

Construction Act – Interim Adjudication

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Summary

The *Construction Act* (CA) Part II.1 Construction Dispute Interim Adjudication provides for construction dispute interim adjudication. Adjudication is available to every contractual relationship in the construction pyramid where the contract relates to an improvement. Interim Adjudication may be used to resolve disputes as outlined in CA [Section 13.5](#) (1) or by mutual agreement. In relation to prompt payment rules and holdback release, interim adjudication may be mandated. In other circumstances, a party may choose to initiate interim adjudication. This Practice Tip addresses both situations in relation to the roles of a Certificate of Practice holder in a project.

Although interim adjudication has been in effect since October 2019, not everyone is aware of it, and it has not been utilized in situations where it could be of great benefit.

Note: Where the term “project” is used, it has the same meaning throughout as “improvement” in the CA. This is an over-simplification, but until the CA is clarified by amendment or court ruling, it is an appropriate approximation.

The CA contains Part I.1 Prompt Payment (the subject of Practice Tip PT.10.3) and Part II.1 Construction Dispute Interim Adjudication (the subject of this Practice Tip).

The information in this Practice Tip is organized under the following headings:

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Background

Prior to the 2019 amendments to the *Construction Act*, little could be done to quickly or inexpensively resolve construction disputes. The most common legal remedies involved liens or lawsuits, neither of which are inexpensive or quick.

The intent of the CA was to keep the money flowing at all levels in the construction pyramid. The primary mechanisms were a requirement for prompt payment and a process for interim adjudication of construction disputes (including payment-related issues). For convenience, interim adjudication may be referred to in this Practice Tip as simply adjudication.

Holders of a Certificate of Practice should be familiar with the requirements that apply:

1. To the prime or head contract (which could be between the owner and the contractor [e.g. a CCDC 2 contract], owner and construction manager [e.g. a CCDC 5B], or owner and each trade contractor [e.g. a CCDC 5A/CCDC 17 contracting structure]) when the holder is the payment certifier;
2. To the contract between the owner and the holder;
3. To the subcontract between the holder and the subconsultants;
4. To the subcontract between the prime consultant and the holder as a subconsultant; and
5. To the contract between the design-builder and the holder.

The same adjudication legislation applies in each of these situations, but the holder's role, responsibilities, and specific applicable clauses vary.

Holders should be particularly careful not to give legal advice to owners some of whom may be unfamiliar with the adjudication provisions. Owners should obtain legal advice about the responsibilities imposed on them by the CA, and about the timing and the wording of any notices or other documents related to adjudication.

Scenarios

1. Adjudication Process

1. Availability of Adjudication:

a) Types of Matters for which Adjudication is Available:

The availability of adjudication, and the applicable rules and procedures, are the same regardless of whether the adjudication is between an owner and contractor, between an owner and Certificate of Practice holder or, to a large extent, between a contractor (or holder) and their subcontractor (or subconsultant).

A party to a contract or subcontract may refer to adjudication a dispute respecting any of the following matters:

- i) The valuation of services or materials provided under the contract;
- ii) Payment under the contract, including in respect of a change order, whether approved or not, or a proposed change order;
- iii) Disputes that are the subject of a notice of non-payment under [Part I.1](#);
- iv) Amounts retained as set-off by trustee (CA [Section 12](#)) or as lien set-off (CA [Section 17.\(3\)](#));
- v) Payment of a holdback (CA [Section 26.1](#)) or (CA [Section 26.2](#));
- vi) Non-payment of holdback (CA [Section 27.1](#)); and
- vii) Any other matter to which the parties to the adjudication agree, or that may be prescribed (CA [Section 13.5\(1\)](#)).

An adjudication may only address a single matter unless the parties agree otherwise (CA [Section 13.5\(2\)](#)).

