



How to prepare for an adjudication

Tactics, strategies, planning and panic

By: Karen Groulx, Partner

Introduction

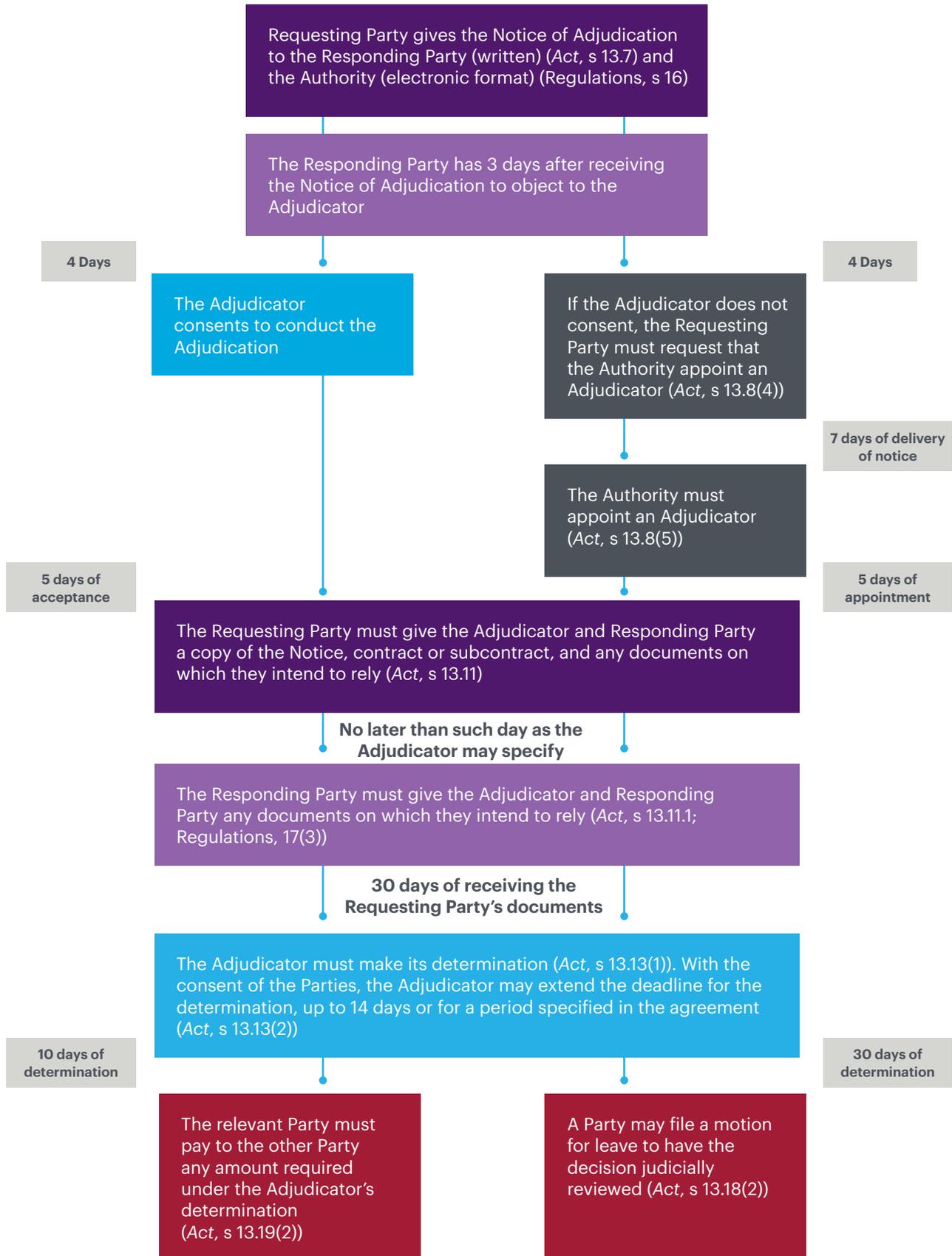
On October 1, 2019, the construction dispute adjudication provisions of the new *Construction Act*¹ took effect. Adjudication applies to all public and private sector construction contracts entered into on or after October 1, 2019.² On the same date, the prompt payment regime came into force, with adjudication being used as a cost effective, flexible, and swift means of enforcing the prompt payment regime. (For more on the prompt payment regime, see my previous article on the amendments to the *Construction Act*.) These new regimes are mandatory, as parties may not contract out of either procedure.

A predominant feature of the new adjudication procedure is the pace at which both payment for services and work and the settlement of certain disputes will happen. The phrase “pay now, argue later” will be applicable to adjudication under the new *Act*, as the emphasis shifts to ensuring parties are paid within strict deadlines.

