

Coming to Canada: Adjudication

On 1 October 2019, Ontario introduced the final phase of amendments intended to modernise its Construction Act (the “Bill”). Amongst these changes is the introduction of mandatory adjudication for payment related disputes.

Authors:
Nathan Modell
James Hughes

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Last year, 2018, marked the 20th anniversary in England, Wales and Scotland of the Housing Grants, Construction and Regeneration Act 1998 (the “Act”), which introduced the statutory right to adjudicate on qualifying construction contracts.

Over the course of 20 years, the use of adjudication in construction projects to resolve disputes has evolved, rightly or wrongly, to include all types of disputes and not just those related to payment.

An entire industry has developed around adjudication and it is not uncommon now for adjudication to be used to determine complex disputes, including those concerning professional negligence – at least on an interim basis.

In this note, we examine how the newly introduced adjudication procedure in Ontario compares to the procedure in England, Wales and Scotland.

What is adjudication?

Adjudication is an interim dispute resolution method, designed to provide a decision that is binding on the parties until the dispute can be determined by court proceedings, arbitration or settlement.

Adjudication aims to provide a timely and efficient resolution to disputes. For the construction industry, this can help to reduce a dispute’s interference with a project’s delivery schedule.

In England and Wales, statutory adjudication has been available on all qualifying construction contracts since the Act came into force in 1998. Ontario became the first Canadian jurisdiction to adopt a comparable adjudication regime on 1 October 2019.

When can adjudication be used?

In England, Wales and Scotland

To have a right to adjudicate under the Act, the dispute must relate to a “construction contract”. This includes an agreement for any of the following:

- Carrying out construction operations;
- Arranging for the carrying out of construction operations by others;
- Providing labour for the carrying out of construction operations;
- Carrying out architectural, design or surveying work; and
- Providing advice on building, engineering, interior or exterior decoration.

In addition, the dispute must have “crystallised” i.e. the claim must have been presented to the other party before the start of the adjudication process.

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In Ontario

Ontario's new adjudication procedure is designed to resolve issues related to payment. Disputes that will be subject to the mandatory adjudication regime include those relating to:

- The valuation of services or materials provided under the contract;
- Payment under the contract, including in respect of a change order, whether approved or not, or a proposed change order; or
- Disputes that are the subject of a notice of non-payment.

However, the Bill also provides that – subject to both parties' agreement – adjudication may be used in other forms of dispute.

How is an adjudication commenced?

In England, Wales and Scotland

As per Section 108 of the Act, adjudication is available “*at any time*” (emphasis added).

The adjudication process is initiated by one party serving written Notice of adjudication (“Notice”) on the other. The Notice will include a description of the nature of the dispute, the parties involved, and the nature of the remedy being sought by the referring party.

In Ontario

Unlike the Act, subject to alternative agreement, the adjudication process may only be commenced prior to the completion of the relevant contract or sub-contract.

The adjudication process is initiated in a manner similar to England, Wales and Scotland, whereby one party serves written Notice describing:

- (a) The names and addresses of the parties;
- (b) The nature and a brief description of the dispute;
- (c) The nature of the redress sought; and
- (d) The name of a proposed adjudicator.

How is an adjudicator appointed?

In England, Wales and Scotland

An adjudicator must be appointed within 7 days of service of the Notice.

If an adjudicator is not specified in the contract, the parties may agree to an adjudicator or request that the Authorised Nominating Authority (“ANA”) appoint an individual.

Simultaneously, the referring party should prepare and serve a referral notice on the adjudicator and the responding party. The referral notice will describe the referring party's case, and should be accompanied by documentary evidence where necessary.

In Ontario

It will be mandatory for the ANA to appoint an adjudicator where the parties' proposed adjudicator does not consent to their appointment within four days of Notice being given.

Where the ANA is to appoint an adjudicator, subject to the adjudicator's consent, the appointment must be made no later than 7 after receiving a request for appointment.

Similarly to the Act, no later than five days after the appointment of the adjudicator, a referring party must

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provide the adjudicator with a copy of the Notice, supported by:

- (a) A copy of the contract or subcontract; and
- (b) Any documents that the party intends to rely upon during the adjudication.

