

# Goodmans<sup>LLP</sup> Update

## Adjudication under the *Construction Act*: Tight Timelines and Document Management

The *Construction Lien Amendment Act* was passed in December 2017 and substantively changed the *Construction Lien Act*, now the *Construction Act* (the “*Act*”). Its primary purposes were to: (i) modernize the existing *Construction Lien Act*; (ii) provide prompt payment legislation throughout Ontario; and (iii) introduce adjudication provisions for disputes arising in the course of a contract. For further information on the *Construction Act* see our June 20, 2018 Update, *Construction Act: Here We Go!*, as well as our December 17, 2018 Update, *Bill 57 and Amendments to the Construction Act*.

### Adjudication

One of the most significant changes introduced in the *Act* is an adjudication regime to resolve disputes on construction projects as they arise in the course of the project, rather than at the end of a project.

Unlike typical litigation, or even arbitration, which usually are “after the fact” processes requiring parties to recreate the history, the new adjudication process is intended to achieve real time resolution of construction disputes at unprecedented speed. Therefore, members of Ontario’s construction industry, including owners, contractors and subcontractors, need to ensure they are well positioned to initiate and respond to claims under the tight timelines set out in the *Act*.

### Which Contracts Are Subject to Adjudication?

Although certain provisions of the *Act* came into force in July 2018, the adjudication provisions will not come into effect until October 1, 2019. Importantly, even then, the adjudication provisions will only apply to construction contracts and subcontracts entered into on or after October 1, 2019.

### What Types of Disputes are Subject to Adjudication?

Pursuant to section 13.5(1) of the *Act*, parties will be able to adjudicate disputes relating to:

- i. the valuation of services or materials provided under the contract or subcontract;
- ii. payment under the contract or subcontract, including under approved, unapproved, and proposed change orders;
- iii. disputes that are the subject of a notice of non-payment under the new prompt payment regime;
- iv. amounts retained as set-off;
- v. non-payment of holdback; and
- vi. any other matter the parties to adjudication agree to.

Unless the adjudicator and the parties agree otherwise, only one “issue” at a time can be referred to adjudication.

Furthermore, unless agreed by the parties, an adjudication may not be commenced after the date the contract or subcontract is completed (section 13.5(3)).

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## Who Can Refer a Dispute to Adjudication?

Either party to a contract may refer a dispute to adjudication. Therefore, while an owner can adjudicate a dispute with a contractor, an owner cannot adjudicate a dispute with a subcontractor.

## How is Adjudication Commenced?

Pursuant to section 13.7 of the *Act*, a party commences the adjudication process by giving the other party written notice of adjudication that includes:

- i. the names and addresses of the parties;
- ii. the nature and a brief description of the dispute, including details respecting how and when it arose;
- iii. the nature of the redress sought; and
- iv. the name of a proposed adjudicator to conduct the adjudication.

## What Timelines Apply to Adjudication?

Unlike typical litigation, where parties have months to gather documents, and thereafter complete discoveries, the adjudication process is intended to be completed from start to finish in 46 days. Therefore, a party who is organized and able to quickly assemble relevant documents will be at a considerable advantage to initiate and respond to claims.

Once a party has provided a written notice of adjudication, the parties have four days to agree on an adjudicator, failing which one will be chosen by the Authorized Nominating Authority (section 13.9).

Pursuant to section 13.11 of the *Act*, within five days of the adjudicator being accepted or appointed, the referring party must provide the adjudicator with: (i) the written notice of adjudication; (ii) a copy of the contract or subcontract; and (iii) any documents they intend to rely on. Although there is no timeline specified for when the responding party must provide its own materials, once the adjudicator receives the referring party's materials, the adjudicator must release its decision within 30 days (section 13.13(1)). Therefore, the responding party will necessarily be required to respond well within that 30-day limit. This poses a potential disadvantage to the responding party. However, the adjudicator can request up to 14 additional days to provide its decision, but this request can be rejected by either party (section 13.13(2)).

Furthermore, although the parties can agree to further time extensions, any such request is subject to the adjudicator's consent (section 13.13(2)).

Once the adjudicator has made its decision, if payment is ordered, it must be made within 10 days (section 13.19(2)).