Despite the challenges that will come with these new practices, there are steps that parties may take to prepare for adjudication, either as the party initiating the adjudication process (the “**Requesting Party**”) or as the party responding to the dispute (the “**Responding Party**”).

¹ RSO 1990, c C.30, PART II.1, ss 13.1-13.23 [Act]. See also *Adjudications Under Part II.1 of the Act*, O Reg 306/18, O Reg 109/19 [Adjudications Reg].

² This excludes contracts or subcontracts that result from procurement processes initiated before October 1, 2019.



Do I have the right to the determination of a dispute by adjudication?

The following points highlight the key questions to consider before bringing a Notice of Adjudication. However, parties would do well to familiarize themselves with the statutory requirements to ensure proper compliance.

Is there an existing construction contract or subcontract?

Not all contracts or disputes are eligible for adjudication, and in some circumstances there may be a better dispute resolution mechanism available.

A party may only refer a dispute to adjudication if that dispute arises from a construction contract dealing with one of the matters enumerated in section 13.5 of the Act (listed below), or one that is specifically provided for in the construction contract.

That being said, parties should be cognizant of whether a contract exists to begin with. Where the parties do not have a written construction contract or subcontract, a debate may ensue as to whether or not there is an existing construction contract or subcontract that is subject to a right to adjudication of payment disputes. The lack of a written contract or subcontract will certainly complicate matters, and any determinations as to the existence of a contract, whether it is in writing or not, will be made on a case-by-case basis.

When was the contract or subcontract entered into?

Prompt payment and adjudication apply to contracts and subcontracts entered into on or after October 1, 2019. However, there is an important caveat: if the Owner of the premises began the procurement process³ for the improvement that was the subject of the contract or subcontract before October 1, 2019, prompt payment and adjudication will not apply.

Is the contract complete?

If the contract or subcontract work and/or services has been completed, then there is no right to adjudication unless the parties to the adjudication agree otherwise.⁴ However, at any time before the contract is complete, a party to a qualifying construction contract has the right to refer a payment dispute to an Adjudicator. To do so, the party must deliver a written Notice of Adjudication to the Responding Party, and an electronic copy the Notice to ADR Chambers, the service provider that has been appointed as the Authorized Nominating Authority (the “**Authority**”).⁵

Does the dispute qualify for adjudication?

Per section 13.5 of the Act, disputes over the following matters may be referred to adjudication:

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. a person to whom payment is guaranteed under a labour and material payment bond required under subsection 85.1(4) of the Act may refer to adjudication any dispute with the principal and the surety in relation to the payment guaranteed under the bond;⁶ and
8. any other matter that the parties to the adjudication agree to, or that may be prescribed.

³ Under section 1(4) of the Act a “procurement process” is commenced at the earliest of the making of: a request for qualification, a request for quotation, a request for proposals, or a call for tenders.

⁴ *Ibid*, s 13.3(3).

⁵ *Adjudications Reg*, *supra* note 1, s 16.

⁶ *Ibid*, s 25.

Accordingly, the parties may provide in the contract or subcontract what types of disputes may be subject to adjudication. This is particularly important for disputes that may arise after the contract is complete. The Act is clear that the Adjudicator has no jurisdiction to determine disputes after the contract is completed unless the parties agree otherwise.⁷ Therefore, parties must ensure any non-enumerated issues they wish to bring to adjudication, including any that may arise after the contract is complete, are explicitly provided for in the contract or subcontract.

Be aware that merely including the dispute in the contract is not sufficient: parties must also ensure that the dispute has crystallized, meaning any steps set out in the contract as a prerequisite to the right to commence a dispute have been satisfied. For example, if the parties are negotiating the subject of a dispute in accordance with the dispute resolution procedure and have not completed the negotiation stage set out in the contract, the Responding Party may argue that the Adjudicator does not have the requisite jurisdiction for determination of the dispute as the “dispute has not yet crystallized”. Such a requirement however, would not apply to issues arising from matters involving disputes that are the subject of a Notice of Non-Payment under Part 1.1 of the Act.

Is adjudication the right method of dispute resolution?

If the Responding Party is insolvent or its financial status is such that any determination for payment in favour of the Requesting Party is likely to be unenforceable, adjudication is likely not the best means of dispute resolution. Similarly, if the dispute involves complex issues of delay, large dollar amounts or unusually complex technical design or construction issues, the “quick and dirty” method of adjudication may not be the best means of dispute resolution.

How can I commence an adjudication?

