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ADJUDICATION OF CONSTRUCTION CLAIMS



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A BRAVE NEW WORLD: QUALIFYING, CERTIFYING AND REGULATING ADJUDICATORS

As of October 1, 2019, it was a brave new world in Ontario, at least with respect to the resolution of construction disputes. With the coming into force of Part 11.1 of the *Construction Act* and Ontario Regulation 306/18 made under the Act, industry participants will be able to resolve certain disputes by way of adjudication. Adjudication will be undertaken by a third-party “neutral”, an adjudicator, who is empowered to render an interim binding decision generally within 30 days from the date all required documents have been submitted.

Adjudication is not arbitration nor is it akin to the judicial system. The goal of adjudication is to resolve payment disputes quickly, so that money can flow through the construction pyramid without unnecessary delay; and work on projects can continue unfettered by the stand-offs that are often the consequence of protracted disputes over payment. Indeed, adjudication has best been described as a system of rough justice, where the

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adjudicator possesses inquisitorial powers, and the usual rules of evidence do not apply. Thus, for the system to function as intended, “who” the adjudicators are, including how they are selected and regulated, is as important as “what” the process of adjudication is.

As noted in “*Striking the Balance*”, the April 2016 Report regarding “Prompt Payment” and “Adjudication” in Ontario, the prescribed requirements to qualify as an adjudicator cross the spectrum. In the U.K., there are no prescribed requirements to become an adjudicator; while at other end of the spectrum, in Australia for example, one must possess a professional degree like engineering or law, must have at least five years’ experience in administering construction contracts, and must have completed the required training.

Additionally, to ensure a consistent level of competency, most jurisdictions having an adjudication regime have implemented a regulatory body or bodies to oversee the training and qualification of adjudicators. In the U.K., a variety of institutions like the Association for Consultancy and Engineering (ACE) and the Chartered Institute of Arbitrators (CIArb) are designated as Adjudicator Nominating Bodies (ANBs) and provide the training and maintenance of adjudicator rosters. By contrast, the regime in Ontario will be administered by a single Authorized Nominating Authority (ANA), being ADR Chambers, which was appointed by the provincial government in July 2019 following a competitive request for proposal process. The ANA will be known as Ontario Dispute Adjudication for Construction Contracts (ODACC) which will service the construction industry across Ontario.

The key goals of ODACC include:

- proportionality in the conduct of an adjudication, and the desire to avoid excess expense (that is, the cost of the process should be proportionate to the amount in dispute);
- civility, procedural fairness, competence, and integrity in the conduct of adjudications; and
- ensuring that the duties performed within the adjudication processes are exercised consistently, impartially, and efficiently.

The April 2016 Report also recommended that “*explicit criteria*” be adopted as it would “*assist in ensuring that Ontario develops a well-qualified group of adjudicators*”; and indeed, the regulators adopted the recommended prescribed requirements in the Regulation, which requirements include that an individual:

- have at least 10 years of relevant working experience in the construction industry;
- has successfully completed the ANA’s qualification training programs; and
- has made payment of any required fees, costs and charges for training and qualification as required by the ANA.

Notable is the fact that the applicants need not possess a professional degree, but rather the emphasis is placed upon “*relevant working experience*”.

“*Relevant working experience*” is defined in the Regulation as including: “*experience working in the industry as an accountant, architect, engineer, quantity surveyor, project manager, arbitrator or lawyer*”. Given that adjudication is not intended to replicate litigation, it makes sense then that adjudicators are not necessarily lawyers. The April 2016 Report indicates that, in the U.K., “*the majority of Adjudicators are not chosen for their expertise as lawyers, but rather for expertise in relevant technical subjects*”. Thus, parties are given the flexibility of appointing an adjudicator with the experience that best suits the nature of the dispute to be adjudicated.

“*Good character*” requirements are also included in the Regulations. An adjudicator applicant cannot be an undischarged bankrupt nor have been convicted of an indictable offence in Canada or a comparable offence outside of Canada; and, as part of the application process, adjudicator applicants must make specific declarations to that effect. Interestingly, such criteria mirror the requirements for licensure of most self-regulating professions in Ontario, including the Law Society of Ontario and

the Professional Engineers of Ontario. And similarly, those holding a certificate of qualification will also have to adhere to a code of conduct, and in failing to do so may risk suspension or revocation of their qualification.

