



# New construction adjudication process coming

**Focus on Alternative Dispute Resolution**

September 3, 2018 | Written By Meagan Gillmore



*Howard Wise says a new adjudication process over payment disputes 'gives an opportunity to address issues sooner rather than later.'*

Lawyers say the forthcoming adjudication process for Ontario's construction industry has the potential to resolve payments in a timely fashion, but companies need to start preparing now for the changes.

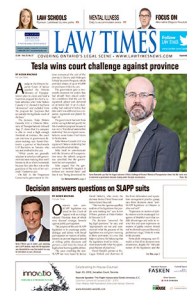
The Ontario government passed sweeping changes to the province's construction law last

December. This includes rules to enforce prompt payment and the creation of an adjudication process to settle payment disputes. Both of these measures come into effect on Oct. 1, 2019.

"It's a natural evolution as construction gets more complex," says Howard Wise, a partner at Goodmans LLP in Toronto who focuses on commercial litigation and construction law.

"It gives an opportunity to address issues sooner rather than later, which is ultimately a good thing for parties."

Neil Abbott, a partner with Gowling WLG in Toronto who practises construction law, says prompt payment helps companies co-operate and lowers tensions on a job site.



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“Prompt payment is designed to keep the project going,” he says. “[The government] brought in adjudication to resolve those payment disputes on an invoice-by-invoice basis.”

The Construction Act says owners will have to pay general contractors within 28 days after receiving an invoice. After general contractors are paid, they have seven days to pay subcontractors. Those subcontractors need to pay their subcontractors seven days after they’ve been paid, the law says.

Disputes about payment can be sent to adjudication if there isn’t already a contract dispute resolution process written in the contract, the law says. The parties can pick their adjudicator from a list of qualified adjudicators, and if they can’t agree on the adjudicator, one can be chosen for them, says the act.

“[Prompt payment rules] only work if you also have a hammer in the anvil,” says Abbott. “You’ve got a backstop.”

The law says adjudication decisions must be made within 30 days and be in writing. These decisions are binding on an interim basis, the law says.

Litigation can sometimes happen a decade after a project is complete, says Abbott. Adjudication “at least eliminates some of the misery associated with that,” he says.

Parties may decide to not take a case to court after adjudication, says Harvey Kirsh of Kirsh Construction ADR Services Ltd. in Toronto, who has practised construction law for more than 40 years.

“Often, the parties seem to find that interim adjudication will often be the ones that the parties at the end of the day accept,” he says. “They don’t necessarily proceed to another round of dispute resolution, either by court proceedings or arbitration.”

Parties may also choose not to go to court when the project is complete because a dispute may not seem as important then, he says. The adjudication process can also be a chance to show the benefits of alternative dispute resolution, says Marvin Huberman, president of the Alternative Dispute Resolution Institute of Ontario.



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“The table is set for a potentially terrific opportunity to really achieve the goals of the new Construction Act and simultaneously many of the goals of alternative dispute resolution,” he says.

“This type of initiative can facilitate achieving the goals of ADR — alternative dispute resolution or appropriate dispute resolution — which is to reduce court caseloads and really provide speedy resolutions of disputes [that] are disruptive to communities and businesses.”

The government will choose an Authorized Nominating Authority to select and train qualified adjudicators and administer a code of conduct. The Authorized Nominating Authority has not been selected yet, and more information about the selection process will be available in the coming months, a spokesperson for the Ministry of the Attorney General wrote in an email to *Law Times*.

The email further says that a registry of qualified adjudicators will likely be posted online after.

Regulations under the Construction Act say adjudicators must have at least 10 years of experience in the construction industry, for example, as an accountant, architect, engineer, quality surveyor, project manager, lawyer or arbitrator.

Ontario is the first Canadian jurisdiction to introduce an adjudication process for construction, says Huberman, but other jurisdictions are looking at it. In the United Kingdom, where there has been adjudication in construction disputes for years, Huberman says, “there seems to be interest on focusing attention on dispute prevention.”

Meanwhile, lawyers say businesses need to change how they do things to prepare for this new process.

“I think like everything it will have growing pains. People won’t necessarily be used to it,” says Wise, noting there’s still more than a year before the regulations about adjudication come into force.

Companies may need to hire staff whose job it is to respond to adjudications, he says. They’ll also need to make sure their documents are organized, he says. The law says the party that requests the adjudication has five days to give relevant documents to the adjudicator once the adjudicator has been chosen.

“There’s going to be a new regime, and if you have to make sure you have the resources internally to deal with responding to a request to adjudicate because it is done in almost a real-time situation,” says Wise.

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legislation was tested in the Court of Appeal, with six rulings released recently, four of which were deemed strategic lawsuits against public participation. Do you think anti-SLAPP legislation is working well?

- Yes, if a defendant can bring an anti-SLAPP motion at the beginning of the trial before they have filed a statement of defence, it promotes expression on matters of public interest.
- No, in earlier cases involving anti-SLAPP motions, many felt the legislation was interpreted in a way that made it too easy for the defendants to earn a dismissal.

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