Once a party determines there is a crystallized dispute that qualifies for adjudication, the next step is to initiate the adjudication process by drafting a Notice of

Adjudication, identifying an Adjudicator, and delivering the Notice of Adjudication to the relevant parties.

Prepare a Notice of Adjudication

In preparing a Notice of Adjudication, there are three main things to keep in mind. First, the Notice of Adjudication must be sufficiently detailed to allow the Adjudicator to come to a decision. Second, each Notice of Adjudication may only deal with a single issue, unless the parties and Adjudicator agree otherwise. And third, in adjudications dealing with a Notice of Non-Payment, such Notices must lay out all the reasons for the non-payment.

Draft a detailed notice

The party to the contract or subcontract who wishes to refer a dispute to adjudication must provide to the other party a written Notice of Adjudication that includes:

- a. the names and addresses of the parties;
- b. the nature and a brief description of the dispute, including details respecting how and when it arose;
- c. the nature of the redress sought; and
- d. the name of a proposed Adjudicator to conduct the adjudication.⁸

Drafting the Notice of Adjudication is extremely important as it strictly limits the issues the Adjudicator may determine. For example, if the Requesting Party asks the Adjudicator to “value the services or materials provided under the contract at \$230,000” and does not add other qualifying language such as “or such other amount as the Adjudicator determines”, then the Adjudicator will not have the jurisdiction to determine any other amount in terms of the “value of the services or materials provided under the contract”. Similarly, if the Requesting Party only seeks the determination of the “value of the services or materials provided” without seeking a ruling for payment by the Responding Party to the Requesting Party of the amount determined by the Adjudicator, then the Adjudicator will not have the jurisdiction to make a finding that the Responding Party must pay the Requesting Party.

⁷ *Supra* note 1, s 13.5(3).

⁸ *Ibid*, s 13.7.



Limit the notice to a single issue

It is also important to ensure that each adjudication deals only with a single issue. Pursuant to section 13.5(4) of the Act, an adjudication may only address a single matter, unless the parties to the adjudication and the Adjudicator agree otherwise. So, if the same matter or related matters in respect of an improvement are the subject of disputes to be adjudicated in separate adjudications under subsections 13.5(1) and (2) of the Act, the parties to each of the adjudications may agree to the adjudication of the disputes together by a single Adjudicator as a consolidated adjudication, subject to the agreement of the adjudicator. Nevertheless, even if the parties to each of the adjudications do not agree to hear the disputes together, the Contractor may still require the consolidation of the adjudications.⁹

For example, suppose the Requesting Party makes a claim for a determination of the “valuation of services or materials provided” for a certain improvement. Then, under the same project, the Responding Party brings its own Notice of Adjudication for “an extension of time and for valuation of services or materials” and for payment based on the valuation of the services or materials as determined by the Adjudicator. In such a circumstance, it may be appropriate to consolidate the related matters.

Special considerations for adjudications on Notice of Non-Payment

Adjudications stemming from a Notice of Non-Payment require some additional planning, as the Notice must list all reasons for non-payment.¹⁰ This is critical, as the Adjudicator would likely reject a defence for non-payment that was not set out in the Notice.

There are specific timelines and procedures that must be followed when Notices of Non-Payment are involved. In the case of a Contractor who intends to withhold payment from its Subcontractor by reason of receiving a Notice of Non-Payment from the Owner, the Contractor must do three things: give a Notice of Non-Payment to its Subcontractor within the prescribed time that specifies the amount not being paid; include a copy of the Notice of Non-Payment received from the Owner; and, no later than 21 days after giving the Notice of Non-Payment to the Subcontractor, provide an undertaking to refer the matter to adjudication under Part II.1 of the Act.¹¹ Under this scenario, both the Contractor delivering the Notice of Adjudication and the Owner receiving the Notice of Adjudication would be “forewarned” that adjudication might occur, given that the Owner delivered a Notice of Non-Payment to its Contractor, with the likely result that the “dispute” and the withholding of payment would flow down the construction pyramid.

