



## **Post-pandemic Construction Disputes: What to Expect from Real-time Adjudication**

**Compliance and Ethics**

**Employment and Labor**



Except for essential work, construction activity, like other sectors of the economy, has virtually come to a standstill in many jurisdictions due to the COVID-19 pandemic. As some lockdowns lift and the construction industry slowly scales back up, there will likely be issues the parties will need to resolve.

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Many of these problems will stem from work stoppages, time delays, and costs, and most will be resolved by the parties based on contract terms and negotiations. However, the length and severity of this economic shutdown are unprecedented and, when projects resume — despite everyone's best efforts — [increased litigation is likely](#).

Construction and building activity drive economic growth, so a smooth functioning dispute resolution system is important. Post-pandemic, this will be even more essential, and the flow of money in construction activities will be one of the keys to getting back on track.

Let's first understand why some disputes arise in construction matters. The supply of labor, materials, and equipment on a construction project often represent a significant undertaking by contractors. The contractor incurs these costs on the basis they will be recovered, along with a profit margin, as the project progresses.

For owners, construction projects represent significant capital outlay, and the longer a project takes to complete, the more interest the owner pays on the capital. Moreover, the project owner does not begin to see a return on its capital until the project is completed and brought into service to help generate income. Often, when a dispute arises, an owner may stop payments to a contractor due to the owner's need to protect rights of set-off.

If parties are not able to resolve issues through early stage negotiations, there is a risk that a party may stop performing its obligations. The flow of money will stop, and costs will increase for all parties. For the owner, each day a project is delayed affects the return on its investment. For the contractor, a delayed resolution means that labor, equipment, and management expertise potentially sit idle and costs mount. Negotiations can be a waste of time and resources if one of the parties is not serious and stalling for time.

The parties can turn to the courts, but courts are often overburdened, too formal, and lack the technical expertise and resources to resolve issues in a timely and efficient manner. In many jurisdictions around the world, there are security of payment laws, which are laws designed to protect suppliers of services by giving them the right to register their claim against title to the property, much like a mortgage but in the form of a construction lien.

While a construction lien secures value for you, it does not ensure that you get paid quickly and without costly litigation. Litigation, unfortunately, is not a winning solution for either party.

How swiftly parties can resolve disputes will be essential for resuming construction activities following the economic stoppage. As of Oct. 1, 2019, the province of Ontario joined a growing list of common law jurisdictions around the globe that has embraced a summary adjudication process in construction projects.

This adjudication process, when invoked by a party, becomes mandatory on the other party. The process uses compressed timelines in order to fast-track through the various stages of adjudication and means that construction disputes will be resolved in 46 days or less. In Ontario, this is a significant cultural shift in an industry that has been reluctant to modernize itself.

Ontario is betting that a reasonably sophisticated early dispute resolution process, in the form of adjudication on virtually any issue under the construction contract, will ensure that parties to the contract are paid on time.

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This provides assurances that funds will flow to subcontractors and suppliers, and the project proceeds in a timely manner. Under the framework, a person experienced in the construction industry for at least 10 years and a member in good standing of a self-governing professional body such as engineer, architect, accountant, lawyer, or quantity surveyor could become an adjudicator. The adjudication process is administered by a private body, called an Authorized Nominating Authority (Authority).

It is responsible for the training and qualifying of adjudicators, maintaining a public registry of adjudicators, ensuring the expertise and experience of adjudicators is adequate, and handling complaints against adjudicators. The Authority has powers to set fees and other charges in relation to all aspects of the adjudication and the training and qualifying of adjudicators.

The parties must select an adjudicator from the registry maintained by the Authority. However, the parties are prohibited from selecting an adjudicator in advance, such as naming an adjudicator in the construction contract. If the parties cannot agree on one, the Authority will select an adjudicator for the parties. An adjudicator must, among other things, be impartial.

Only parties to a contract can commence adjudication. The intended purpose of adjudication is to resolve disputes on construction projects as they arise in the project progresses, rather than waiting until the end of the project. In this sense, it is “real-time” resolution of construction disputes. An adjudicator will have the authority to determine nearly all disputes and has wide powers to conduct the adjudication in the manner he or she determined in the circumstances.

The adjudicator may take the initiative in ascertaining the relevant facts and law, draw inferences based on the parties’ conduct, request the assistance of an expert, make site visits, or set oral hearings in person or by video or teleconference. The key to this framework is the strict timeline for each step in the adjudication, including the obligation of the adjudicator — with limited exceptions — to render a decision within 30 days of receiving the adjudication documents.

Furthermore, the decision of an adjudicator will be immediately binding until a court or arbitrator determines otherwise. For instance, if an adjudicator orders that an owner must pay the contractor an amount, the owner must do so within 10 days.

If the owner does not pay, there is interest on the overdue amount and the contractor may suspend work and the owner must pay any demobilization and remobilization costs.

An adjudicator’s decision can be filed with the court and it will be enforced like a court order. An adjudicator’s decision is not easily appealable except under limited grounds. It appears the primary goal of the adjudication process is swift resolution under tight timelines, and not necessarily getting it perfectly right. In that sense, it is somewhat “rough justice.”

However, the adjudicator’s decision is interim in the sense that a party may still commence litigation in the courts or, if the contract permits, by arbitration and the decision of that tribunal would be final. It is expected that parties will seek further recourse from the courts only on rare occasions.

The adjudication fee is paid by the parties equally unless the parties agree otherwise, or the adjudicator decides differently. For disputes under CA\$50,000 the fees are fixed between CA\$800 and CA\$3,000, depending on the amount in dispute. The adjudicator is paid on an hourly basis, on a sliding scale between CA\$250 and CA\$750, if the dispute is more than CA\$50,000. A portion of the adjudicator’s fees are also allocated to the Authority, which is designed to be self-funding and

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independent of the government.

When the construction industry emerges from the current extraordinary event, the industry will face many challenges. Having a swift and efficient dispute resolution process will be indispensable in getting construction projects back on track.

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**For more advice and information on the coronavirus pandemic, visit the [ACC COVID-19 Resource Center](#).**

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Hydro One Networks Inc. is the largest transmitter and distributor of electricity in Ontario and one of the largest in North America. Dhawan advises in a broad range of legal areas, focusing on negotiating construction and infrastructure development projects, closing merger and acquisition deals, negotiating loan and security agreements for transactions involving corporate finance, negotiating pension investments in fixed income, private equity, and other asset classes in tax-efficient structures, structuring corporate reorganization for tax efficiencies, and developing and responding to term sheets with contractual clauses and formulas to construct commercial agreements. He was called to the Ontario Bar in 1993, after receiving his Bachelor of Laws degree from the University of Windsor and his Bachelor of Commerce and Finance degree from the University of Toronto.