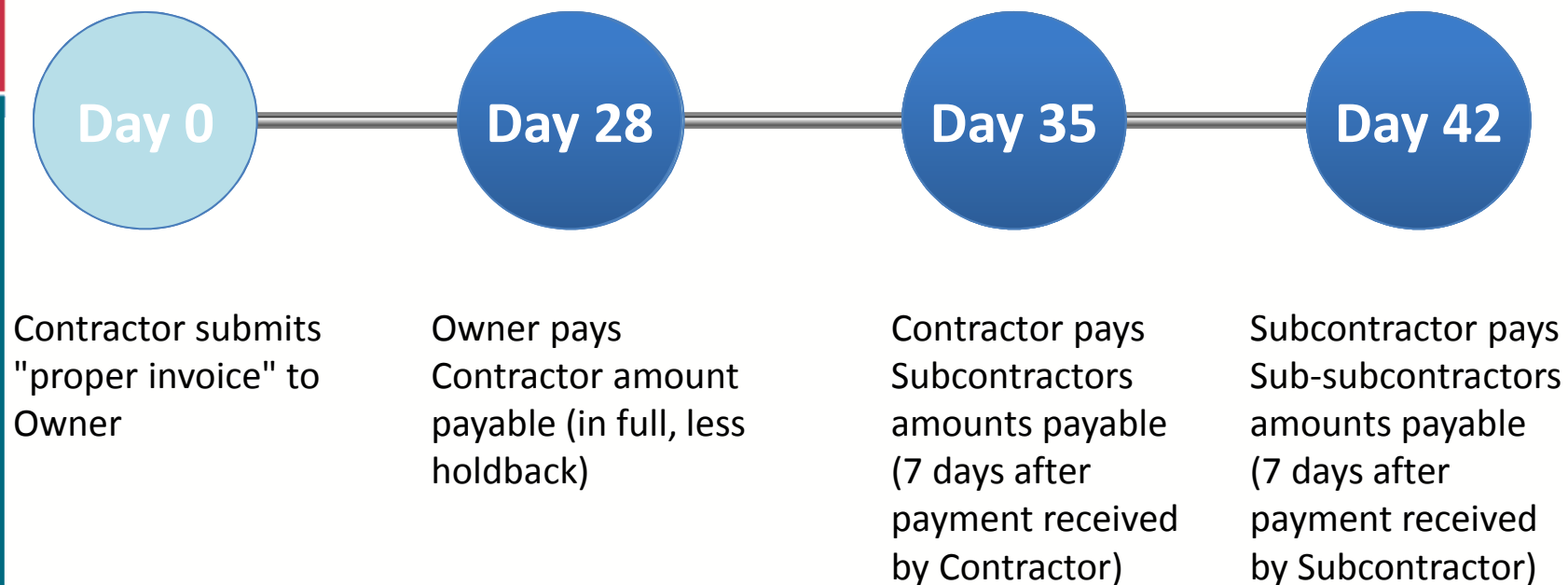
Prompt Payment Regime

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*

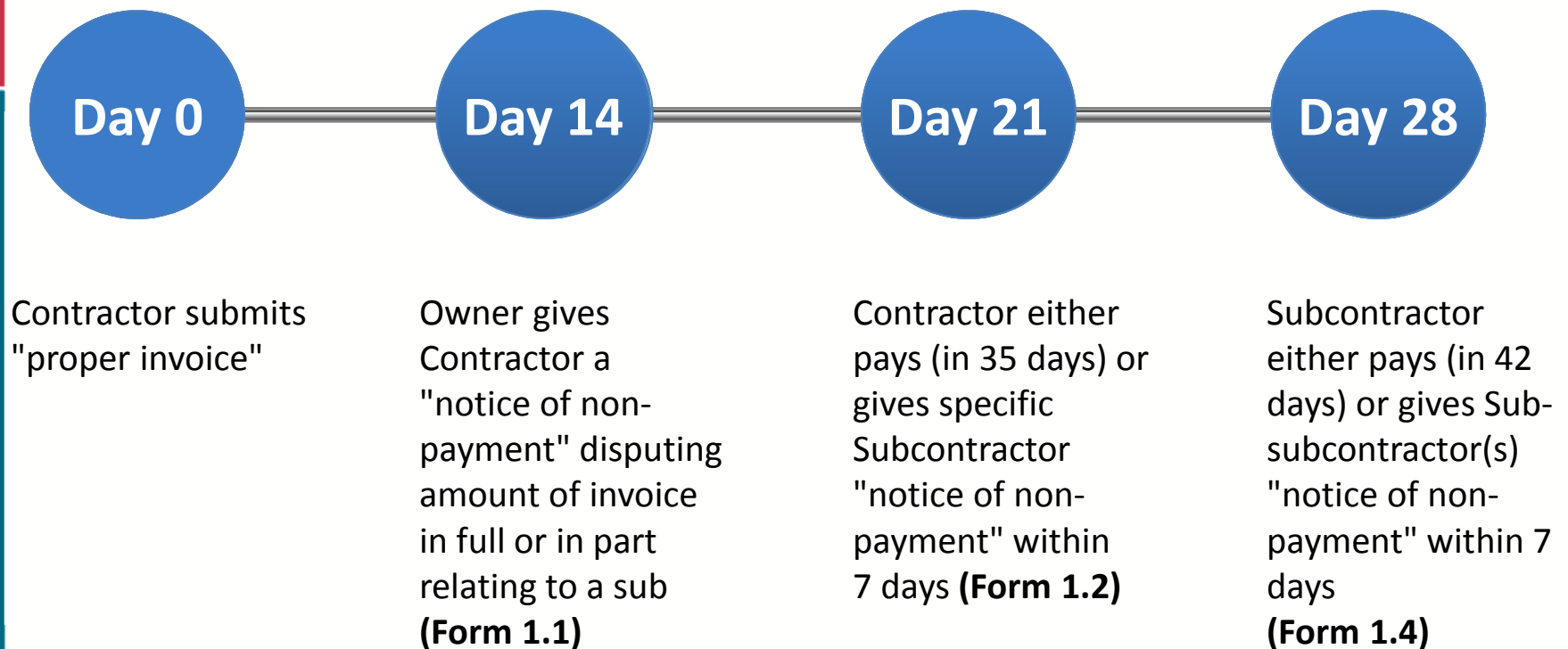
Prompt Payment Regime

No Disputes or Payment Issues



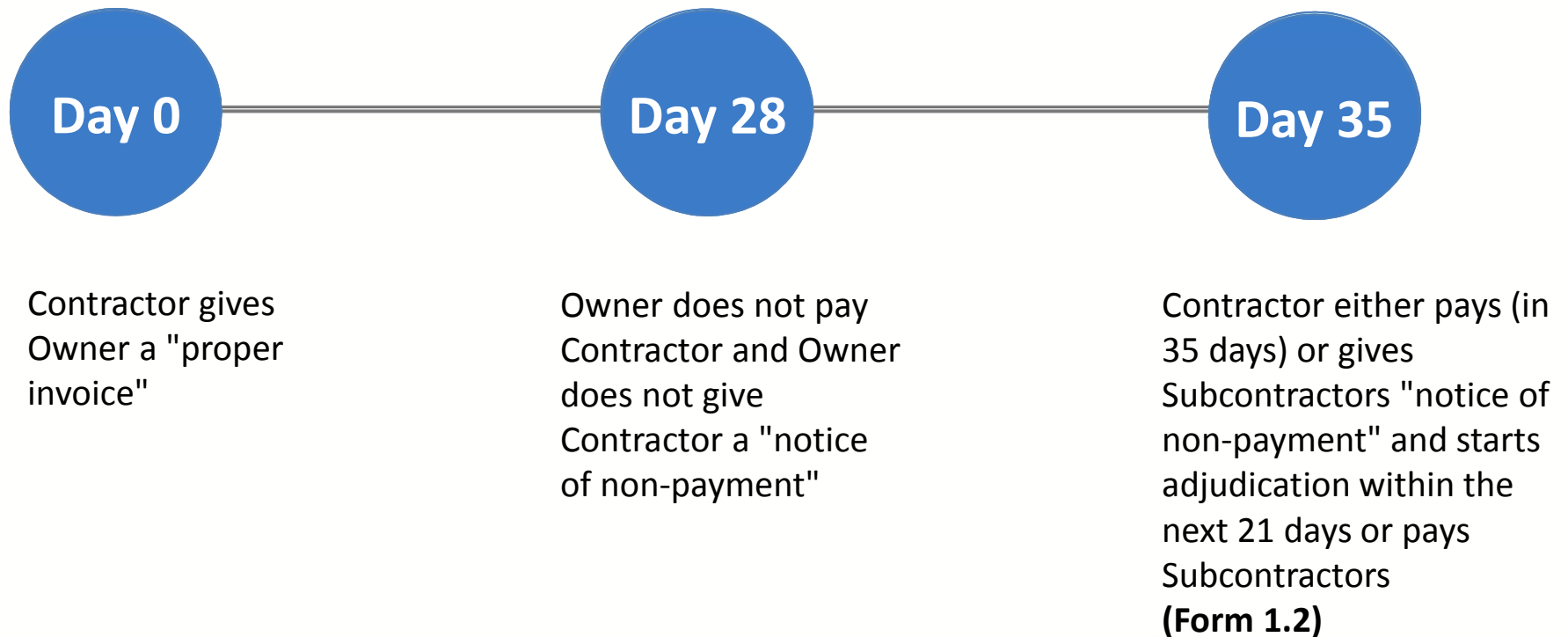
