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PUBLICATION

Adjudication Under the New *Construction Act*

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The last article outlined the proposed Prompt Payment provisions that will be added to Ontario's *Construction Lien Act,* which should come into force in the spring of 2018.

This article sets out how disputes on construction projects can be determined on an interim basis using a new (to Ontario) concept called "Adjudication".

Compared to Litigation or even Arbitration, Adjudication will be a lightning fast way to get an interim decision when a dispute arises between parties to a contract. Adjudication will resemble a court or arbitration proceeding, with both sides given an opportunity to present their case to a neutral arbiter, who will then make a determination.

Sometimes referred to as "pay now, argue later", adjudication does not take away the jurisdiction of a court or an arbitrator (if the parties have agreed to submit matters to arbitration), but a determination under an adjudication is binding on the parties until a court or arbitrator makes a finding in the matter.

Many of the details about adjudicators and adjudication procedure will be set out in regulations under the new Act, and those regulations will not be drafted until later in the summer of 2017. The following information is based on the text of the proposed adjudication provisions in the Act, as well as the report to the Province recommending the introduction of adjudication in Ontario.

Who Are Adjudicators?

Adjudicators will not need to have a legal background, but likely will have to be members of a regulated profession (in addition to lawyers, this is expected to include engineers, architects and quantity surveyors). The thought is that the parties will agree (or, absent agreement, the Adjudicator Nomination Authority ("ANA") will appoint) adjudicators with training/background/experience that is tailored to the issue for adjudication.

Adjudicators will be screened and trained by the to-be-established ANA. The ANA will maintain a roster of pre-approved adjudicators, and only roster adjudicators will be permitted to conduct adjudications.

What Gets Adjudicated and Who Pays?

Adjudication will only apply to contracts entered into after the adjudication section comes into force, expected to be some time in early 2018.

The Act will allow adjudication of the valuation of services or materials provided under a contract, and payment under a contract, including under approved, unapproved, and proposed change orders. Disputes that are the subject of non-payment notices under the prompt payment provisions can be adjudicated (and, as set out in the last article, will have to be adjudicated in some circumstances). Non-payment of holdback and set-off claims can also be adjudicated. This is not a closed list, and other issues that can be adjudicated may be added by regulation.

Importantly, only one "issue" at a time can be referred to adjudication, unless the parties and the adjudicator agree otherwise. The issue can go to adjudication even if it is also the subject of a court action (including a lien action), or an arbitration, unless the court action or arbitration has already been finally determined.

Generally speaking, the parties to the adjudication will each be responsible for an equal share of the adjudicator's fees, and each party bears its own costs, regardless of the result. That said, the adjudicator has the discretion to punish one party with costs, but only if the adjudicator determines that the party acted in a manner that was "frivolous, vexatious, an abuse of process or other than in good faith".

Commencing the Adjudication

A party can only commence an adjudication against a party with whom it has a contract. As an example, an owner can adjudicate a dispute with a contractor, but not with a subcontractor; the contractor can adjudicate with owner and subcontractor, but not with a party below the subcontractor; the subcontractor can adjudicate with the contractor and with a party below it (sub-subcontractor, though the Act does not use that term), and so on. The adjudication provisions do not contemplate a "third party" proceeding, so "stacked" or "cascading" adjudications will likely result.

An adjudication has to be started before the date the contract between the parties is completed, unless the parties agree otherwise. It is started by a party giving a notice of adjudication setting out the names and addresses of the parties, the nature of the dispute and a brief description including how and when it arose, and what redress is being sought. The notice will also propose an adjudicator. The parties are prohibited from agreeing on the adjudicator in advance (precluding the use of a "project adjudicator").

Adjudication Timelines

There is no timeline in the Act for the responding party to deliver material, or even to agree to or dispute the proposed adjudicator. However, the Act states that there is a 4 day deadline for the adjudicator to agree to take on the adjudication, which implies that the parties have to agree on the adjudicator prior to that. If there is no agreement within 4 days, the person who started the adjudication must ask the ANA to appoint an adjudicator. The ANA then has 7 days to appoint an adjudicator.