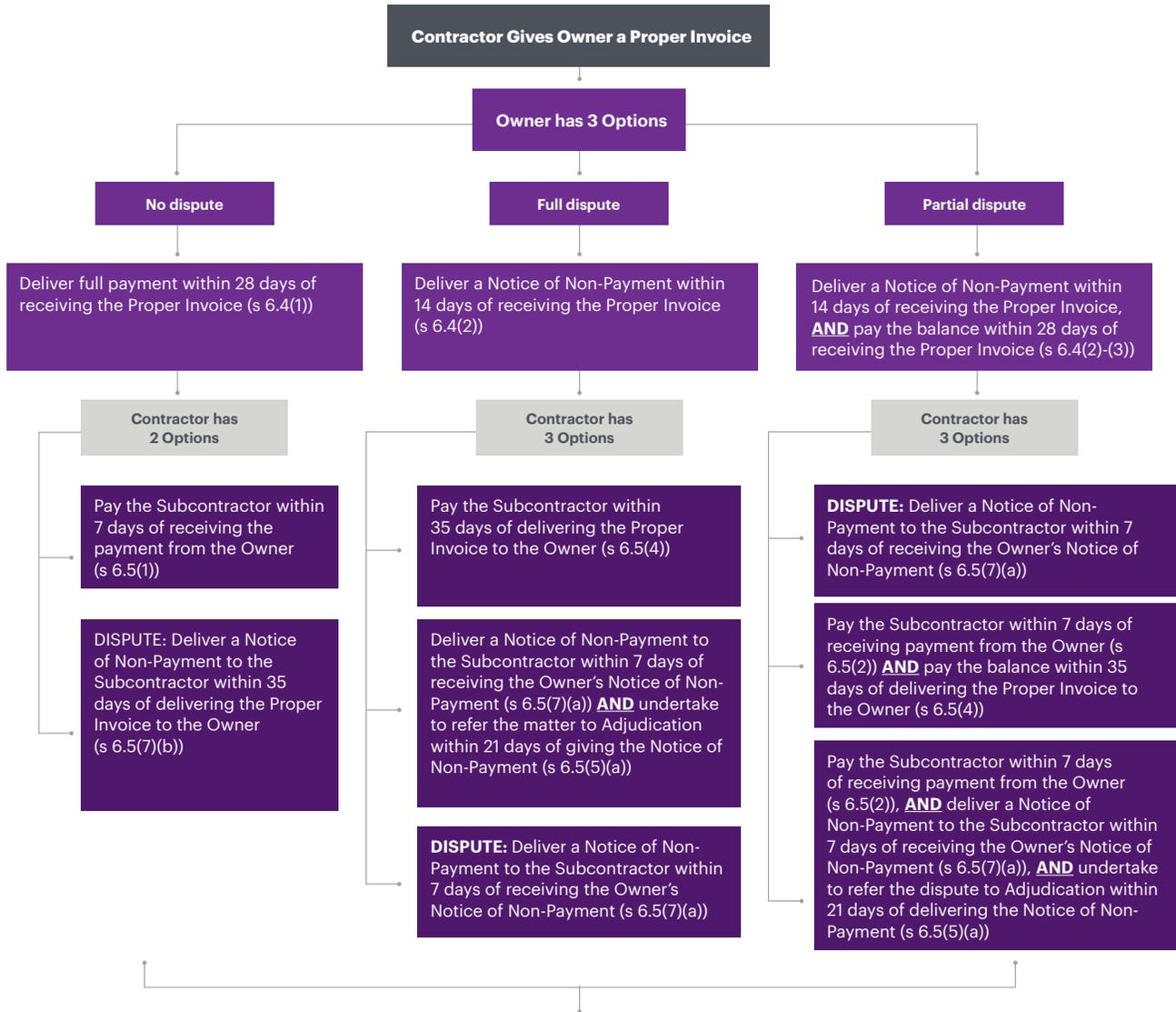
⁹ Notice under subsection 18(1) of the *Adjudications Reg* such notice may not be given later than the fifth day after the Adjudicator receives the documents required by section 13.11 of the Act: see *Adjudications Reg*, *supra* note 1, s 18(3).

¹⁰ Act, *supra* note 1, s 6.4(2).

¹¹ *Ibid*, s 6.5(5).

The party responding to a Notice of Non-Payment must be prepared to adjudicate the reasons for the non-payment.

For more information on these and other timelines, see chart below.



Subcontractors have several options:

If the Subcontractor received **full payment** from the Contractor, they can:

- a. pay the Sub-Subcontractor in full within 7 days of receiving payment from the Contractor (s 6.6(1)); **or**
- b. Dispute the invoice from the Sub-Subcontractor and deliver a Notice of Non-Payment within 42 days of the Contractor delivering the Proper Invoice to the Owner (s 6.6(7)).

If the Subcontractor received **partial payment** from the Contractor, they can:

- a. give a partial payment to the Sub-Subcontractor within 7 days of receiving payment from the Contractor (s 6.6(2)) **and** pay the remainder within 42 days of the Contractor delivering the Proper Invoice to the Owner (s 6.6(7)); **or**
- b. give a partial payment to the Sub-Subcontractor within 7 days of receiving payment from the Contractor (s 6.6(2)), **and** give their own Notice of Non-Payment within 7 days of receiving the Contractor's Notice of Non-Payment, **and** if the Contractor's Notice of Non-Payment is because of a dispute over the Subcontractor's invoice, undertake to refer the matter to Adjudication within 21 days of delivering the Notice of Non-Payment to the Sub-Subcontractor (s 6.6(6)(a)); **or**
- c. dispute the invoice from the Sub-Subcontractor and deliver a Notice of Non-Payment within 42 days of the Proper Invoice being delivered from the Contractor to the Owner (s 6.6(7)).

