

Adjudication of Construction Disputes Available Online During Pandemic

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Construction disputes in Ontario can be determined online within 45 days, allowing participants to get a timely resolution while maintaining social isolation.

Ontario's Premier Doug Ford declared a state of emergency in relation to the COVID-19 pandemic on March 17, 2020. In his press conference, Premier Ford specifically stated that construction projects would not be affected by Ontario's state of emergency.

On March 24, Premier Ford ordered all non-essential businesses to close down. Among the list of businesses listed as essential are Ontario's construction projects in the industrial, commercial, institutional and residential sectors.

The message from governments is clear; construction is among the most important sectors in Ontario's economy, and it has to be fostered during this period of unprecedented upheaval, provided proper health and safety protocols are in place.

One area that has not received special accommodation is with respect to enforcement. In fact, as of the writing of this article, the typical enforcement procedure available across the industry, a court action, is temporarily suspended, with no scheduled date for a return to regular operations. Further, the Ontario court system is not set up to allow for social distancing. The Advocates' Society is working with the Court to expand virtual access to the courts, but realistically the development and implementation of a standard for video or telephone hearings is at least weeks, if not months, from coming online.

However, under the *Construction Act*, certain construction disputes can already be determined using an isolation-friendly means of dispute resolution known as "adjudication". As an added benefit, it is a statutory requirement that the adjudication has to be fully completed (including a written determination delivered to the parties) in no more than 46 days, though this deadline is likely subject to the discretion of the Adjudicator while Ontario's emergency declaration remains in effect.

But more importantly for our current reality, adjudications can be done entirely remotely using the online portal established by the Ontario Dispute Adjudication for Construction Contracts (“ODACC”). Most adjudications will be done by the exchange of limited written submissions, with evidence attached. In the occasions where the adjudicator has to hear a witness’ verbal testimony, or if the adjudicator needs to hear submissions from a party’s representative, these can be done using ODACC’s videoconferencing software. Ultimately, the decision on the procedure to be applied to a particular dispute is left up to the discretion of the adjudicator.

The flexible approach to adjudication procedure was designed with speed in mind, and was necessary in order to allow all submissions and evidence to be received to meet the extremely tight deadlines in these lightning-fast adjudications. Although not the intended purpose, the flexibility is uniquely poised to make adjudication the natural first choice to hear and determine construction disputes.

There are two caveats with the adjudication provisions. The first is the fact that determinations, while binding, are interim decisions. This means that any party who disagrees with the determination can go to court to try to get a different decision from a judge. Nevertheless, if an adjudicator requires one party to make a payment to the other party, the determination must be obeyed unless and until a judge decides otherwise.

The second caveat is regarding the transition provisions in the *Construction Act*, which provide that if the contract for the improvement (that is, the contract between the owner and first level of contract) was dated before October 1, 2019, or if a procurement process for the improvement was started before that date, the provisions do not apply. However, the parties to the dispute are still at liberty to agree to have the provisions apply, and to submit their dispute to adjudication.

Blaneys is one of very few law firms in Ontario to have a certified ODACC adjudicator as a member. Our [Construction Law Group](#) is available to address any questions you have about adjudication.

The information contained in this article is intended to provide information and comment, in a general fashion, about recent cases and related practice points of interest. The information and views expressed are not intended to provide legal advice. For specific legal advice, please contact us.