In two notable instances, the referral of a dispute to adjudication is effectively mandatory. Specifically:

- i) In the case where a contractor or holder (as the case may be) has not been paid by an owner pursuant to the prompt payment rules, and the contractor or holder wants to rely on the owner's non-payment as the basis for refusing to pay subcontractors or subconsultants (CA [Section 6.5\(6\)](#)). Similarly, in the case where a subcontractor or subconsultant (as the case may be) has not been paid pursuant to the prompt payment rules by the contractor or holder and wants to rely on the contractor's or holder's non-payment as the basis for refusing to pay sub-subcontractors or sub-subconsultants (CA [Section 6.6 \(6\)](#)). See Practice Tip PT.03 *Construction Act* – Prompt Payment for more information on prompt payment.
- ii) In specific circumstances where the 10% statutory holdback has not been released (CA [Section 27.1\(2\)-\(3\)](#)).

With respect to the other matters for which adjudication is available, adjudication is not mandatory in the sense a party is not required to refer its dispute to adjudication. However, if a party does decide to refer a dispute to adjudication, the responding party is required to participate.

Some common examples of disputes that might be referred to adjudication include:

- a dispute over the failure to pay (whether pursuant to the prompt payment rules or otherwise);
- a dispute over the failure to issue a change order;
- a dispute over entitlement to payment of a claim (e.g. alleged delay costs); and
- in the case of a construction contract specifically, a dispute over a claim for payment the contractor has submitted that has been rejected by the owner or a finding of the consultant.

Additionally, the CA explicitly allows parties to refer any "other matter" to adjudication on which they agree. As a result, a contract may include language (possibly in the dispute resolution section) regarding certain additional types of disputes the parties are agreeing, in advance, to resolve by adjudication.

b) Timing for Bringing an Adjudication:

With respect to when an adjudication can be launched, an adjudication may not be commenced after the date the contract or subcontract is completed unless the parties agree otherwise (CA [Section 13.5\(3\)](#)). (The CA is unclear as to whether termination of a contract is considered the same as completion. This issue had not been ruled on by the courts at the time of writing this Practice Tip.) Additionally, a party may not refer a matter to adjudication if the matter is the subject of a court action or arbitration that has already been finally determined (CA [Section 13.5\(5\)](#)).

The CA does not prevent a party that is unhappy with the result of an adjudication from subsequently "re-disputing" the issue in court or arbitration.

Beyond this, there are certain defined timing constraints in the CA for when adjudications pertaining to certain types of disputes have to be launched (notably, adjudications compelled by instances of non-payment under the prompt payment rules or the non-release of holdback).

c) Dispute Resolution Clauses in Contracts

As noted, referring a dispute to adjudication does not prevent the parties from also litigating or arbitrating that same dispute. Therefore, Certificate of Practice holders should not ignore the dispute resolution provisions in their contracts as they will still be relevant and may even stipulate additional procedures that apply to an adjudication the parties may engage in pursuant to the *Construction Act*.

2. Process and Timing:

a) Initiating an Adjudication

- i) If a party to a contract or subcontract wishes to refer a dispute to adjudication, it must give the other party a written notice of adjudication that includes certain pieces of information, including the name of a proposed adjudicator (CA [Section 13.7\(1\)](#)).

b) Appointing an Adjudicator

- i) With respect to the appointment of an adjudicator, only an adjudicator listed on the adjudication registry may conduct an adjudication (CA [Section 13.9\(1\)](#)). The parties can either agree to an adjudicator or request the "Authority" (known as [Ontario Dispute Adjudication for Construction Contracts](#) [ODACC]) to appoint one (CA [Section 13.9\(2\)](#)). It is not possible to select an adjudicator in advance for future disputes by way of a clause in the contract (CA [Section 13.9\(3\)](#)).
- ii) If a proposed adjudicator does not agree to the appointment within four days after the notice of adjudication is given, the initiating party must request ODACC appoint the adjudicator (CA [Section 13.9\(3\)](#)). ODACC is to then appoint an adjudicator within seven days of receiving the request (CA [Section 13.9\(5\)](#)).
- iii) Within five days after the adjudicator has agreed or is appointed, the initiating party must provide the adjudicator with a copy of the notice of adjudication, the contract or subcontract, and any documents on which it intends to rely (CA [Section 13.11](#)).

c) Responding to a Notice of Adjudication

- i) The responding party will provide a written response after the adjudicator has been appointed (CA [Section 13.11.1](#)). Typically, once appointed the adjudicator will establish a timeframe for when the responding party has to deliver its response.