If the Subcontractor received **no payment** from the Contractor, they can:

- a. pay the Sub-Subcontractor in full within 42 days of the Contractor delivering the Proper Invoice to the Owner (s 6.6(5)(b)); **or**
- b. give their own Notice of Non-Payment within 7 days of receiving the Contractor's Notice of Non-Payment, **and** if the Contractor's Notice of Non-Payment is because of a dispute over the Subcontractor's invoice, undertake to refer the matter to Adjudication within 21 days of delivering the Notice of Non-Payment to the Sub-Subcontractor (s 6.6(6)(a)); **or**
- c. dispute the invoice from the Sub-Subcontractor and deliver a Notice of Non-Payment within 42 days of the Proper Invoice being delivered from the Contractor to the Owner (s 6.6(7)).

NB: If the Owner does not pay the Contractor or deliver a Notice of Non-Payment, the Contractor must deliver its own Notice of Non-Payment (whether based on lack of payment from the Owner or a dispute over the Subcontractor's invoice) to the Subcontractor within 35 days of delivering the Proper Invoice to the Owner (ss 6.5(7)(b))

Identify an Adjudicator

In addition to drafting the Notice of Adjudication, the Requesting Party should select an Adjudicator from the Adjudicator registry on the Authority's public website. In this regard, it should be noted that the entity named the Ontario Dispute Adjudication for Construction Contracts ("ODACC") has been appointed the Authorized Nominating Authority under the Construction Act. According to a report in the Daily Commercial News, Ontario Attorney General Doug Downey and Mr. Allan Stitt, President of ODACC are both confident that adjudication will be able to launch on October 1, 2019 as planned.¹² The Adjudicator should have expertise suitable for the nature of the dispute at issue and be free from conflicts of interest with the Requesting Party or the Responding Party. As set out in the Act, the parties to the adjudication may agree on an Adjudicator, or may request that the Authority appoint an Adjudicator.¹³

If a Responding Party to a Notice of Adjudication wants to object to the proposed Adjudicator named by the Requesting Party, they must do so within three days of receiving the Notice of Adjudication, as the Adjudicator only has four days within which to advise that it does not consent to conduct the adjudication.¹⁴ If an Adjudicator does not consent to conduct the adjudication within four days of receiving the Notice of Adjudication, the party who gave the notice shall request the Authority appoint an Adjudicator.¹⁵ The Authority is required to appoint an Adjudicator, subject to his or her prior consent, no later than seven days of the request for an appointment.¹⁶ No later than five days after an Adjudicator agrees or is appointed to conduct the adjudication, the Requesting Party must deliver

to both the Responding Party and the Adjudicator the documents upon which the Requesting Party intends to rely, together with a copy of the contract or subcontract at issue and a copy of the Notice of Adjudication.¹⁷

If the Responding Party does not deliver an objection to the proposed Adjudicator, the Authority, and the Requesting Party, the Adjudicator (assuming the Adjudicator does not object within the four-day timeline) will be deemed to have consented to the appointment. At this point, the Responding Party will not have a right to object to the appointment, unless the Responding Party can demonstrate to the Adjudicator that there is another basis upon which to object to the appointment, such as a conflict of interest. In such circumstances, the party objecting to the appointment on the basis of an alleged conflict of interest should consider notifying the Authority, as the Authority is required to establish a process for accepting and dealing with complaints against adjudicators.¹⁸

By way of example, a clear conflict of interest would arise where the Adjudicator is a party to the construction contract in dispute. Another example may arise where the particular Adjudicator derives much of his or her income from a particular client who has continuously sought the appointment of the same Adjudicator. This was the case in *Cofely Ltd v. Bingham et al.*,¹⁹ wherein the court noted in the three years before the adjudication, 18% of the Adjudicator's appointments and 25% of his income as an arbitrator came from cases involving the Requesting Party. The Court found that there was apparent bias and the adjudicator was removed.

¹² "Ontario's AG and Authorized Nominating Authority confident in launch by Oct. 1", Daily Commercial News, July 22, 2019.

¹³ *Ibid*, s.13.9(2).