Prompt Payment Issues – Scenario 1

Specific Dispute between Owner, Contractor and Sub



Prompt Payment Issues – Scenario 2

Non-payment by Owner when due



Prompt Payment Issues – Scenario 3

Dispute between Contractor & Subcontractor

Day 0

Contractor gives Owner a "proper invoice"

Day 28

Owner pays Contractor amount payable

Day 35

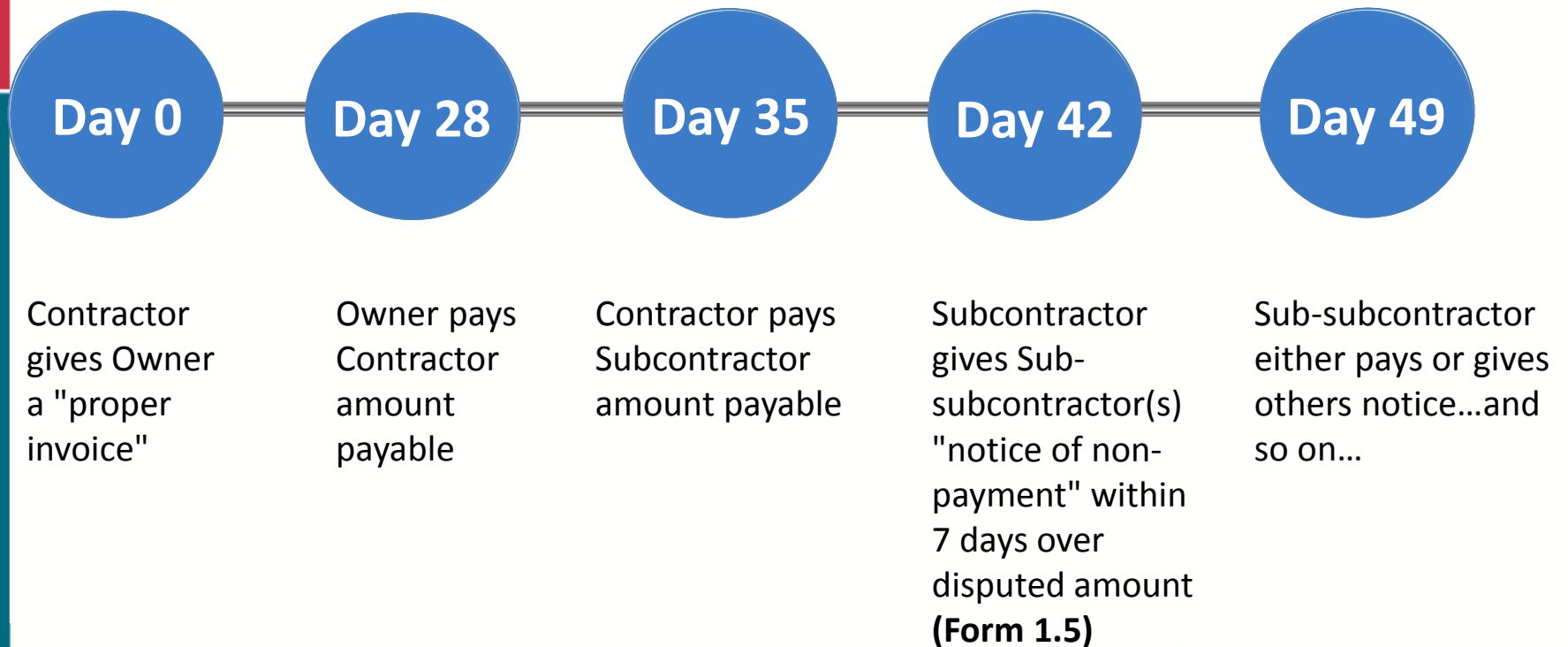
Contractor gives Subcontractor "notice of non-payment" within 7 days of receipt of payment over disputed amount
(Form 1.3)