The adjudicator qualification process developed by ODAAC appears to be extensive and includes:

1. Completion of a two-day orientation program offered by ODACC. The program provides potential candidates with overviews of the adjudication regime, of the Act, and of the Adjudicator’s Code of Conduct; practical tips on managing and conducting adjudications; and a familiarity with the appointment process and ODACC procedures. More information is available online at <www.sfhgroup.com/odacc-program>.
2. Upon successful completion of the orientation program, an adjudicator applicant must complete the ODACC online quality evaluation process and may be required to submit a video to demonstrate their ability to conduct adjudications; and
3. Once the evaluation process is complete, the adjudicator applicant must complete the Adjudication Application Form which can be found online at <<https://adrchambers.com/wp-content/uploads/2019/08/Application-ODACC.pdf>>.

As part of the adjudication application step, in addition to attesting to the prescribed qualifications, adjudicator applicants must indicate the following:

- their proposed hourly rate for ODAAC adjudications;
- whether they are prepared to fix their fees charged for other arbitrations to the same rate as proposed for ODAAC adjudications; and

- the geographic locations in which they are prepared to work.

Adjudicator applicants must also agree to abide by the ODAAC Adjudicators' Code of Conduct, which is appended to the Adjudication Application Form. The "draft" Code of Conduct requires, among other things, that an adjudicator will:

1. uphold principles of civility, procedural fairness, competence, and integrity in conducting the adjudication;
2. ensure that the costs and time required for the adjudication are proportionate to the value of the claim and the parties' expectations;
3. avoid conflict of interest;
4. maintain confidentiality; and
5. advise ODAAC immediately of any change in circumstances which result in a contravention of the requirements under the Regulations.

While the Code speaks to consequences for non-compliance, which include suspension or cancellation of the Certificate of Adjudication, what the complaints procedure entails is yet unknown. In the Code, the process is as set out on the ODACC website; however, at the time of this writing, no procedure has yet been published.

Indeed, much has yet to be revealed. For sure, the ease with which this initial qualification process is implemented, and the quality of the "founding" adjudicators put forward under this initial process will lay the foundation for what is to come. What we do know for sure is that the construction industry in Ontario will undergo significant change as the adjudication process is implemented.



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THE AUTHORITY AND JURISDICTION OF CONSTRUCTION ADJUDICATORS

It is indisputable that disputes are a frequent feature of any construction project. In addition to the age-old typical complaints about non-payment or poor workmanship, claims related to schedule delay and productivity have gained popularity in recent years. Everyone expects that parties will be exchanging large binders filled with documents supporting their respective claims for compensation and relief at the conclusion of almost every project.

The need to resolve these large, complex construction disputes has led to the rise of mediation and arbitration as alternatives to the protracted and public process of court litigation. Mediation can be incredibly valuable as a means of bringing many project participants together to reach closure on claims through negotiated settlements. Arbitration offer parties the opportunity to have their disputes heard and decided by experienced and specialized arbitrators, out of the public eye.

Both these processes are essential tools in resolving construction disputes. However, they both tend to be used *after* the completion of the project, not when the disputes are "ripe". Now, with the arrival of adjudication in Ontario on October 1, 2019, a whole new tool has been added to the toolbox of remedies available to deal with construction project disputes.

One of the fundamental benefits of adjudication, compared to any of the other traditional approaches to dispute resolution, is *timing*. Adjudication offers parties to a dispute both a way of getting a

decision about a dispute in a matter of weeks, rather than months or years, and the process itself can be initiated in real-time while work on the project continues.

The second benefit is the lower *cost* of adjudication as a decision-making process, compared to the alternatives. Ontario Dispute Adjudication for Construction Contracts (ODACC) (the name given to the Authorized Nominating Authority described in the *Construction Act*) has created a fee structure based on the size and complexity of the claim in question. For example, a determination on a dispute valued up to \$10,000 can be obtained for a base fee of \$800 (with that cost split between the parties). More complex disputes attract higher adjudication fees, but the rates are still relatively modest in relation to the amounts in issue.

The introduction of adjudication under the *Construction Act* has raised many questions about how the process will work in practice. Other articles in this special series address questions about timing issues, transition rules, appointment of adjudicators, and enforcement of adjudicators' decisions. This article will focus on the jurisdiction and powers of the adjudicator, and their connection with the key priorities of *timing* and *cost*.

Availability of Adjudication under the Act

Under Part II.1 — the new part of the *Construction Act* containing the adjudication rules — adjudication is now available to a fixed class of project participants: parties to: (i) “a contract” or (ii) “a subcontract”. By definition, those terms refer to agreements between, respectively, the owner and contractor, and the contractor and a subcontractor or among subcontractors. In all these cases the essential condition is that such agreements relate to *the supply of services or materials to an improvement*.

