

CONSTRUCTION ADJUDICATION

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Overview

As of October 1, 2019, construction adjudication is a new means by which construction disputes are resolved. The process is meant to be a fast and efficient way to get a ruling on an issue while the project is ongoing. Rather than taking years to determine an issue, an interim resolution is imposed so that funds can flow through the project.

The determination under an adjudication is an interim binding determination. It is not a final proclamation of an issue (the parties are free to go to Court), but it must be complied with.

It is important to note that this process applies to every construction contract in the Province of Ontario and that parties cannot contract out of these provisions. Parties can outline additional procedures in their construction contract, but those procedures cannot be in conflict with the provisions of the *Construction Act*.

It is equally important to note that a party to a construction contract can only invoke adjudication before the contract is completed. Once the construction contract is complete, there is no recourse to the adjudication process. As mentioned, this procedure is intended to be a solution resolve dispute in real time to ensure orderly payment down the construction pyramid.

Effective Date

The adjudication provisions of the *Construction Act* came into force on October 1, 2019. However, it will be some time before we start to see the full effects of these amendments.

Adjudication is only applicable to prime contracts entered into (i.e. contracts between a contractor and owner) or procurement processes that are started AFTER October 1, 2019. This means that a determination has to be made as to whether the specific dispute is determined by adjudication.

The Adjudicators

An adjudication may only be conducted by an adjudicator who is certified by the Ontario Dispute Adjudication for Construction Contracts (“ODACC”).

Certified adjudicators are professionals in the construction industry with 10 or more years of relevant experience. These are (and will be) people such as accountants, quantity surveyors, engineers, architects, quantity surveyors, project managers, contractors, subcontractors, arbitrators, or lawyers. Whether the 10 years’ experience is sufficient to become an adjudicator is at the discretion of ODACC.

In addition to this experience, the person must:

- have successfully completed the Construction Adjudication and ODACC Orientation Program
 - the online component can take between two to six hours to complete
 - the in-person component takes place over two full days
- not be an undischarged bankrupt
- not have been convicted for an indictable offence in Canada or of a comparable offence outside Canada;
- pay to ODACC the required fees, costs or charges for training and qualification as an adjudicator; and
- agree to abide by the requirements for holders of certificates
 - successfully complete the continuing training programs provided by ODACC;
 - comply with the adjudicator code of conduct;
 - provide to ODACC proof, when required, of the individual’s eligibility to hold the certificate;
 - immediately notify ODACC in writing if the individual ceases to be eligible to hold the certificate;
 - maintain records as required by ODACC A and report information respecting them to ODACC on its request;
 - pay to ODACC the required fees, costs or charges for training and qualification as an adjudicator; and
 - comply with the *Construction Act* and the adjudications regulation, and with any further directions or requirements of ODACC.

The Role of ODACC

ODACC's role is to:

- develop and oversee programs for the training of persons as adjudicators;
- qualify persons who meet the prescribed requirements as adjudicators;
- establish and maintain a publicly available registry of adjudicators;
- appoint an adjudicator when required; and
- perform any other duties or powers as may be prescribed.

ODACC is also permitted to set the fees, costs and charges for adjudications, as well as the fees payable for the certification and training of adjudicators. ODACC is a private entity and is not a government body.

Availability of Adjudication

Parties are free to include in their contracts what issues they would like to be subject to adjudication.

The following are the subjects that are required to be available for adjudication:

- the valuation of services or materials provided under the contract/subcontract;
- payment under the contract/subcontract, including in respect of a change order, whether approved or not, or a proposed change order;
- disputes that are the subject of a notice of non-payment;
- amounts retained for set-off by trustee or for lien set-off;
- payment or non-payment of holdback; and
- any other matter that the parties to the adjudication agree to, or that may be prescribed.

Commencement of Adjudication

Step One

When a dispute arises during the contract, a party may refer that dispute to an adjudication by giving the other party (with a copy to ODACC) a written notice of adjudication that includes the following:

- the names and addresses of the parties;
- the nature and a brief description of the dispute, including details respecting how and when it arose;

- the nature of the redress sought; and
- the name of the proposed adjudicator to conduct the adjudication.

The parties to the adjudication may agree to an adjudicator at the time the dispute arises (Note, they cannot agree on an adjudicator at the outset of the contract).

Upon receipt of the notice of adjudication, the proposed adjudicator has 4 days in which to confirm the appointment. If they do not, then the party that gave the notice must request that ODACC appoint the adjudicator. ODAAC then has 7 days in which to appoint one for the dispute.

Step Two

Within 5 days of the appointment of the adjudicator, the party who gave the notice of adjudication shall provide to the adjudicator a copy of the notice and shall provide the adjudicator and the other party:

- a copy of the contract or subcontract; and
- any documents the party intends to rely on during the adjudication.

Step Three

A party who receives a notice of adjudication has a right to respond. The timeline for a response is mandated by the adjudicator who is engaged for that dispute.

Powers of an Adjudicator

In making a determination of a dispute, and subject to the requirements of the *Construction Act*, an adjudicator may conduct the adjudication in a manner he or she determines appropriate. In other words, so long as there is a fair and impartial process, an adjudicator is free to establish a process by which to conduct the adjudication.

An adjudicator has the following statutory powers:

- issuing directions respecting the conduct of the adjudication;
- taking the initiative in ascertaining the relevant facts and law;
- drawing inferences based on the conduct of the parties to the adjudication;
- conducting (subject to the consent of the owner of the premises) an on-site inspection of the improvement that is the subject of the contract or subcontract;

- obtaining the assistance of a merchant, account, actuary, building contractor, architect, engineer or other person in such a way as the adjudicator considers fit, as is reasonably necessary to enable him or her to determine better any matter of fact in question;
- making a determination in the adjudication; and
- any other power that may be prescribed.

