CONSTRUCTION ADJUDICATION TAKES ROOT IN CANADA

*Andrea Lee**

I. INTRODUCTION

Construction is a dynamic industry governed by multiple tiers of complex contracts and relationships. In Canada, construction employs 1.4 million people and generates $147.5 billion annually.[1] It accounts for 7.5 per cent of the nation's gross domestic product (GDP),[2] fourth behind real estate, manufacturing, and mining, oil, and gas.[3] Essential services are provided by a myriad of design professionals, contractors, trades, and suppliers, working together to create the built form—and, along the way, dealing with project budgets and schedules and the myriad of changes that arise in the course of projects. Measures such as liquidated damages and guaranteed maximum price and back-to-back liability provisions have become standard as performance incentives or pressure points, depending on one's perspective.

Amid these tensions and competing interests, it is not surprising that, to paraphrase the old adage, "into each construction site, a little rain must fall". According to one report, the value of construction disputes in North America more than doubled between 2019 to 2020, from $18.8 million to $37.9

*Partner, Glaholt Bowles LLP, Toronto.

[1] BuildForce Canada, "Construction Industry Key Indicators", online <https://www.buildforce.ca/en/key-indicators>.

[2] Canadian Construction Association, "The Impact of the Construction Industry is Everywhere", online <https://www.cca-acc.com/about-us/value-of industry/#:~:text=Construction%20employs%20over%201.4%20million,gross%20domestic%20product%20(GDP)>.

[3] Statistics Canada, "Industry GDP", online <https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3610043406>.

million,[4] with the average dispute resolution process lasting between 14 and 18 months.[5] The main causes of disputes in North America are disagreements over contractual obligations between the owner, contractor, and other construction parties, errors and omissions in contract documents, and owner-directed changes to the construction plan.[6] The most widely used forms of dispute resolution as of 2020 appear to be party-to-party negotiations, followed by mediation.[7] Arbitration surpassed litigation to rank as the third most common dispute resolution method.[8] This article will explore construction adjudication, a new form of dispute resolution that originated in the UK and is now gaining a foothold in Canada, with Ontario being the first jurisdiction to adopt it, followed by Saskatchewan and Alberta, and other provinces following soon. The article will also discuss the international experience with the adoption of adjudication and the challenges arising from the process, which may serve as a roadmap for the growth of adjudication in Canada.

II. THE UK EXPERIENCE

Ontario's adjudication regime finds its roots in the United Kingdom's *Housing Grants, Construction and Regeneration Act 1996* ("HGCRA"),[9] applicable to all construction contracts in England, Wales, Scotland and Northern Ireland. Related to the HGCRA is *The Scheme for Construction Contracts* (the "Scheme"),[10] which governs adjudication procedure in England and Wales in circumstances where a contract has no

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[4] Arcadis, "2021 Global Construction Disputes Report" at 8, online <https://www.arcadis.com/en/knowledge-hub/perspectives/global/global-construction-disputes-report>.

[5] *Ibid* at 12.

[6] *Ibid* at 13.

[7] *Ibid* at 14.

[8] *Ibid*.

[9] HGCRA, 1996 c 53, Part II, s 108.

[10] Regulations 1998 (SI 1998 No 649). There is a separate Scheme for Scotland.

adjudication provisions, where one or more of the statutory requirements is not met, or where the parties have so agreed.

Statutory adjudication as a real-time, interim binding dispute resolution process was developed in response to cash flow delays and litigation that were significantly impacting the UK construction industry and clogging the court system. An adjudicator's determination is binding on the parties to the adjudication until a determination of the matter by a court, arbitration or agreement of the parties. Adjudication unfolds in a tight timeframe, often leading to its characterization as "rough justice".