d) Adjudication Procedures and Powers of Adjudicator

- i) The adjudicator is given certain powers under the CA (in addition to any other powers specified in the applicable contract or subcontract). These include issuing directions for the conduct of the adjudication, obtaining the assistance of certain third-party advisors (e.g. contractor, architect, engineer, or accountant), and conducting an on-site inspection (CA [Section 13.12\(1\)-\(2\)](#)).
- ii) The procedures for the adjudication are set out in the CA and its regulations and will also be established by the adjudicator once it has been appointed. Additionally, as noted above, the applicable contract or subcontract may set out additional procedures that apply to the adjudication, but they cannot conflict with the provisions of the CA (CA [Section 13.6](#)).

e) Determination

- i) The adjudicator must issue its determination within 30 days of receiving the preliminary documentation from the initiating party, unless the parties and the adjudicator agree to an extension (CA [Section 13.13\(2\)](#)).

f) Consolidating Adjudications

- i) Multiple adjudications can be consolidated. Specifically, if a contractor (or holder) is engaged with the owner in an adjudication and is also engaged in an adjudication with its subcontractor (or subconsultant) over the same or a related matter, the parties to both adjudications may agree to adjudicate the disputes together (CA [Section 13.8\(1\)](#)).

If the parties do not agree, the contractor (or holder) may nevertheless require the consolidation of the adjudications (CA [Section 13.8\(2\)](#)). There are sometimes certain benefits to consolidating adjudications including efficiencies (from a timing and resource perspective) and ensuring a consistent result in the two disputes.

- g) Adjudicator's Fee
 - i) The adjudication fee must be agreed to by the parties and the adjudicator, otherwise it will be determined by ODACC (CA [Section 13.10](#)).
 - ii) Payment of the adjudication fee is split equally between the parties (CA [Section 13.10\(3\)](#)). However, the adjudicator has the ability to order one party pay some or all of the other party's costs and any portion of the adjudicator's fee if the adjudicator determines that party acted in a manner that was frivolous, vexatious, an abuse of process, or other than in good faith (CA [Section 13.17](#)).
- h) Amounts Payable
 - i) A party required under an adjudicator's determination to pay an amount must make payment within 10 days of when the determination was communicated to the parties and failure to do so will lead to certain consequences (CA [Section 13.19\(2\)](#)). Notably, in the case where the successful party was a contractor or subcontractor, they will have the right to suspend work. They will be entitled to the reasonable costs they incur as a result of the suspension and any subsequent resumption of work (CA [Section 13.19\(5\)-\(6\)](#)).
 - j) Finality and Judicial Review of Adjudicator's Determination
 - i) A party to an adjudication may, within a certain period, file the determination with the court. The determination will then be enforceable as if it were a court order (CA [Section 13.20](#)).
 - ii) A party may apply to the Ontario Division Court to have an adjudicator's determination judicially reviewed. However, an adjudicator's determination may only be set aside on judicial review on certain (fairly narrow) grounds (CA [Section 13.18](#)).

2. Assisting the Client in an Adjudication between Owner and Contractor

1. Nature of assistance given.

A holder may be requested by their client to provide assistance where the client is engaged in an adjudication with their contractor.

The nature of this assistance may include, for example, providing factual information (such as invoices, payment certificates, or other project documentation). Beyond this, the client may request the holder to provide an assessment of the claims or assertions being made by the contractor.

In these cases, the holder should review the terms of the architectural services contract to confirm whether the type of assistance being requested is contemplated within the agreed upon scope of services or if it would amount to extra services.

If the holder does provide assistance, they should at all times act in accordance with the terms of their contract and the standard of care to which they are subject (which will often be set forth in their contract with the client). The holder should also be careful to maintain a position of impartiality in any assistance it does provide. Becoming a biased advocate for the client or otherwise providing assistance in a manner that does not comply with the holder's standard of care and other obligations may give rise to liability on the part of the holder.

3. Assisting the Contractor in an Adjudication between Owner and Contractor

1. Nature of assistance given.

The holder may be requested to provide assistance to a contractor in an adjudication between an owner and contractor, particularly in the context where the holder has been retained by the contractor directly (as may be the case on a design-build project).