How long will the adjudicator have to make a determination?

In England, Wales and Scotland

An adjudicator must reach a decision within 28 days of their receipt of the referral notice.

However, this deadline may be extended by up to 14 days with the consent of the referring party, or, where both parties consent, by such longer period as agreed.

In Ontario

The adjudicator must make a determination by no later than 30 days after service of the Notice and supporting documents.

As in England, Wales and Scotland, the adjudicator's deadline for determination could be extended by a period of up to 14 days, or, through written agreement of the parties, for as long as deemed necessary.

Is an adjudicator's decision enforceable?

In England, Wales and Scotland

The decision of an adjudicator is binding until the dispute is finally determined by legal proceedings, arbitration or agreement.

However, there are very limited grounds upon which an adjudicator's decision can be set aside, including where

an adjudicator is found to have breached "the rules of natural justice". This may occur if an adjudicator fails to act impartially; or where there has been some form of procedural irregularity.

Additionally, a party may make an application for judicial review where an application is filed with 30 days of the adjudicator's decision.

In Ontario

As in England, Wales and Scotland, the adjudicator's decision is binding on the parties until the determination of the matter by a court, arbitration or written agreement between the parties.

Under the Bill, with the leave of the Divisional Court a motion for leave to bring an application for judicial review may be made no later than 30 days after the adjudicator's decision is communicated.

A party who is required by the determination to pay an amount to another party must pay that amount no later than 10 days after the determination has been communicated.

Failing payment, interest will begin to accrue on the amount unpaid, and the aggrieved contractor or subcontractor may suspend work until the amount is paid.

How are the costs of an adjudication apportioned?

In both jurisdictions, subject to an alternative agreement, the parties shall bear their own costs of the adjudication.

However, in Ontario, an adjudicator may make an alternative order as to costs where it can be determined that a party acted in a manner that was frivolous, vexatious, an abuse of process or other than in good faith.

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Will adjudication apply nationwide in Canada?

Due to Canada's federal-jurisdictional system, the provisions of the Bill will only be enforceable in Ontario.

However, following the Bill's announcement in late 2017, several other jurisdictions in Canada (including the federal government) have put forward proposals for the introduction of similar adjudication regimes.

As legislators continue to push to address discrepancies between the completion of construction projects and payment of contractors, it is becoming increasingly likely that mandatory adjudication procedures will be adopted nationwide.

What should those working in Ontario be aware of?

- Review current contractual arrangements to ensure that adjudication clauses are drafted in compliance with the Bill.
- Unless you have the approval of your insurers, when drafting adjudication clauses ensure that only payment issues can be adjudicated.
- Given the strict deadlines for production of documents, ensure that there are processes in place for the production of relevant materials upon the commencement of an adjudication.

Conclusion

Ontario's Bill is aimed at decreasing payment-related delays whilst increasing the use of alternative dispute resolution, with legislators hoping that this will increase productivity and employment in Ontario's construction industry.

The newly introduced mandatory adjudication regime shares many similarities with adjudication in England, Wales and Scotland, and, looking ahead, it is anticipated that the regime will develop in a comparable manner over time.

The Bill is at the forefront of a wider national push for the introduction of mandatory adjudication, which, if successful, would represent a fundamental shift in the management of disputes in the Canadian construction industry that those involved will need to understand.

In England, Wales and Scotland, we have the benefit of over 20 years of experience of adjudication and have witnessed how it has developed beyond the intention that it be a tool primarily to expedite payment.

It remains to be seen whether adjudication in Ontario will develop beyond strict payment issues, as it has done in England, Wales and Scotland. However, those working or advising on construction works in Ontario would be wise to familiarise themselves with the Bill and ensure that appointment contracts adequately reflect the new regime and limit adjudication to issues of payment only – if that is the parties' intention.

This article is only intended to provide general information and should not be relied upon as legal advice.

For further information please contact:



Nathan Modell
Partner
+44 (0) 20 7469 0442
n.modell@beale-law.com



James Hughes
Trainee Solicitor
+44 (0) 20 7469 0490
j.hughes@beale-law.com