Day 42

Subcontractor either pays (in 42 days) or gives Sub-subcontractor(s) "notice of non-payment" within 7 days and starts adjudication within the next 21 days
(Form 1.4)

Prompt Payment Issues – Scenario 4

Dispute between Subcontractor & Sub-subcontractor



Practical Implications

- need for education and training across organizations
- requires shift in mindset and approach to contracting and payment
- 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
- 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
- if subcontractor ensure that you are notified about the date the proper invoice was submitted and the date the owner paid the contractor



DISCUSSION OF PROMPT PAYMENT



Construction Act

Two Key Changes:

- Prompt Payment
- Adjudication

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
- adjudicator's fee paid equally by parties
- parties pay own costs

Adjudication

Authorized Nominating Authority (ANA)

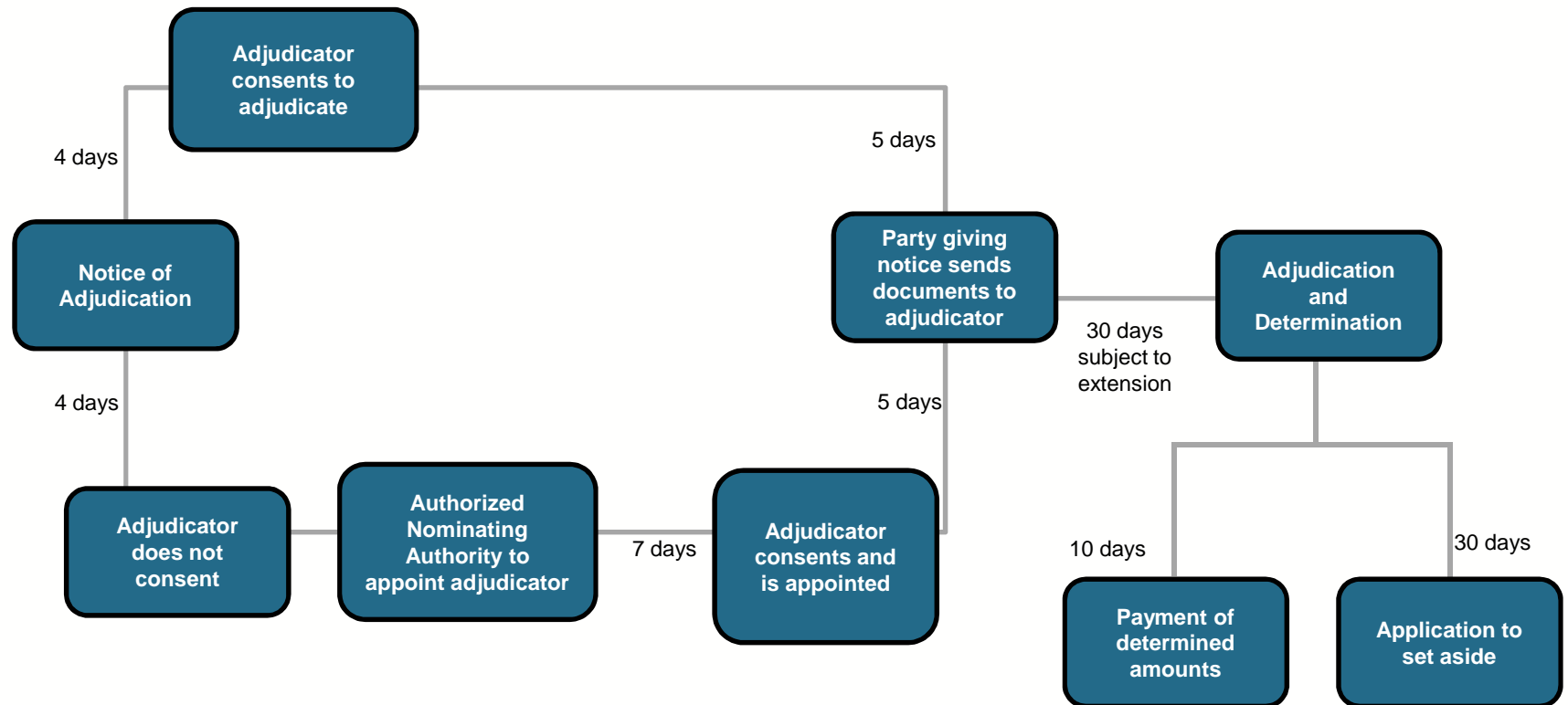
- authority governing adjudicators = Ontario Dispute Adjudication for Construction Contracts (“ODACC”)
- responsibilities:
 - develop training, educational materials
 - certify adjudicators
 - maintain registry of adjudicators
 - set fees
 - develop code of conduct, deal with complaints
 - annually report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

Adjudication

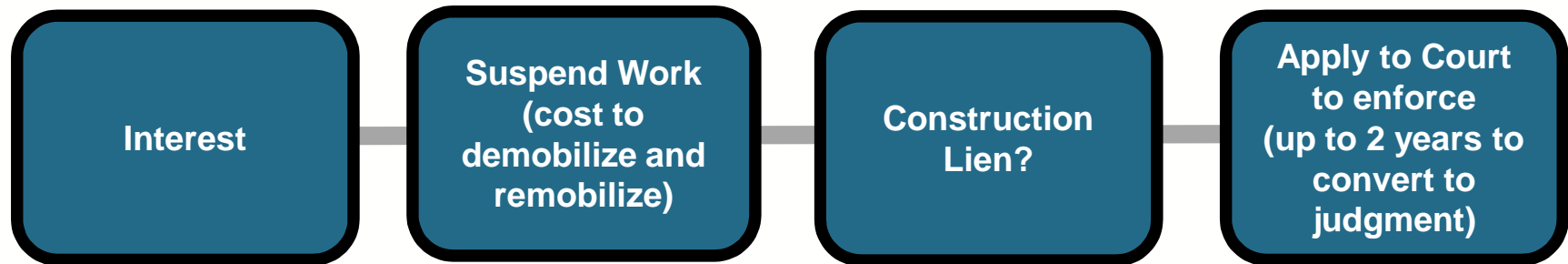
Adjudication Process

- 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
- 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



QUESTIONS?

Faren Bogach

fbogach@weirfoulds.com

416-947-5078

Caitlin Steven

csteven@weirfoulds.com

416-365-6520

WeirFoulds^{LLP}