Strategies for making the most of Ontario's new adjudication regime under the *Construction Act*

By Christophe Shammas

The nature of construction disputes is in the process of dramatic change. The recent changes to the renamed *Construction Act* have focused on three major reforms: modernization of the lien provisions (which came into effect on July 1, 2018), the introduction of prompt payment and a new interim adjudication regime. Loopstra Nixon has previously written about the new prompt payment and adjudication provisions on the *Construction Act*, which will come into effect on October 1, 2019.

This article will focus on strategies that construction organizations can implement to make the most of the adjudication regime, which will provide a process for owners, contractors and subcontractors to resolve their disputes mid-project on an interim basis.

The adjudication regime will apply to construction contracts where:

a) the prime contract for the project was entered into on or after October 1, 2019;
b) the procurement process for the project commenced on or after October 1, 2019; and
c) if the contract relates to a leasehold improvement, the lease was entered into on or after October 1, 2019.

Parties will be able to adjudicate various disputes including interim payments, delay claims, defects in work and holdback. In the United Kingdom, where an adjudication regime has been in place since 1998, adjudications have also extended to matters involving professional negligence.

Once the adjudication process is triggered by a notice of adjudication, responding parties will be faced with extremely tight timelines to respond. The general practice in the United Kingdom is for responding parties to have seven days from receiving the referring party's submission to respond with all the documents it intends to rely on. The Ontario Dispute Adjudication for Construction Contracts has published a "Recommended Adjudication Time Line" with even tighter timelines for responding parties.

The new adjudication regime will require industry participants to change how they manage projects and handle disputes. The unforgiving timelines of adjudication, combined with the fact that the ability to appeal an adjudication decision mid-project is limited, means that organizations will have to implement strategies to ensure that they are well-positioned to deal with adjudications.

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Organizations need to ensure that they have easy access to documents and witnesses

Most adjudications will be determined in writing, meaning that they will be decided based on an adjudicator's review of documents and possibly witness statements. As such, organizations should ensure their employees, consultants and contractors are properly documenting conversations, agreements and site visits and that they organize their documents so that parties and their lawyers have easy access to information. This can be achieved by adopting certain software solutions, staffing projects differently or implementing policies that employees working on projects must follow.

Organizations will need to be able to spot issues early

Parties that wait until an adjudication actually begins to prepare will be left scrambling and on their back foot. This will be especially problematic in cases where a referring party has spent months preparing its claim, which has been a common experience in the United Kingdom. As such, project managers and other individuals on site must ensure that they identify areas of dispute as early on as possible and build a file relating to that dispute. Even in cases where it appears that the parties are working to resolve a dispute, parties must be ready for the possibility that one party will turn around and trigger the adjudication provisions of the *Construction Act*.

Organizations should think about adjudication when negotiating contracts

The *Construction Act* allows parties to add terms to their contracts regarding the adjudication process and the matters that can be referred to adjudication. While parties cannot contract in a manner that contradicts the minimum requirements of the *Construction Act*, they will have the ability to tailor how they adjudicate disputes to the unique aspects of their projects.

While there are likely to be growing pains as organizations adjust to the adjudication scheme, the experience in the United Kingdom suggests that it will significantly reduce the amount of disputes that end up in the Courts. In the short term, organizations should ensure that they are not caught flat-footed by the faster pace of this regime.

For further information concerning these developments, please contact Christophe Shammas or Michael McWilliams from Loopstra Nixon's Construction Litigation Group.

The Canadian adjudication scheme has been based on the model used in the United Kingdom, which has been in place since 1998. Loopstra Nixon is the Canadian affiliate of LawExchange International. LawExchange International is an established network of international independent law firms throughout Europe, North and South America, Asia and Australia. As a result, Loopstra Nixon has the capacity to tap into the institutional knowledge gained by its LawExchange International counterparts in the United Kingdom to assist its clients with construction adjudications.