The first jurisdictional issue is whether those coming to the adjudication are indeed parties to a con-

tract or subcontract. Perhaps the analyses undertaken by the courts from time to time about whether someone is eligible to lien under s. 14 of the Act or is subject to (or beneficiary of) the trust obligations under the Act will be applied when determining whether adjudication is available to the parties. Put another way, it may be unlikely that anyone who would not also have lien rights will be found to have the ability to resort to adjudication.

However, an interesting question arises when considering the services of those such as geotechnical engineers, surveyors and others whose services are provided well before the start of construction. Are these parties supplying services to “an improvement”, when the work associated with the improvement — defined by the Act as “*any alteration, addition or capital repair to the land*” ... [or] ... “*any construction, erection or installation on the land*” — has not yet commenced? What if the project is cancelled after their services are performed but before the improvement is ever started? Is adjudication nevertheless available during this early pre-construction period?

As noted, the definition of “contract” refers to the contract between the owner and the contractor, with “contractor” being defined as a person contracting with the owner (or owner's agent) *to supply services or materials to an improvement*. It is inherently a prospective agreement and covers anyone in direct contract with the owner who is going to be doing something for the improvement in the future. These early providers of engineering services for what could be considered at that point as the “planned improvement” may argue that their services are nevertheless being provided under a “contract” within the meaning of the Act. It follows that any disputes under that services contract are eligible for adjudication even though the improvement itself has yet to commence and may not in fact commence for years.

Because of cases like these, future courts may be forced to recognize a fundamental difference between the availability of adjudication and the availability of lien rights.

The second jurisdictional condition is that there must be a “dispute” in relation to at least one of the seven enumerated matters in s. 13.1(5) of the Act:

1. The valuation of services or materials provided under the contract.
2. Payment under the contract, including in respect of a change order, whether approved or not, or a proposed change order.
3. Disputes that are the subject of a notice of non-payment under Part I.1.
4. Amounts retained under section 12 (set-off by trustee) or under subsection 17(3) (lien set-off).
5. Payment of a holdback under section 26.1 or 26.2.
6. Non-payment of holdback under section 27.1.
7. Any other matter to which the parties to the adjudication agree, or that may be prescribed.

The requirement that there be an actual “dispute” is critical to the question of jurisdiction, and the validity of any adjudication. The term itself is not defined in the Act. However, it is reasonable that there will have to exist some disagreement between the parties over an issue. This means that a contractor, for example, cannot submit a request for a proposed change order to an owner (see item 2 of the above list) and then immediately launch an adjudication against the owner for compensation without first allowing the owner to assess the request and respond. What if, given the circumstances, the owner was actually prepared to agree with the contractor’s entitlement? In such a situation, an owner may be in a position to attack the jurisdiction of the appointed adjudicator on the basis that there is not a “dispute” before him or her, at least until the owner has had an opportunity to consider the request.

Whether the “dispute” falls within the scope of one of the listed matters is the next part of the analysis. In “*Striking the Balance*”, the report that led to the changes to the *Construction Act*, the authors originally recommended that the jurisdiction of adjudication flowed from a proper invoice (being a claim for payment under a contract/subcontract) and those claims made as part of the proper invoice and set-offs against amounts otherwise due. This would have clearly created a well-delineated and limited jurisdiction for adjudication.

However, as drafted, the legislation does not specifically refer to the proper invoice as the foundation of adjudication (other than one indirect reference, by referring in item 3 to notices of non-payment under the prompt payment section, Part I.1 of the Act). As a result, the jurisdiction is arguably broader than originally envisioned. Most common disputes arising on a construction project will likely fall within one or more of the listed matters, making adjudication widely available.

For example, imagine an owner assessing contractual liquidated damages against a contractor as a result of delays in the construction schedule, and deducting those damages from payments. While that dispute would likely fall under item 4, it could also lead to a very complicated adjudication over responsibility for delay in the schedule of the whole project. Remembering the key principles of *timing* and *cost*, there will undoubtedly be significant challenges to those governing principles in cases like this.

Other notable rules regarding jurisdiction include the following:

- unless the parties agree otherwise, an adjudication may not be commenced if the notice of adjudication is given after the date the contract or subcontract is completed;
- an adjudication may only address a single matter (unless the parties to the adjudication and the adjudicator agree otherwise); and

- a party may refer a matter to adjudication even if the matter is the subject of a court action or of an arbitration unless the action or arbitration has been finally determined.

Questions of interpretation, such as what a “single matter” means, will need to be sorted out over time. For example, does the phrase refer only to a specific *event of delay* on a project, or to “*project delay*” overall, taking into account concurrent delays and interrelated events?

