

Guide to the Conduct and Enforcement of Adjudication in Ontario

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Construction adjudication is an expedited process for resolution of construction disputes. Construction adjudication came into effect in Ontario on October 1, 2019 with the amendments to the new *Construction Act*.

Adjudication is only applicable to projects where the contract was entered into on or after October 1, 2019, or where a procurement process was commenced on or after October 1, 2019. It is important to note that under the transition provisions of the *Act*, the relevant contract for the purposes of the transition period is the prime contract, i.e. the contract between owner and contractor, not any subcontract under that contract. Further, Section 1(4) stipulates that a “procurement process” is commenced for the purposes of the Act on the earlier of the making of a request for qualifications, a request for quotation, a request for proposals, or a call for tenders.

Adjudication is binding on an interim basis. In the event that the parties are not in agreement with the adjudicator’s determination, the option to proceed with a court action remains in place. The parties may also seek judicial review of the determination under Section 13.18(1) with leave of the Divisional Court.

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.

AVAILABILITY OF ADJUDICATION

Per Sections 13.5(1) and (2) of the *Act*, the following construction disputes 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. Any other matter that the parties to the adjudication agree to, or that may be prescribed.

An adjudication may only address a single matter, unless the parties to the adjudication and the adjudicator agree otherwise.

EXPIRY OF ADJUDICATION PERIOD

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.

THE ADJUDICATION PROCESS

1. Notice of Adjudication - The claimant must deliver a written notice of adjudication to the other party and to Ontario Dispute Adjudication for Construction Contracts (ODACC).¹ Ideally, notice should be delivered on the same day. Notice must include the following information:

- 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.

Note that ODACC has template documents for the adjudication process and an electronic portal for submission of documents to the adjudicator and opposing party.²

2. Selection of an Adjudicator - The parties may agree to an adjudicator from the registry of qualified adjudicators,³ or may request that ODACC appoint an adjudicator. An adjudication may only be conducted by an adjudicator listed in the registry. The claimant should propose an adjudicator but if the parties cannot agree, one will be appointed.

3. Delivery of Documents - Within five days of the selection of the adjudicator, the claimant delivers a Statement and supporting documentation to the responding party and the adjudicator. A Statement is a detailed account of the dispute and similar to a Statement of Claim. Importantly, even without the supporting documentation of a formal, written contract, parties can still utilize the adjudication provisions under the Act.

4. Process Selection – The adjudication procedure is negotiated between the parties and the adjudicator. There are four styles of adjudication called “Pre-Designed Adjudication Processes” that can be found on the ODACC website.⁴ Each process has its own cost implications. The adjudicator will make the ultimate decision on appropriate procedure and relevant timelines.

¹ <https://odacc.ca/wp-content/uploads/2020/01/20191213-ODACC-Notice-of-Adjudication.pdf>.

² <https://odacc.ca/en/odacc-custom-system/>.

³ <https://odacc.ca/en/adjudicator-registry/>.

⁴ <https://odacc.ca/en/claimants/adjudication-process-2/>.

a) Pre-Designed Adjudication Process 1:

- Adjudication in writing only;
- Submission of parties' arguments (and photographs) is limited to two pages per party, not including a copy of the construction contract (which must be submitted⁵) and a copy of the disputed invoices (which may also be submitted); and
- Determination is expected to be approximately one to two pages.

b) Pre-Designed Adjudication Process 2:

- Adjudication in writing only;
- Submission of parties' arguments (and photographs) is limited to five pages per party, not including a copy of the construction contract (which must be submitted) and a copy of the disputed invoices (which may also be submitted); and,
- Determination is expected to be approximately one to two pages.

c) Pre-Designed Adjudication Process 3:

- Adjudication in writing only;
- Submission of parties' arguments (and photographs) is limited to five pages per party, not including a copy of the construction contract (which must be submitted) and a copy of the disputed invoices (which may also be submitted);
- Each party may submit additional documents, parts of documents and witness statements to a maximum of ten pages; and,
- Determination is expected to be approximately five pages.

d) Pre-Designed Adjudication Process 4:

- Submission of parties' arguments (and photographs) is limited to ten pages per party, not including a copy of the construction contract (which must be submitted) and a copy of the disputed invoices (which may also be submitted);
- Each party may submit additional documents, parts of documents, and witness statements to a maximum of 25 pages (in total);
- Each party has half an hour to make an oral presentation;
- Presentation can be conducted by videoconference or teleconference (but will not be in person); and,
- Determination is expected to be approximately five pages.

5. Responding materials – Responding party may deliver responding materials to the claimant and the adjudicator. The response shall be provided no later than such day as the adjudicator may specify, but must be provided to the adjudicator and every other party on the same day.

6. Determination – The adjudicator is required to release a written determination within 30 days from receipt of all documentation from the parties to the dispute. A certified determination is to

⁵ The lack of a written contract does not preclude a claimant from pursuing adjudication.

follow within 7 days. The adjudicator may, on consent of the parties, extend the time for delivery of the determination by 14 days, or at a later date as agreed to by the parties.