## What is the Procedure for Adjudication?

The *Act* allows parties to agree to an adjudication procedure in their contract. If the parties fail to do so, then the procedures under the *Act* govern (section 13.6).

The *Act* provides little specific guidance on how the adjudication should be conducted. Instead, the adjudicator is given wide discretion to "conduct the adjudication in the manner he or she determines appropriate in the circumstances" (section 13.12(4)).

Furthermore, pursuant to section 13.12 of the *Act*, the adjudicator has the power to issue directions respecting the conduct of the adjudication, including the power to:

- i. take the initiative in ascertaining the relevant facts and law;

- ii. draw inferences based on the parties' conduct;
- iii. conduct onsite inspections of the improvement (subject to the owner's consent); and
- iv. obtain the assistance of an expert (with the adjudicator able to order that one or both parties pay the expert's fees).

## Who Pays for Adjudication?

The parties to the adjudication will each be responsible for an equal share of the adjudicator's fees (section 13.10(3)). Furthermore, unlike traditional litigation, where the unsuccessful party is often responsible for a portion of the other side's legal costs, each party to an adjudication will be responsible for their own costs, regardless of the outcome (section 13.16). However, an adjudicator has discretion to order a party to pay all or a portion of the other party's costs where the party acted in a manner that was "frivolous, vexatious, an abuse of process or other than in good faith" (section 13.17).

## How Are Adjudication Decisions Enforced?

Once the adjudicator has rendered its decision, either party may file the determination with the court. The decision is then enforceable as if it were a court Order, including by way of a writ of execution and garnishment (section 13.20).

Perhaps more importantly, in the event a party fails to make the payment ordered by the adjudicator, the unpaid party is entitled to suspend its work on the project. The party in default is then not only responsible to pay the amounts ordered by the adjudicator, plus interest, but they are also responsible to pay the costs of the suspension and any remobilization costs (section 13.19).

## Can an Adjudicator's Decision be Appealed?

An adjudicator's decision cannot be appealed in the traditional sense; however, the decision is an interim decision and therefore the parties are still able to bring the matter before the court or to arbitration once the project is complete. However, the adjudicator's decision remains binding on the parties throughout the project until a determination is made by the court or an arbitrator, or until the parties agree otherwise (section 13.15).

In addition, either party to the adjudication can bring an application for judicial review to set aside the adjudicator's decision. Under the *Act*, to seek judicial review, a party must first bring a motion for leave within 30 days of the adjudicator's decision (section 13.18). The adjudicator's decision may be set aside based on one of the following grounds:

- i. at the time of the adjudication, one party was operating under a legal incapacity;
- ii. the contract between the parties was invalid or ceased to exist;
- iii. the determination dealt with a matter that could not be adjudicated, or was unrelated to the subject of the adjudication;
- iv. the adjudication was conducted by someone not qualified to be an adjudicator;
- v. the procedure for the adjudication did not comply with the procedures set out in the *Act*;
- vi. there was a reasonable apprehension of bias on the adjudicator's part; or
- vii. the adjudicator's decision was made as a result of fraud (section 13.18(5)).

Based on these enumerated grounds, it appears that whether the adjudicator got the decision "right" or "wrong" is not a basis for judicial review. These grounds reflect the fact that an adjudicator must make its decision under tight timelines and that the goal of adjudication is a speedy resolution, even if that means sacrificing "correctness".

## How Can You Prepare for the New Adjudication Regime?

Although the new adjudication regime is still several months away, owners, contractors and subcontractors should start positioning themselves for success. With adjudication's focus on speed, parties need to ensure their document management systems are accurate, organized, and

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current, and that documents are easily accessible. A party who can quickly pull together the relevant documents to bring or respond to a claim will have an immediate advantage; forewarned is forearmed!

The *Act* gives considerable leeway to the parties to specify in their contract agreement the adjudication procedures to be followed. Owners, contractors and subcontractors should begin considering what type of procedure best suits their interests, and ensure these procedures are clearly set forth in their contracts. Notably, parties are prohibited from contracting out of the *Act*.

For further information concerning these developments, please contact either of the authors or any other member of our [Construction Law Group](#).