¹⁴ If an Adjudicator does not consent to conduct the adjudication within four days after the Notice of Adjudication is given, the Requesting Party shall request that the Authority appoint an Adjudicator. See: *Act, supra* note 1, s 13.9(4).

¹⁵ *Ibid*, s 13.9(4).

¹⁶ *Ibid*, s 13.9(5).

¹⁷ *Adjudications Reg, supra* note 1, s. 16.1.

¹⁸ The Authority is required to establish a code of conduct for adjudications which shall address, among other matters, "conflicts of interest and related procedural matters". See *ibid*, ss 7(1) and 7(2). The Authority is also required to establish a complaints process for accepting and dealing with complaints against adjudicators. See *ibid*, s 10.

¹⁹ [2016] EWHC 240 (Comm), at paras 103-104, online: <www.bailii.org/ew/cases/EWHC/Comm/2016/240.html>.

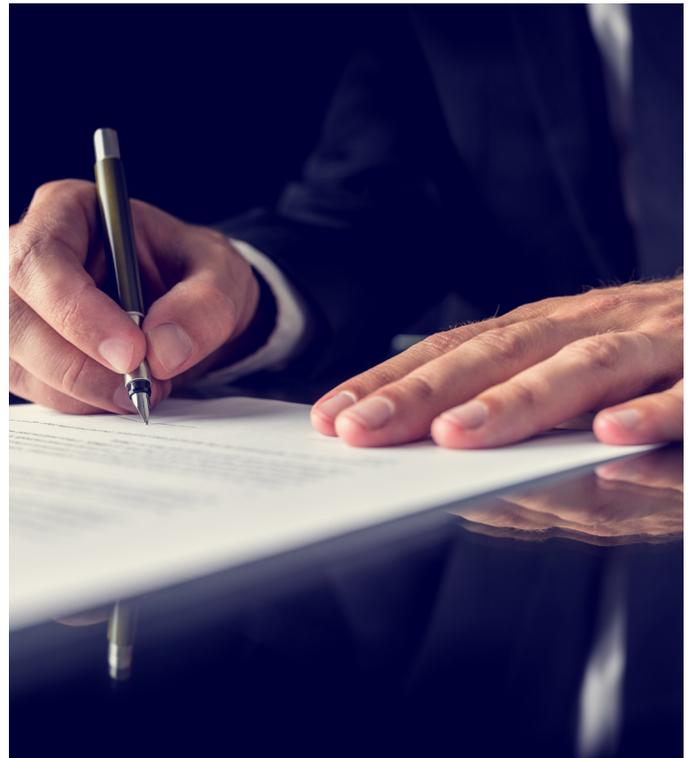
It is good practice to voice any concerns as early as possible, should any issues arise during the proceedings. In a decision of UK's Technology and Construction Court ("TCC"), *Imperial Chemical Industries Limited v. Merit Merrell Technology Limited*,²⁰ the Court determined that when a party to an adjudication objects early and reserves its position of objecting to the Adjudicator's jurisdiction, that party may participate in the adjudication without prejudice and may raise the issue of the Adjudicator's lack of jurisdiction in subsequent enforcement proceedings.²¹ On the other hand, where a party makes no objection to the jurisdiction of the Adjudicator during the adjudication proceedings, that party will be taken to have "consented" to the Adjudicator's jurisdiction and therefore the decision.²²

The principles set out in these decisions would likely be equally applicable in adjudications conducted in Ontario. As such, a party who fails to object to the jurisdiction of the Adjudicator during the adjudication proceedings is likely to be precluded from doing so in proceedings seeking to set aside the determination made by an Adjudicator and be found to have "consented" to the jurisdiction of the Adjudicator.

Deliver the Notice of Adjudication

Once the Notice of Adjudication has been drafted, the Requesting Party is then responsible for serving the Notice on the Responding Party and the Authority on the same day. The Requesting Party must provide a written copy of the Notice to the Responding Party, and an electronic copy to the Authority.²³ In the case of a consolidated adjudication, every other party must also receive a copy of the Notice.²⁴ Furthermore, the Requesting Party must provide all relevant documents to the Adjudicator no later than five days after the Adjudicator agrees or is appointed to conduct the adjudication.

Subject to the time limitations set out in the Act and Regulations, the Adjudicator may issue directions respecting the disclosure of documents on which a party intends to rely in an adjudication to ensure all parties have the opportunity to review those documents.²⁵ In this regard, the Adjudicator is required to act fairly and impartially. Though the timelines for the Requesting Party are laid out in section 13.11 of the Act, currently, there are no strict disclosure deadlines for the Responding Party: the Adjudicator has the discretion to issue directions on when such documents have to be submitted to the Adjudicator and other parties.²⁶ However, given that the Adjudicator has a short time span to deliver his or her decision, the timeline for delivery of a response will be short. As such, the Responding Party will likely have very limited time to prepare its response to a Notice of Adjudication.