Adjudication of Labour Material Payment Bond Claims

In addition to the matters listed in s. 13.5(1) of the Act, adjudicators have the jurisdiction to deal with another subject of disputes on construction projects: payment under labour and material payment bonds. However, adjudication is only available to deal with disputes over payments guaranteed under the mandatory payment bonds issued for public contracts over \$500,000 as required by s. 85.1(4) of the Act, and not all payment bonds. Subcontractors — the beneficiaries of labour and material payment bonds — who wish to take advantage of adjudication will therefore need to determine whether a payment bond issued on a particular project qualifies as falling under the mandatory bonding sections of the Act.

The process of adjudicating payment bond disputes is found in s. 25 of O. Reg. 316/18 rather than the Act itself. Modifications to the general adjudication rules have been made to accommodate the bond claim process, creating a number of unique and interesting characteristics:

- the list of specific matters for which adjudication is available (*i.e.*, s. 13.5(1)) does not apply, suggesting that all legal arguments and defences related to bond claims may be available without constraint, such as allegations of “bad faith”;
- the “contract” in question is the public contract, not the subcontract or payment bond, but for purposes of issuing the notice of adjudication, the notice must come from a party to the payment bond;
- as a result, the parties to the payment bond adjudication are the subcontractor, the principal and the surety, making the adjudication a three-party adjudication instead of the usual two-party adjudication;
- any provisions in the *subcontract* regarding adjudication procedures apply to supplement the statutory process instead of the prime contract’s provisions, including any additional powers granted to the adjudicator under the subcontract;
- the contractor cannot compel consolidation as it can otherwise do with non-payment bond disputes;
- holdback is not retained from any payments ordered; and
- if payment ordered under a determination is not made, the subcontractor does not have the right to suspend work, as it could otherwise.

The mandatory labour and material payment bond is now a prescribed form of bond under the Act (Form 31) which extends coverage to lower-tier sub-subcontractors with respect to the contractor’s statutory holdback obligations under the Act. This means that sub-subcontractors may have the right to seek an adjudication determination when the contractor fails or refuses to retain and pay holdback, and the surety adopts the contractor’s position, making the job of an adjudicator even more challenging.

Powers of an Adjudicator

An adjudicator enjoys considerable power to get to the bottom of the dispute. Subject to the requirement that the adjudicator conduct the process im-

partially, the adjudicator may conduct the adjudication in whatever manner he or she determines appropriate in the circumstances. The principles guiding the adjudicator in fashioning the appropriate process will likely be, again, based on *timing* (rendering a determination within 30 days) and *cost*, in relation to the amount in dispute and complexity of the issues.

Under the Act and Regulations, in addition to any powers set out under a contract or subcontract, an adjudicator can:

- issue directions respecting the conduct of the adjudication, including with respect to the response to the notice of adjudication, and the disclosure of documents, to ensure all parties have a chance to review documents being relied upon;
- take the initiative in ascertaining the relevant facts and law — which allows adjudicators to do their own independent legal research on issues, without the benefit of submissions of legal counsel;
- draw inferences based on the conduct of the parties to adjudication;

- conduct an on-site inspection of the improvement that is the subject of the contract or subcontract in certain situations;
- obtain the assistance of a merchant, accountant, 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 (with the costs borne by the parties); and
- make a determination in the adjudication, including ordering a party who had acted in a manner that is frivolous, vexatious, an abuse of process or other than in good faith to pay any part of the adjudicator's fee.

The Regulations specifically provide that any failure of a party to the adjudication to comply with a direction or other requirement of the adjudicator does not somehow undermine the adjudicator's powers. Presumably, the adjudicator can proceed to issue a valid and enforceable determination in the face of a party's refusal to comply with the process.

Time will tell how the questions surrounding jurisdiction and adjudicators' exercise of powers will get treated by the courts, but the answers will no doubt be fascinating for everyone involved.

“[C]ontractors are looking for guidance on how much it will cost to take a dispute through adjudication. The answer to this of course is dependent on the complexity of the dispute and the amount of expert support required. . . . Despite the fact that there is nothing preventing contractors from representing themselves in adjudication and doing all of the work that sits behind the process, the reality is that it is rare. The adjudication process in the UK has been itself a minefield of jurisdictional challenges and procedural pitfalls. It is therefore far more common for parties to be represented by lawyers and / or consultants, both of which cost money which is not recoverable. Even the simplest of disputes will incur costs which may well outweigh the sums in dispute, particularly when you take into account the adjudicator's fee which is likely to be split equally between the parties – per s. 13.10(3)”.