Similar to the considerations outlined above with respect to a holder providing assistance to an owner, the architect should act with caution and provide any such assistance in accordance with its obligations and standard of care.

4. Adjudication Between the Client and Certificate of Practice Holder

1. Causes giving arise to adjudication.

As noted, a holder and their client may engage in adjudication under the CA and the considerations described above with respect to the availability and process of the adjudication will apply.

5. Responding to an Adjudication Initiated by a Subconsultant

1. Causes giving arise to adjudication.

A holder may find itself in the position of having to respond to an adjudication initiated by a subconsultant. The holder should first confirm the matter in dispute is capable of being adjudicated under the CA, and that the dispute is still able to be referred to adjudication (e.g. confirm the applicable subcontract has not already been completed).

The holder should also consult the terms of the subcontract to confirm whether other adjudication procedures are stipulated. The holder will then need to follow the rules regarding the appointment of an adjudicator and, once the adjudicator is appointed, follow the procedures set down by the adjudicator.

6. Adjudication Provisions in OAA Standard Contracts

The OAA standard form contracts contain various clauses of which holders should be aware that relate to adjudication. Below is a summary of some of the relevant clauses using examples from the versions for use by architects:

1. Adjudication provisions in OAA 600

- a) With respect to the OAA 600-2021A contract:

- i) Article A18 provides a field, with sample language pre-populated in the template contract form, for the parties to include with respect to how the Architect would be compensated for assistance it provides to the Client in connection with an adjudication. Further, GC 4.1.11 clarifies that the provision of services such as reviewing and reevaluating additional drawings, specifications, change orders, or other documents, or increased levels of effort requested by the Client in connection with an Adjudication are to be treated as Extra Services.
- ii) The contract adds definitions for “Lien Legislation” (which includes the CA) and “Adjudication.”
- iii) GC 5.3 includes as part of the Client’s responsibilities the requirement to provide any legal, accounting, and insurance counselling services the Client determines to be necessary for an issue related to Adjudication.
- iv) The contract, in GC 11.4, provides the Architect with a right to terminate the contract if the Client fails to pay when due any amount payable to the Architect under an adjudicator’s determination.
- v) The contract stipulates in GC 12.5 that any amounts determined or resolved in favour of the Architect must be paid within 28 days of the determination or resolution or such shorter period as provided by Lien legislation (which, in the case of a determination made by an adjudicator under the CA, would be 10 days).
- vi) GC 15.1 explains the Architect’s obligations for retaining records with respect to a matter in dispute (which would include a matter that is the subject of an adjudication).
- vii) GC 16.2 of the contract’s dispute resolution provisions clarifies that disputes may be referred to Adjudication by either party.

2. Adjudication provisions in OAA 800

1. With respect to the OAA 800-2021A contract:

- i) The contract adds a definition of “Lien Legislation” (which includes the CA).

3. Adjudication provisions in OAA 900

1. With respect to the OAA 900-2021A subcontract:

- i) Article A16 states any dispute regarding an invoice or payment is to be resolved in accordance with the subcontract's dispute resolution provisions or, if applicable, Adjudication.
- ii) The subcontract adds definitions for "Lien Legislation" (which includes the CA) and "Adjudication."
- iii) In GC 8.4, the subcontract states that where a single policy of insurance includes both the Architect and Subconsultant as insured, the Subconsultant agrees to pay its share of any deductible in accordance with any determination of responsibility, whether by settlement, Adjudication, dispute resolution, or other formula agreed by the parties.

7. P3s and AFPs

Please note different considerations and rules under the CA apply in the context of Public Private Partnership (P3), alternative financing and procurement (AFP) arrangements, and Integrated Project Delivery (IPD), which are beyond the scope of this Practice Tip.

References

Construction Act (CA), R.S.O., 1990, Chapter C.30.

[Ontario Court Forms – Construction Act](#)

OAA 600-2021

OAA 800-2021

OAA 900-2021

Practice Tip PT.10.3 *Construction Act* – Prompt Payment

Canadian Handbook of Practice for Architects (CHOP)

The OAA does not provide legal, insurance or accounting advice. Readers are advised to consult their own legal, accounting or insurance representatives to obtain suitable professional advice in those regards.