Timing for a Determination

An adjudicator is required to provide written reasons for their determination within 30 days of receiving the notice of adjudication, a copy of the contract/subcontract, and the documents that the parties intend to rely on.

This 30-day deadline can be extended, at any time before its expiry:

- on the adjudicator's request, with the written consent of the parties to the adjudication, for a period of no more than fourteen (14) days; or
- on the written agreement of the parties to the adjudication, subject to the adjudicator's consent, for the period specified in the agreement.

In the event that an adjudicator makes his/her written determination after the deadline, that determination is of no force and effect.

Early Termination of an Adjudication

The parties may, at any time after the notice of adjudication and before a determination, agree to terminate the adjudication (i.e. if the matter settles).

An adjudicator may resign from an adjudication if they determine that the matter is not eligible for adjudication, or he or she is not able or competent to conduct the adjudication.

If the adjudicator fails to complete an adjudication, the party who gave the notice of adjudication may commence the adjudication again.

Effect of a Determination

Until there is either a determination of the matter by a court, a determination of the matter by way of an arbitration, or a written resolution between the parties, the determination is binding on the parties.

A determination for payment of money has to be paid within 10 days. If it is not paid, then interest accrues on the amount payable (at the contract rate, but if there is no stated contract rate then the *Courts of Justice Act* rate applies).

The greatest leverage is that the failure to make the payment within 10 days allows the contractor/subcontractor to suspend work on the project. If work is suspended, then that party is under no obligation to return to site until the following is paid:

1. the amount of the determination;
2. interest;
3. all reasonable costs associated with the suspension of the work; and
4. all reasonable costs incurred to resume the work are paid.

These costs, in addition to the critical impact on the project means that there are serious repercussions for not following a determination. Thus, when faced with a determination for payment of money, the payment should be made immediately to avoid these costs.

In addition, a determination may be filed with the Court and enforceable in the normal course. It must be filed within 2 years of the later of: 1) the date the determination was communicated, or 2) the final determination of an application for judicial review.

Consolidated Adjudications

As a general rule, an adjudication must only address one matter. However, the parties to an adjudication and the adjudicator may agree otherwise.

If the same or related matters in respect of the same project are the subject other adjudications, the parties to all of the adjudications may agree to have the disputes heard together by a single adjudicator as a “consolidated adjudication”.

If the parties to all of the adjudications do not agree to the consolidation, the contractor still has the ability to require the consolidation of the adjudications by giving a written notice of consolidation within 5 days of the adjudicator receiving the documents relied on. The notice must include the name of one proposed adjudicator to conduct the consolidated adjudication and, for each adjudication:

- the names and addresses of the parties;
- the nature and a brief description of the dispute, including details respecting how and when it arose;
- the nature of the redress sought; and
- a copy of the notice of adjudication.

Costs of Adjudication

The parties and adjudicator can agree to the fee for an adjudication in advance. If they do not agree, then there is a set fee that has been determined by ODACC as follows:

Amount Claimed	Adjudication Fee
< \$9,999	\$800
\$10,000 - \$24,999	\$1,000
\$25,000 - \$34,999	\$2,000
\$35,000 - \$49,999	\$3,000
\$50,000 - \$249,999	\$250/hr
\$250,000 - \$499,999	\$400/hr
\$500,000 - \$999,999	\$500/hr
> \$1,000,000	\$750/hr

In addition to these amounts, if the adjudicator retains the services of another person (i.e. accountant, architect, engineer, etc.) then the adjudicator may fix that cost which shall be reasonable and proportionate, and direct that the parties pay that cost.

The parties share the cost of an adjudication unless the adjudicator determines that one party to the adjudication has acted in a manner that is frivolous, vexatious, an abuse of process or other than in good faith.

Likewise, the parties to an adjudication bear their own legal costs unless the adjudicator determines that one party to the adjudication has acted in a manner that is frivolous, vexatious, an abuse of process or not in good faith.

Challenging a Determination

Aside from taking the matter to court/arbitration, the only way to challenge a determination of an adjudicator is to have the determination set aside on judicial review.

First, the party seeking to have it set aside must obtain leave from the Divisional Court. The motion for leave must be filed within 30 days of the determination and the Court may dismiss that motion without reasons. No appeal lies from an order on a motion for leave to bring an application for judicial review.

If leave is granted, a determination can only be set aside if one (or more) of the following is established:

- the applicant participated in the adjudication while under a legal incapacity;
- the contract or subcontract is invalid or has ceased to exist;
- the determination was of a matter that may not be the subject of adjudication under the *Construction Act*, or of a matter entirely unrelated to the subject of the adjudication;
- the adjudication was conducted by someone other than an adjudicator;
- the procedures followed in the adjudication did not accord with the procedures to which the adjudication was subject under the *Construction Act*, and the failure to accord prejudiced the applicant's right to a faire adjudication;
- there is a reasonable apprehension of bias on the part of the adjudicator; and/or
- the determination was made as a result of fraud.

In the event that leave is not granted or the application fails, the party may still seek to have a final determination by a court or arbitrator as the case may be. The determination by the adjudication is admissible as evidence in the proceeding, however the adjudicator is not compellable to give evidence in any action or other proceeding in respect of a matter that was the subject of the adjudication.

Conclusion

Construction adjudication has been used in other jurisdictions around the world for some time. It is a fundamental change in the way that disputes can be resolved in Ontario. The quick turn around on making a determination means that disputes can be handled early and often, hopefully preventing a protracted legal dispute after the contract is completed.