—Nicola Huxtable, “What can the Ontario construction industry learn from adjudication in the UK?”
(Driver Trett Newsetter, July 31, 2019)



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THE ENFORCEABILITY OF THE ADJUDICATOR'S DETERMINATION AND THE POTENTIAL FOR JUDICIAL INTERVENTION: QUITE A HILL TO CLIMB

The framers of Ontario's *Construction Act* intended to provide a reasonable basis for the court to support the determinations of adjudicators, while at the same time allowing for the court to play an effective supervisory role where an adjudicator has seriously transgressed. The fact that adjudicator's determinations are issued on an interim binding basis, as per ss. 13.1 and 13.15(1) of the Act, and are subject to the final and binding decisions of the courts or arbitral tribunals, provides a principled basis for providing such legislative protection to the determinations of adjudicators.

From a public policy perspective, if it is probable that the court would not intervene, then parties are more likely to honour the adjudicator's determination and the policy objectives of the Act are more likely to be achieved.

The High Bar

Accordingly, while judicial review has been made available, its availability is significantly constrained.

First, permission ("leave") is required before a party may apply for judicial review. Under s. 13.18(1) of the Act, an application for judicial review of a determination of an adjudicator may only be made

with leave of the Divisional Court, and under subs. (2) a motion for leave must be filed no later than 30 days after the determination is communicated to the parties. Pursuant to subs. (3), a motion for leave may be dismissed without reasons.

Second, under s. 13.18(4), no appeal lies from an order on a motion for leave to bring an application for judicial review.

Third, an adjudicator's determination can only be set aside for specified reasons.

Specifically, s. 13.18(5) provides that the determination of an adjudicator may only be set aside if the applicant establishes one or more of the following grounds:

1. The applicant participated in the adjudication while under a legal incapacity.
2. The contract or subcontract is invalid or has ceased to exist.
3. The determination was of a matter that may not be the subject of adjudication, or of a matter entirely unrelated to the subject of the adjudication.
4. The adjudication was conducted by someone other than an adjudicator.
5. The procedures followed in the adjudication did not accord with the procedures to which the adjudication was subject, and the failure to comply prejudiced the applicant's right to a fair adjudication.
6. There is a reasonable apprehension of bias on the part of the adjudicator; or
7. The determination was made as a result of fraud.

Conspicuous by its absence is any reference to errors of fact or law. In other words, provided that none of the seven grounds is applicable, the adjudicator — as in the U.K. — has "*the right to be wrong*".

Fourth, s. 13.18(7) provides that an application for judicial review does not operate as a stay of the operation of the determination unless the Divisional Court orders otherwise.

At the same time, however, subs. (6) provides that if the Divisional Court does set aside the determination, the court may require that any or all amounts paid in compliance with the determination be returned.

The philosophical approach taken by s. 13.18(5) is consciously analogous to that contained in Chapter VII of the UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006. By way of comparison, article 34(2) of the Model Law provides:

- (2) An arbitral award may be set aside by the court specified in article 6 only if:
 - (a) the party making the application furnishes proof that:
 - (i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or
 - (ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
 - (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or
 - (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which

the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or

(b) the court finds that:

- (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or
- (ii) the award is in conflict with the public policy of this State.

A review of the two provisions indicates that grounds 1 and 2 of s. 13.18(5) are analogous to article 34(2)(a)(i) of the Model Law, while ground 3 aligns with both article 34(2)(a)(iii) and article 34(2)(b)(i), and grounds 4 and 5 are similar to articles 34(2)(a)(ii) and (iv).

Although bias and fraud, the final two grounds referred to in s. 13.18(5) have no parallel in s. 34 of the Model Law, they are consistent with the grounds that are available to challenge an arbitrator as set out in article 12 of the Model Law, as follows:

Article 12. Grounds for challenge

- (1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him.
- (2) An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

Of the seven grounds set out in s. 13.18(5), ground 3 (the determination was of a matter that may not be the subject of adjudication or of a matter entirely unrelated to the subject of the adjudication) and ground 5 (the procedures followed in the adjudica-

tion did not accord with the procedures to which the adjudication was subject, and the failure to comply prejudiced the applicant's right to a fair adjudication) are likely to be the most frequently invoked. Simply put, ground 3 raises the jurisdictional issue of the adjudicator who "*answers the wrong question*", while ground 5 raises the issue of natural justice.

Ground 3: Jurisdiction

From a jurisdictional perspective, the matters that may be the subject of adjudication are set out in s. 13.5(1) as follows:

1. The valuation of services or materials provided under the contract.
2. Payment under the contract, including in respect of a change order, whether approved or not, or a proposed change order.
3. Disputes that are the subject of a notice of non-payment under Part I.1.
4. Amounts retained under section 12 (set-off by trustee) or under subsection 17(3) (lien set-off).
5. Payment of a holdback under section 26.1 or 26.2.
6. Non-payment of holdback under section 27.1.
7. Any other matter that the parties to the adjudication agree to, or that may be prescribed.