²⁰ *Imperial Chemical Industries Limited v Merit Merrell Technology Limited*, [2016] EWHC 2915 (TCC).

²¹ *Ibid*, at paragraph 10.

²² *Ibid*.

²³ *Adjudications Reg*, *supra* note 1, s 16.

²⁴ *Ibid*, s 16.

²⁵ *Ibid*, s 20.

²⁶ *Ibid*, 17(3).

How do I prepare for an adjudication?

Requesting Party

Establish right to adjudicate

- Ensure you have a qualifying construction contract that began on or after October 1, 2019
- Confirm the contract is not complete or terminated

Establish qualifying dispute

- Ensure the dispute qualifies for adjudication, either under the Act or the terms of the contract
- Ensure the dispute has crystallized

Prepare

- Implement strong practice management procedures from the beginning to stay organized
- Assess likelihood of success and the Responding Party's ability to pay should you be successful

Deliver Notice of Adjudication

- Deliver a written copy to the Responding Party and an electronic copy to the Authority
- Deliver a copy to the Adjudicator within 5 days of their consent/appointment

Support your claim

- Deliver supporting documentation to the Adjudicator within 5 days of their consent/appointment
- Monitor disclosure: ensure volume of documentation is proportional to the nature of the dispute

Responding Party

Beware

- Be alert to any possible disputes that may be developing
- Once a Notice of Adjudication is delivered, you will be under intense time pressures—be prepared!

Prepare

- Implement strong practice management procedures from the beginning—avoid ambush!
- Keep documents organized to allow easy access to key documents

Confirm

- Confirm that the construction contract qualifies for adjudication
- Check that the dispute is eligible for adjudication, either through the Act or the terms of the contract

Object

- Deliver any Notice of Objection to the proposed Adjudicator within 3 days of receiving the Notice of Adjudication
- Ensure any objections to the adjudication procedure are raised early

Respond

- Deliver a Response and any supporting documentation within the time prescribed by the Adjudicator



Because a party can refer a matter to adjudication at any time during the term of a construction contract or subcontract,²⁷ it is important to maintain sound project management practices in order to ensure that relevant documents can be put together quickly. Stories abound of adjudication by ambush wherein a Requesting Party has had months to prepare its case, but once the Notice of Adjudication is served, the Responding Party is left with a relatively short time of seven to 14 days (based on the UK experience) to respond to voluminous material. In such situations, the Responding Party is faced with the prospect of diverting internal resources or retaining external resources (both at considerable expense) to compile a responding position. The short answer is that this is the new reality of adjudication, and Responding Parties may not always be able to look to Adjudicators for relief.

Take, for example, the decision of the UK TCC in *Deluxe Art & Theme Ltd v Beck Interiors Ltd*.²⁸ Though one party to the dispute submitted their documents late, which forced the other party to scramble to reply, the court upheld the arbitrator's decision not to grant an extension. Justice Coulson noted that "the courts have always recognized that questions of timetabling are uniquely a matter for the Adjudicator, who has to produce his [or her] decision in a very short space of time".²⁹ Parties should be prepared for Canadian courts to take a similar approach.

In addition to the Notice of Adjudication, counsel for either party should submit a summary of their position, including key supporting documents, and take into account the complexity of the issues and the amount at stake to consider whether or not expert reports

or witness statements would assist the Adjudicator in its determination of the issue in dispute. What material may be helpful to the Adjudicator depends on the nature of the dispute. In short, preparing for adjudication is similar to preparing for other forms of dispute resolution, albeit on a much shorter timeframe.

Furthermore, counsel should keep in mind that principles of proportionality will apply. Such principles should be considered in putting together the materials in support of or in response to an adjudication, and counsel should monitor the volume of materials being submitted to ensure they are proportionate to the nature of the dispute.

What are my considerations as a Responding Party?

Responding Parties face some additional hurdles as their timelines are generally more restrictive than those of the Requesting Parties.

No time extensions

What is arguably most important to the Responding Party is to ensure that it responds on time. The consequences of failing to respond to a Notice of Adjudication in accordance with the timelines set out in the Act and the Regulations could result in significant cost consequences for the Responding Party, including court sanctioned requirements to pay. Unlike in other areas of law, a Responding Party should not expect to receive an extension of the short time frames set out in the Act and the Regulations to respond to a Notice of Adjudication. An Adjudicator's power to determine

²⁷ Subject to the requirements applicable to prompt payment set out at Part I.1 Act. See Act, supra note 1, s 13.5.