Under the HGCRA, any party to a dispute may commence adjudication by delivery of a notice of adjudication to every other party to the contract. Within seven days of the notice of adjudication, an adjudicator is selected either by agreement of the parties or by the nominating body and a referral notice must be delivered to the adjudicator by the party initiating the adjudication, accompanied by copies of the construction contract and other documents relied upon. The adjudicator has powers to give directions as to the timetable and procedure for the adjudication, including limits as to the length of written submissions or oral representations. The adjudicator may also request any party to the contract to supply documents reasonably required, meet and question any of the parties to the contract and their representatives, conduct site visits and inspections, carry out any tests or experiments, appoint experts, assessors, or legal advisers, and issue other directions relating to the conduct of the adjudication. This process is contemplated to result in an adjudicator's decision within 28 days of receipt of a referral notice, which can be extended to 42 days if the referring party agrees or to such period of time as all parties agree. Once the adjudicator has made a decision, it is binding unless and until it is overturned by litigation, arbitration or by agreement of the disputing parties, unless the contract provides that the adjudication is non-binding.

Notably, while the HGCRA received Royal Assent on July 24, 1996, and adjudication did not come into effect until 1998, there

were no cumbersome transition provisions in the legislation such as those found in Ontario's Act. Rather, adjudication simply applied to contracts entered into after May 1, 1998.[11]

It could be that this straightforward transition rule in some way contributed to the rapid uptake of adjudication in the UK. A published adjudication report indicated that in 1998, the first year the adjudication regime came into effect, there were 187 adjudications referred to all adjudicator nominating bodies, followed by a sharp increase to 1309 in the second year.[12] In 2020, twenty-two years later, there were close to 2,000 construction adjudications,[13] leading some to call adjudication the most popular method for resolving construction contract disputes in the UK.[14]

The success of adjudication has depended on the efficiency of the process and recognition of its value by the UK courts. Lord Justice Coulson, in discussing the need to keep any enforcement proceedings as simple and streamlined as possible, remarked:[15]

> This process evolved in order to ensure that the speedy adjudication process created by the Housing Grants (Construction and Regeneration) Act 1996 was not derailed by delays in the subsequent enforcement of the adjudicator's decision. Although it has come at some cost to

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[11] M. Molloy, "Ireland Finally has its Macob Moment", online <http://constructionblog.practicallaw.com/ireland-finally-has-its-macob-moment/>.

[12] Adjudication Society, "Report No 19", online <https://www.adjudication.org/sites/default/files/Adjudication%20Report%2019%20-%20November%202020.pdf>.

[13] *Ibid*.

[14] Royal Institution of Chartered Surveyors, "Adjudication of Construction Disputes in a Post-Pandemic World", online <https://www.rics.org/uk/news-insight/latest-news/news-opinion/adjudication-of-construction-disputes-in-a-post--pandemic-world/>.

[15] *John Doyle Construction Ltd v Erith Contractors Ltd*, [2021] EWCA Civ 1452 at para 29.

> other court users in the TCC [Technology and Construction Court] (because they can sometimes be bumped down the queue for interim appointments in order to prioritise adjudication enforcement hearings), it has generally been regarded as a great success. It is one of the reasons why, speaking personally, I rather cavil at the suggestion that construction adjudication is somehow 'just a part of ADR'. In my view, that damns it with faint praise. In reality, it is the only system of compulsory dispute resolution of which I am aware which requires a decision by a specialist professional within 28 days, backed up by a specialist court enforcement scheme which (subject to jurisdiction and natural justice issues only) provides a judgment within weeks thereafter. It is not an alternative to anything; for most construction disputes, it is the only game in town.

The growth of statutory adjudication in UK and sustained referrals throughout the decades have overcome any initial doubt about the industry's ability or desire to adapt to this dispute resolution process. Adjudication has since been adopted in numerous common law jurisdictions, including Australia, New Zealand, Malaysia, Singapore, Ireland, and now Canada.

III. TRANSITIONING ONTARIO TO ADJUDICATION

For years, Canadian courts have been choked by delays and cumbersome procedures. In the report *Delaying Justice is Denying Justice – An Urgent Need to Address Lengthy Court Delays in Canada,* the Standing Senate Committee on Legal and Constitutional Affairs noted that when delays become excessive, the consequences can be serious; multiple adjournments and court appearances place an additional strain on already limited court resources.[16] The Committee explored alternatives to

[16] Senate Standing Committee on Legal and Constitutional Affairs, "Delaying Justice is Denying Justice – An Urgent Need to Address Lengthy Court Delays

traditional litigation that could free up the courts, recommending that the Government of Canada work with the provinces and territories to implement more efficient systems for judicial appointments, case and case flow management, the use of restorative justice programs, integrated service models, "shadow courts", and therapeutic courts, and to develop technology to modernize court procedures and infrastructure.