If a party initiates an adjudication in respect of a matter not listed, then a challenge under ground 3 should succeed.

Similarly, under s. 13.5(3) an adjudication may not be commenced if the notice of adjudication is given after the date the contract or subcontract is completed, unless the parties to the adjudication agree otherwise. Accordingly, if a determination results from an adjudication initiated after completion, and there is no express or implied agreement to adjudicate in the circumstances, a challenge based upon ground 3 would likely succeed.

As well, under s. 13.5(4) an adjudication may only address a single matter, unless the parties to the adjudication and the adjudicator agree otherwise. Thus, a determination dealing with multiple matters, absent an express or implied agreement to adjudicate multiple issues, would be subject to a challenge based upon ground 3.

In other words, in exercising their powers, adjudicators must make sure that the matter(s) included within the adjudication are either within the ambit of the jurisdiction created by the Act, or that there is an express agreement to adjudicate between the parties.

Ground 5: Natural Justice

The applicability of the principles of natural justice is also constrained, or focused, by a number of factors:

First, the adjudicator is intended to function as an inquisitor.

Pursuant to s. 13.12 (1), and subject to the obligation to conduct the adjudication in an impartial manner, in conducting an adjudication an adjudicator may issue directions respecting the conduct of the adjudication; take the initiative in ascertaining the relevant facts and law; and draw inferences based on the conduct of the parties to adjudication; conduct an on-site inspection (subject to certain limitations); obtain the assistance of a merchant, accountant, 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; make a determination in the adjudication; and exercise any other power that may be prescribed in the Regulations; and, subject to the express requirements of the section, the adjudicator may conduct the adjudication in the manner he or she determines appropriate in the circumstances.

Second, so long as the adjudicator complies with the minimum procedural requirements of the Act and the Regulation, the determination will not be exposed to a serious risk of a successful challenge. This is because s. 13.6(1) provides that an adjudication shall be conducted in accordance with the adjudication procedures set out in this Part, the regulations, and, subject to subs. (2), any additional adjudication procedures that may be set out in the contract or subcontract. Subsection (2) provides that adjudication procedures set out in a contract or subcontract apply only to the extent that they do not conflict with this Part and the regulations, and their application is subject to the exercise of the adjudicator's powers under s. 13.12.

Third, the adjudicator, in conducting the adjudication, is obligated to respect the principle of proportionality, which means that challenges under ground 5, which attempt to raise traditional administrative law complaints, will not succeed. For example, in the event that the adjudicator, reasonably respecting the principle of proportionality, issues a procedural direction, then it is unlikely that the court would intervene. In fact, it is anticipated that many adjudications involving small dollar amounts or discrete issues will be conducted on a documents-only basis — as is the case in other jurisdictions.

The reason for this is that under s. 4(b) of O. Reg. 306/18, adjudicators are required to “*comply with the code of conduct*”. The code of conduct is described at s. 7(1) of the Regulation as follows:

7.(1) The Authority shall, subject to the approval of the Minister, establish and maintain a code of conduct for adjudicators, and shall make the code of conduct publicly available on its website.

(2) The code of conduct shall address, at a minimum, the following matters:

1. Conflicts of interest and related procedural matters.
2. Principles of proportionality in the conduct of an adjudication, and the need to avoid excess expense.
3. Principles of civility, procedural fairness, competence and integrity in the conduct of an adjudication.
4. The confidentiality of information disclosed in relation to an adjudication.
5. Procedures for ensuring the accuracy and completeness of information in the adjudicator registry.

As is evident from the Act and the Regulations, it is intended that the adjudicator, as an inquisitor, is empowered to take the initiative to craft a procedure that is appropriate, and proportional to the dispute, and procedural fairness will be considered by the court through this over-arching lens.

Conclusion

It is clear that the Act and the Regulations are written so as to support the institution of adjudication, and limit the court's need to intervene to a limited number of extreme circumstances. Of particular importance, of course, is the implicit recognition that the public policy objectives of interim binding dispute resolution are of sufficient importance to support the proposition that, although adjudicators are not empowered to answer “*the wrong question*”, they do have the “*right to be wrong*” and still withstand judicial review.

From a public policy perspective, if it is unlikely that the court will intervene, then parties are more likely to honour determinations and the policy objectives of the Act are more likely to be achieved.