²⁸ [2016] EWHC 238 (TCC).

²⁹ *Ibid*, at para 40.

a dispute will not be affected by a party's failure to provide documentation on time, whether that be failing to serve a response to the Notice of Adjudication, to provide specified information within the time allotted, to comply with the Adjudicator's call for a conference, or to do any other thing the Adjudicator requests or directs that is within the jurisdiction of the Adjudicator, including calling on expert assistance or a site attendance with the consent of the Owner.

Objecting to the Adjudicator

As soon as the Notice of Adjudication is received, the Responding Party should do two things: one, consider whether or not the Requesting Party had a right to refer the dispute to adjudication; and, two, promptly consider whether or not the proposed Adjudicator is suitably qualified to determine the dispute. If the Responding Party objects to the proposed Adjudicator, it must deliver a Notice of Objection to the Requesting Party and the Adjudicator within three days of receiving the Notice of Adjudication. The Authority will then be required to designate an Adjudicator for the determination of the dispute, taking into account the nature of the dispute to be determined.³⁰

Timelines for required documents

As previously mentioned, the current timelines for a Responding Party to submit a response and supporting documentation is at the discretion of the Adjudicator.

And, once again, if a party is concerned that the deadlines were so short as to breach the principles of natural justice, it is important that the party raise those concerns early. Similar to the decision in *Deluxe Art*, the TCC in *Bovis Lend Lease Ltd v. The Trustees of the London Clinic*,³¹ held:

It will be a rare case, if ever, in which it can be said that there is a material breach of the rules of natural justice in adjudication proceedings (in relation to a party not being given a reasonable opportunity to present its case, defence, evidence or other submissions) that the party complaining of such a breach has

not raised the issue during the course of the adjudication. Of course, there may be cases where the complaining party does not know of the unfairness. That could arise, for instance, when an Adjudicator receives evidence or argument from one party which has simply not been communicated at all to the other party.³²

Accordingly, the idiom "the best offence is a good defence" is applicable, as meticulous preparation will be essential to the success of a Responding Party's objections or claims.

How do I review an Adjudicator's decision?

The process for an adjudication is intended to be simple and flexible, and adjudicators are bound to adhere to the stringent principles of natural justice, namely, the avoidance of bias and the granting to each party of a fair hearing.

However, once an Adjudicator delivers its determination, if there were any issues with how the Adjudicator came to that decision, it is open to any of the participating parties to have the decision judicially reviewed. Parties should note that an application for judicial review of an Adjudicator's determination requires leave of the Divisional Court,³³ and may only be made for issues of procedural fairness or jurisdiction. For example, a party may have a decision judicially reviewed where the determination was made on a matter that is not the subject of adjudication under the Act, or the decision was entirely unrelated to the subject of the adjudication.

Given that there is no jurisprudence regarding adjudication in Ontario, the courts may look for guidance from other jurisdictions that have dealt with disputes arising from the adjudicating process. However, absent a clear case of lack of jurisdiction or the breach of the rules of natural justice, it will be a rare case where the courts will interfere with the decision of the Adjudicator.

³⁰ Act, *supra* note 1, s 13.9(4)

³¹ [2009] EWHC 64 (TCC).

³² *Ibid* at para 67.

³³ Act, *supra* note 1, s 13.18.

In *Carillion Construction Ltd. v Devonport Royal Dockyard Ltd.*,³⁴ an oft-cited UK case, the Court of Appeal reviewed the circumstances in which a court may decline to enforce an Adjudicator’s decision:

The objective which underlies the [U.K. Construction Act] and the [Scheme] requires the courts to respect and enforce the Adjudicator’s decision unless it is plain that the question which he has decided was not the question referred to him or the manner in which he has gone about his task is obviously unfair. It will only be in rare circumstances that the courts will interfere with the decision of an Adjudicator.³⁵

The principals set out in *Carillion* arguably apply to adjudications under the Act.

Conclusion

It remains to be seen how the participants in the construction industry will regard the new world of adjudication. One thing is for certain, however, while the old way of resolving disputes through the courts or by way of arbitration will remain, none of the participants in the construction industry will be free from the new reality of the “pay now, argue later” regime known as adjudication. The question will be— are we up for that task?

Please see the Ontario Court Services website for access to the *Construction Act* forms.

For more on this topic, see: Karen Groulx, “How to Prepare for an Adjudication – Tactics, Strategies, Planning and Panic” [available here](#).



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³⁴ [2005] EWHC (Civ) 1358.

³⁵ *Ibid* at para 85.