7. Payment - Upon receipt of the adjudicator's determination, the party who is ordered to pay must make a payment within 10 days. Interest begins to accrue on the day when payment is due to be paid. Interest is based on the prejudgment interest rate in accordance with the *Courts of Justice Act* or the rate specified in the contract or subcontract, whichever one is greater.

8. Adjudication Fees - Parties to an adjudication bear their own legal costs of the adjudication. However, set fees for the adjudication itself can range anywhere from \$800-\$3,000 which is split evenly between the parties. Certain matters may warrant hourly rates ranging from \$250 per hour to \$750 per hour.

ENFORCEMENT OF DETERMINATION

Upon receipt of the certified determination, file the certified copy of the determination along with two additional copies at the civil intake office of the Superior Court of Justice. The Court will return a stamped certified copy of the determination. A court-stamped copy must be delivered within 10 days of receipt to the opposing party.

Once stamped by the court, the determination can be enforced like any other court Order, including by way of writ of execution or garnishment.

FREQUENTLY ASKED QUESTIONS

1. *What is adjudication?*

Adjudication is an expedited process for resolution of construction disputes. Adjudication is binding on an interim basis. In the event the parties are not in agreement with the adjudicator's determination, the option to proceed with a court action remains available.

2. *I did work without a written contract, is adjudication still an option?*

Yes. Even without a written contract, parties may utilize adjudication as long as there is evidence to substantiate the claim.

3. *What is a "proper invoice"?*

Pursuant to Section 6.1 of the *Act*, "proper invoice" is defined as follows:

"proper invoice" means a written bill or other request for payment for services or materials in respect of an improvement under a contract, if it contains the following information and, subject to subsection 6.3(2), meets any other requirements that the contract specifies:

1. The contractor's name and address.
2. The date of the proper invoice and the period during which the services or materials were supplied.
3. Information identifying the authority, whether in the contract or otherwise, under which the services or materials were supplied.
4. A description, including quantity where appropriate, of the services or materials that were supplied.
5. The amount payable for the services or materials that were supplied, and the payment terms.
6. The name, title, telephone number and mailing address of the person to whom payment is to be sent.
7. Any other information that may be prescribed

Pursuant to Section 6.3(2) of the *Act*, a provision in a contract that makes the giving of a proper invoice conditional on the prior certification of a payment certifier or on the owner's prior approval is of no force or effect.

It should be noted that the requirement to submit a proper invoice applies to contracts, not subcontracts.

4. How do I start the adjudication process?

Complete a Notice of Adjudication form by downloading a template from the ODACC website. Submit the notice to the opposing party and to ODACC.⁶ You can choose to submit documents by mail, email or electronically through the ODACC website. You must first register with ODACC to access the portal for submitting documents.

The Notice of Adjudication should include the name of a proposed adjudicator and suggested adjudication process. If approved, all parties will receive confirmation of the assigned adjudicator and approved adjudication process and timelines.

5. What are the key procedural deadlines?

Once the Notice of Adjudication is submitted and an adjudicator is assigned to the dispute, the claimant has five (5) days to deliver their Statement and any supporting documentation that they intend to rely on. The responding party must also adhere to the procedural timeline for filing their materials.

⁶ <https://odacc.ca/wp-content/uploads/2020/01/20191213-ODACC-Notice-of-Adjudication.pdf>

A written determination of the adjudicator will typically be delivered within 30 days from receipt of submissions from all parties in accordance with the selected adjudication process.

6. Once a determination is made, what are the next steps?

Upon receipt of the certified copy of the determination, the claimant should file it along with two additional copies at the civil intake office of the Superior Court of Justice. The court will return a stamped certified copy of the determination. A court-stamped copy must be delivered within 10 days of receipt to the opposing party.

Once stamped by the court, an adjudication determination can be enforced like any other court order, including by way of writ of execution or garnishment.

7. Can an adjudicator's determination be set aside?

Yes. If a party is not in agreement with the determination they may seek judicial review of the determination with leave of the Divisional Court. Such an application must be filed, with proof of service, no later than 30 days after the determination is communicated to the parties.

In the event the Divisional Court sets aside the decision of an adjudicator, the court may require that any or all amounts paid in compliance with the determination be returned.

8. What happens to my lien rights?

Adjudication and preservation of lien rights can be initiated at the same time. Per Section 34(10) of the *Act*, if the matter that is the subject of a lien that has not expired is also a matter that is the subject of an adjudication, the lien will expire on the later of the date on which the lien would expire under Section 31 of the *Act* and the conclusion of the 45-day period next following the receipt by the adjudicator of documents under Section 13.11.

9. Do I require legal representation to adjudicate a dispute?

No. However, it is strongly recommended that you retain legal representation to ensure compliance with rules and deadlines. In addition, experienced advocacy ensures your claim will be presented in the most favourable manner.

The information and views expressed in this Guide are for information purposes only and are not intended to provide legal advice, and do not create a lawyer client relationship. For specific advice, please contact us.