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WHEN YOU WIN: ENFORCING THE ADJUDICATOR'S DECISION

The prompt payment and adjudication provisions under the *Construction Act* came into effect on October 1, 2019, and Ontario's construction industry is now preparing itself for the paradigm shift associated with the new adjudication rules and regulations. Since the announcement of this shift and related amendments to the Act over two years ago, there have been a number of articles published that broadly consider what adjudication means, to whom it applies, how it works and the impact it can have in relation to the successful completion of construction projects. In this article, we consider what the successful party is entitled to do after an adjudicator decides in their favour but the other party is either unable or unwilling to comply. In other words, what can you do when you "win" an adjudication but nevertheless remain unpaid?

For purposes of illustration, it may be helpful to provide an example. A subcontractor submits a payment application for a billing cycle in the amount of \$100,000. Following a series of steps (including the issuance of notices of non-payment), the subcontractor learns it will only be paid \$50,000 of the \$100,000 it invoiced to the general contractor. The subcontractor commences an adjudication for the disputed amount, the parties agree to an adjudicator (or have one selected for them), they exchange documents, and undergo the adjudication process set out by their adjudicator. The adjudicator provides his or her decision to the parties (within his or her allotted timeframe, *i.e.*, 30 days

after receiving the documents) which stipulates that the subcontractor is entitled to payment from the general contractor of a further \$25,000. The subcontractor expects payment within 10 days of the adjudicator's determination being communicated to the parties (as set out under s. 13.19(2) of the Act). Eleven days have now passed, and no payment has been received. Communications have broken down. Now what?

Based on a general review of other jurisdictions that have implemented adjudication, the most commonly cited reasons for non-compliance with an adjudicator's determination are:

- the unsuccessful party does not have the means to pay;
- the unsuccessful party wants to stall for time, while preparing to launch some sort of belated counter-offensive, *e.g.*, another adjudication or action; and
- the unsuccessful party disagrees with the determination and wants to challenge the decision (*i.e.*, by judicial review).

Regardless of the reason, if the unsuccessful party does not pay, the successful party will need to enforce the decision.

Generally speaking, and as discussed below, following an adjudication under the Act, a successful party has a number of tools at its disposal after the communication of an adjudicator's determination.

Enforcement as an Order of the Court

First and foremost, pursuant to s. 13.20(1) of the Act, a party seeking to enforce an adjudicator's determination can do so by filing a certified copy of the determination with the court. This step must be taken within two years of the communication of the determination (or in cases where a determination is subject to judicial review, two years from the dismissal or final determination of that application) (s. 13.20(2)). On its filing with the court, the

adjudicator's determination is enforceable as if it were an order of the court. The filing party must also provide notice to the other party of that filing within 10 days (s. 13.20(3)). Of note, while the party is engaged in enforcement proceedings, s. 13.20(4) of the Act operates to defer payment obligations to parties below. In our example, the subcontractor's obligations to pay its subcontractors and/or suppliers would be deferred pending the outcome of the enforcement proceedings.

Once the adjudicator's determination is an order of the court, Ontario's Rules of Civil Procedure would apply. Specifically, under r. 60.02, an order for the payment or recovery of money can be enforced in the following ways:

- Writ of Seizure and Sale (r. 60.07)
- Garnishment (r. 60.08)
- Writ of Sequestration (r. 60.09)
- Writ of Possession (r. 60.10)

A judgment creditor (in our case, the subcontractor) can also conduct a debtor examination to identify exigible assets (r. 60.18).

Each of the above remedies are significant and provide more immediate consequences than construction industry participants may be accustomed to as compared to, for example, the lengthier construction lien processes and traditional litigation. The consequences may also be serious when considering how construction industry payors typically operate their businesses. For example, a Writ of Seizure and Sale under r. 60.07 allows the sheriff to seize real estate and personal property owned by the debtor (in our case, the general contractor) and to sell it. The proceeds are applied against the amount owed to the creditor. This remedy, if applied, could be significantly detrimental to a general contractor whose assets would otherwise not be available as part of a contractual dispute over payment. As well, the creditor may wish to engage r. 60.18 to examine the debtor. In that regard, it

would be entitled to broadly examine the debtor (or persons other than the debtor in certain circumstances) in respect of: reasons for nonpayment, debtor's income and property, debts owed to and by the debtor, disposal of property, present/past/future means to satisfy the order, whether the debtor intends to obey the order or has reasons for not doing so, and any other matters pertinent to the enforcement of the order. Such an examination would be onerous, to say the least.

Of course, each of these remedies has been tested in the courts in relation to civil litigation matters; however, they will be new to many construction industry participants in the context of adjudication. In that regard, there is no current directly related experience to draw from, and other jurisdictions provide context.

