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Adjudication under the New *Construction Act*

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This presentation does not constitute legal advice or a legal opinion on any matter discussed.

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Adjudication – what is it and why do it?

- “The teeth for ensuring compliance with the pending prompt payment requirements”
- Dispute resolution whereby a qualified individual who is not a judge reviews a dispute to make a quick determination on an interim basis
- Aims of adjudication:
 - Remove dispute gridlock
 - Eliminate late payment and non-performance
 - Free up cash flow and resources

Who decides what and when?

- Adjudicators (s. 13.1)
 - Qualified by the Authorized Nominating Authority designated under the Act
- Adjudicable Disputes (s.13.5)
 - Any party to a contract or subcontract may refer dispute
 - Only available for disputes relating to matters prescribed by statute – namely, non-payment
 - Adjudication must be commenced before Completion of Contract (unless agreed otherwise)
- Consolidation (s. 13.8)

Timelines

Timeline	Step in Adjudication Process
Commencement of Process	Claimant delivers Notice of Adjudication, which includes proposed adjudicator (s. 13.7)
Parties may agree on adjudicator or may have Authority appoint one. If adjudicator does not accept appointment within 4 days following Notice of Adjudication having been given, Claimant is to request that the Authority appoint an adjudicator, which the Authority must do within 7 days of receipt of request for appointment.	Adjudicator appointed (ss. 13.7 and 13.9)
Within 5 days of appointment of adjudicator	Adjudicator receives Claimant's documents (s. 13.11)
-	Respondent may respond in writing, subject to directions of any appointed adjudicator (s. 13.11.1 and Reg. 306/18, s.17)
Within 30 days of receiving Claimant's documents (subject to limited exceptions)	Adjudicator renders decision (s. 13.13)
Within 10 days of receipt adjudicator's decision	Any payments ordered, must be made (s. 13.19(2))

What else do I need to know?

- Interest on late payments (s. 13.19(3))
- Suspension of work (s. 13.19(5))
- Decision enforceable in court (s. 13.20)
- Parties bear their own costs (unless frivolous, vexatious conduct) (ss. 13.16 and 13.17)
- Judicial review (s. 13.18)

“Things that make you go hmm?...”

- Does the adjudication regime apply to me?
 - Transition provisions
- Can I provide for adjudication procedure in my contract?
 - Appointment of adjudicator, but don't name any specific person
 - Timing for exchange of documents
 - Oral hearing
- How can I best prepare for my adjudication?



Andrew Heal

The Adjudication Experience in Other Jurisdictions: Similarities and Differences

- What we can learn from Adjudication in the UK
- What's Similar in Ontario version
 - Adjudication (interim dispute resolution) takes inspiration from the UK process and adjudication in other jurisdictions: Australia, Singapore, Hong Kong (basically other common law countries)
 - Been around since *Housing Grants, Construction and Regeneration Act 1996*
 - No Adjudication yet in the USA
- What's Different in Ontario version
 - Applies to projects large and small, not just PPP's
 - Still have lien rights, trust remedies, and breach of contract claims
 - Must be commenced during project performance, not after

The Adjudication Experience in Other Jurisdictions: Similarities and Differences



Payment Cycle is Now Faster

By General Contractor/ Construction Manager



By Owner

The New Construction Act: Adjudication Concerns

- Procedural fairness
 - Tight timelines
 - Binding in the short term
 - “Quick and dirty” decision
 - “Ambush” and “smash and grab” tactics – UK concerns
- We have a body of UK case law to draw upon

The Adjudication Experience in Other Jurisdictions: Similarities and Differences

- UK experience – early challenges to jurisdiction
 - There may be jurisdiction challenges: adjudicator lacked jurisdiction, dispute had not yet crystalized
 - Adjudicator not properly appointed, or failed to decide in time
- UK experience – natural justice issues
 - Communications with one party (not both), granting insufficient time to respond, failure to give reasons (must be sufficiently probing to withstand scrutiny)
- Ontario – decision is interim binding and admissible later
- Take your shot now, don't wait

The Adjudication Experience in Other Jurisdictions: Similarities and Differences

- UK arbitration claims have dried up, adjudication is used more often
- Adjudication outcome becomes the default, facilitates the flow of payment
 - UK courts have discouraged a “re-run” of the adjudication outcome
 - Limited means to challenge outcome “judicial review”
 - “Procedural niceties” cannot be accommodated in expedited adjudication
 - How much process is enough to make an adjudication fair?
 - Adjudication will de-escalate disputes from liens, litigation or arbitration
 - What about where interim payment claim is dismissed and the contractor or subcontractor still claims a lien?

Glenn Ackerley

Impact on the Construction Industry

- Pros
 - Lower cost/quicker dispute resolution
 - Improved cashflow
 - Improved work planning
 - Improved productivity
- Cons
 - Diverted resources
 - Time-intensive
 - Risk of ambush
 - “Rough justice” decisions

Impact on the Construction Industry

- Collateral impacts
 - Preserve relationships or make adversarial?
 - Replace negotiation/mediation?
 - Changing role of advisors?
 - Lawyers
 - Claims consultants/expert witnesses
 - Increased complexity leading to increases costs?
 - Reduced resort to construction liens?

Bruce Reynolds

Alignment

- Report to the Federal Government
- Manitoba – Bill 218
- Saskatchewan – Bill 152
- Nova Scotia – Bill 119



Questions?

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