Once an adjudicator has been agreed to or selected by the ANA, the party who started the adjudication must deliver to the adjudicator within 5 days the notice, a copy of the contract in question, and any documents the party intends to rely on. This is an important step, as once the adjudicator receives these documents, a determination, supported by written reasons for decision, must be released within 30 days. The adjudicator can request up to 14 additional days, but the adjudicator's request can be refused by either party. The parties can agree between themselves to extensions without limit, though subject to the adjudicator's consent.

These timelines mean that, absent an extension of time, the adjudication will be determined within 46 days of the adjudication being commenced. A determination that is made after the timelines in the Act will be of no force or effect.

Once the adjudicator has made a determination, a party required to pay must do so within 10 days. The Act will also allow for consecutive adjudications in certain circumstances, so that one adjudicator can deal with several issues that arise between parties.

Procedure

The Act will allow the parties to agree to an adjudication procedure in their contract. If they fail to set out a procedure, or if the procedure in the contract does not comply with the Act (presumably referring to contractual provisions that purport to limit an adjudicator's powers or restrict the types of matters can be adjudicated), then the procedure in the Act governs.

There is little in the proposed Act mandating how the adjudication is to be conducted. Instead, the Act gives the adjudicator the discretion to "conduct the adjudication in the manner he or she determines appropriate in the circumstances". The adjudicator is given the power to issue directions respecting the conduct of the adjudication, and is specifically granted the power to take "the initiative in ascertaining the relevant facts and law" and draw "inferences based on the conduct of the parties".

At the adjudicator's request, he or she can conduct on-site inspections of the construction project, though this is subject to approval of the owner or other person with legal authority to exclude persons from the premises.

While it is the intention that the adjudicator will be selected for his or her expertise based on the issue to be determined, the adjudicator is also granted the power to obtain the assistance of experts to determine any matter of fact in question. The list of experts includes a "merchant, accountant, actuary, building contractor, architect, engineer", though this is not a closed list, and

the adjudicator can retain any other person he or she considers fit to assist in the factual determination and direct one or both parties to pay the associated fees.

Enforcement

Once completed, either party to the adjudication can bring an application to the court for an order enforcing the adjudicator's determination. Once that court order is made, it can be enforced like any order of the court, including by way of writ of execution and by garnishment.

In the event of non-payment after the adjudicator has made a determination, then in addition to enforcement, the contractor or subcontractor who has not been paid can suspend their work. The party in default must then pay not only the amount required by the determination plus interest, but also the costs of suspension. Once paid, the non-defaulting party is also entitled to be paid the costs of resuming their work. This shifts the responsibility for costs of demobilization/remobilization of forces onto the defaulting party.

Standard of Review

Given the tight timelines at play, it is inevitable that an adjudicator will come to a "wrong" decision. There is no right of appeal *per se*, but in addition to being able to go to court or to an arbitration to seek a different result, any party to the adjudication can apply to have the decision set aside within 30 days under 7 grounds:

1. At the time of the adjudication, one party was operating under a legal incapacity;
2. The contract between the parties was invalid or ceased to exist;
3. The determination dealt with a matter that could not be adjudicated, or was unrelated to the subject of the adjudication;
4. The adjudication was conducted by someone not qualified to be an adjudicator;
5. The procedures for the adjudication did not comply with the procedures set out in the Act;
6. There was a reasonable apprehension of bias on the part of the adjudicator; or
7. The adjudicator's determination was made as a result of fraud.

Practically speaking, this list is going to mean that "correctness" is not a condition for a proper (and enforceable) adjudicator's decision. To put it another way, an adjudicator's decision that is "wrong" must still be obeyed, as long as the adjudicator answered the questions he or she was asked to answer (and only those questions).

Extended Time to Lien

An adjudication and a lien claim can be advanced at the same time. In an apparent effort to ensure that a claimant is not obligated to run parallel proceedings, the Act includes a new subsection that extends the expiry of a lien.

For example, currently, in most cases a subcontractor's lien expires if not preserved within 45 days from the date of last supply. This deadline will be extended to 60 days pursuant to changes to section 31 of the Act. However, the Act will also include a new subsection that applies to issues that are subject to both a lien claim and an adjudication. The new subsection deems the lien to expire on the later of the date under section 31, or 45 days from when the adjudicator receives the documents from the party who commenced the adjudication. There will also be a provision that states that where there are consecutive adjudications, the lien expires 45 days from when the adjudicator receives the documents relating to the last adjudication.