While directly relevant experience is not available to us, we can nevertheless consider how enforcement of an adjudication is dealt with elsewhere. In the U.K. (where adjudication originated), enforcement proceedings are battlegrounds where adjudicators' determinations are challenged. While consideration of the U.K.'s approach to enforcement could be the subject of an entire article, in brief we note that U.K. courts have generally applied a supportive and purposive approach to enforcement (*i.e.*, narrow grounds to refuse enforcement such as a breach of natural justice and/or a misapplication of jurisdiction).

While the commencement of adjudication in the U.K. was met with a surge of challenges, it is anticipated that, relatively speaking, there will be less challenges to the enforcement of adjudicator determinations in Ontario. That is because in Ontario, the process for enforcement of an adjudicator's determination (and the ability to review such determinations) has been limited under the Act. Grounds for judicial review are narrow and the right to enforce the determination as an order of the court is simplified.

In that regard, subject to the limited circumstances where a judicial review of an adjudicator's determination is successful, we optimistically anticipate that courts will respond as they did in the U.K. by supporting the enforcement of adjudicator's determinations, allowing the determinations to be treated as orders of the court when properly filed, and engaging with those who seek to apply the remedies described above.

Suspension

One powerful right of a party that has not been paid following receipt of an adjudicator's determination is the right to suspension of services under s. 13.19(5). The right of suspension under the Act now arises 10 days following receipt of an adjudicator's determination if the paying party fails to comply. In relation to a suspension, once it arises, not only would the payor party have to pay the amount of the adjudicator's determination, but it could also be exposed to interest accrued on the late payments of the adjudicated amount (at the prejudgment interest rate determined under subs. 127(2) of the *Courts of Justice Act* — currently two per cent), and reasonable costs incurred as a result of the suspension (*i.e.*, demobilization). As well, the suspending party, if it were to return to work, would be entitled to its reasonable costs for remobilization. Specifically, under s. 13.19(6), a contractor or subcontractor who suspends work is entitled to payment by the paying party of any reasonable costs incurred as a result of the resumption of work following the payment of the adjudicated amount and interest.

Default under the Contract

Failure of a party to pay an adjudicator's determination may also trigger the default mechanism of a construction contract depending on the wording of the contract at issue. This remedy will be contract-specific, such that it is important to review the con-

tract carefully in relation to how non-payment of an adjudicator's determination may or may not trigger the ability to declare the non-paying party in default (in our example, the general contractor) and perhaps be entitled to proceed to terminate the contract if the payment default is not rectified.

As well, failure of a general contractor to pay its subcontractors following an adjudication (or generally) may constitute a default under the prime contract.

Surety Bond Claims

Another option available to the party seeking payment following receipt of an adjudicator's decision is in relation to surety bonds. If a subcontractor or supplier had not already done so, it would be in a position to claim on the Labour & Material Payment Bond. Such parties should already have requested a copy of the Labour & Material Payment Bond at the outset of the project; however, if they did not, they can request that information from the general contractor and/or the owner. Once they have the bond, they can file a claim with the bonding company (surety), attaching the determination of the adjudicator, and any other supporting documentation that may assist in the investigation of their claim. We note that the determination against a general contractor is not binding on the surety. If for some reason the surety denies the claim, that subcontractor or supplier can initiate an adjudication against the surety, as above, and pursue the outstanding amount to judgment against the surety.

Conclusion

Each of the above alternatives is significant in that it allows a party to enforce its rights in circumstances where non-payment arises following an adjudicator's determination. These remedies are intended to bootstrap the adjudication regime and promote commercially reasonable behaviour. Giv-

en that all of the aforementioned remedies have the potential to “inflict pain” on the non-compliant payor, the existence of the remedies themselves should hopefully spur parties into reasonable negotiations and enable reasonable outcomes following an adjudication.

That said, much remains to be seen in relation to how construction industry participants, their respective counsel, and the judiciary all react to the new adjudication regime and its interplay with the existing legislative and judicial frameworks that previously governed construction projects.

Stay tuned.

“Down the road, the contractor or owner can turn to the courts if they wish to challenge the determination of an adjudicator. In other jurisdictions that use adjudication, however, challenges have been rare. Still, with prompt payment and adjudication new to Ontario, there’s uncertainty about how effective adjudication will be at resolving disputes quickly, cheaply and once and for all. Ontario is breaking fresh Canadian ground with the legislation, but it isn’t alone. As construction stakeholders across the province prepare for the new rules to come into force, legislators in other provinces and within the federal government are watching closely. Ottawa firmed up plans to implement prompt payment rules for federal work in last year’s Fall Economic Statement and is currently working to pass legislation. Prompt payment is also making at least some progress in every major provincial market”.

—David Kennedy, “Ontario construction industry prepares for New prompt payment, adjudication rules expected to bring ‘profound’ change” (On-Site Magazine, June 11, 2019)