Coinciding with a crescendo of advocacy for legislative reform by the construction industry and public consultations on the modernization of laws governing projects across the country, the Standing Senate Committee report underscored the need for change.

Legal experts such as Duncan Glaholt, who argued for the establishment of an adjudication option for construction disputes as far back as 1996,[17] wrote about the need to reduce court gridlock by getting ahead of significant disputes on construction projects, which result in delays and damages, the cessation of payments and protracted litigation. To address this challenge faced by the construction industry, Mr. Glaholt proposed statutory adjudication. Like the UK, it was proposed that the Canadian process serve as an accessible and efficient form of dispute resolution, to be used by construction parties throughout the lifetime of projects.

The strongest argument for adjudication is that it is a real-time process that allows funds to keep flowing with minimal project interruption—that is, adjudication proceeds in parallel with work on site, and does not lead to work stoppages unless the party prevailing in the adjudication remains unpaid, in which case it is entitled to suspend work. The process is less expensive than litigation or arbitration and can be tailored to suit the complexity and value of the dispute. While adjudication

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in Canada" at 2, online <https://sencanada.ca/content/sen/committee/421/LCJC/Reports/CourtDelaysStudyInterimReport_e.pdf>.

[17] Duncan W. Glaholt, "The Adjudication Option: The Case for Uniform Payment & Performance Legislation in Canada" (1996) 53 CLR (3d) 8.

is binding on an interim basis,[18] it has resulted in few major disputes at the end of projects which take years to resolve.[19] In the United Kingdom, where the concept was introduced a quarter century ago, adjudication quickly became a leading method of resolving construction disputes[20] and has drastically reduced the courts' workload.[21]

In 2016, Bruce Reynolds and Sharon Vogel delivered their expert review, *Striking the Balance: Expert Review of Ontario's Construction Lien Act*. Citing Mr. Glaholt's paper, the authors noted that "adjudication worked, and quickly took root" in the United Kingdom, and that it is now used internationally in a wide range of contexts.[22]

Following the recommendations in the expert review and rounds of consultation with industry stakeholders, in 2018, Ontario announced an overhaul of the *Construction Lien Act.* Its new name, the *Construction Act* (the "Act"),[23] emphasized that the Act encompasses much more than just lien remedies. That year, the Act was modernized to reflect the evolution of the construction industry and the diversity of projects governed by the legislation. Amendments were introduced to address

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[18] An adjudicator's determination is binding on the parties to the adjudication until a determination of the matter by a court, by an arbitrator or by written agreement between the parties respecting the matter of the determination. Nothing in the statute prevents a party from commencing proceedings in court or before an arbitrator to finally determine the matter at any time.

[19] *Ibid*, citing John L. Riches & Christopher Doncaster, *Construction Adjudication* (London: Blackwell Publishing, 2nd edn 2004).

[20] Robert Gaitskell, "Adjudication: Its Effect On Other Forms Of Dispute Resolution* (the UK experience)", Mondaq (20 September 2005), online <https://www.mondaq.com/uk/real-estate/34896/adjudication-its-effect-on-other-forms-of-dispute-resolution-the-uk-experience>.

[21] N. Gould & C. Linneman, "Ten Years on: Review of Adjudication in the United Kingdom" (2008) 134:3 J Prof Issues in Eng Educ & Prac 298.

[22] "Striking the Balance: Expert Review of Ontario's Construction Lien Act" at Ch 9 sec 2, online <https://www.publications.gov.on.ca/striking-the-balance-expert-review-of-ontarios-construction-lien-act>.

[23] *Construction Act* RSO 1990, c 30.

alternatively financed projects, new holdback and bond rules, and extended lien preservation and perfection periods, among others.

In 2019, the long-anticipated prompt payment and adjudication regimes under the Act came into effect. Industry excitement seemed to presage significant uptake. However, Ontario has not witnessed a significant number of adjudications undertaken to date. The primary reason is likely that the complex transition rules governing which projects are subject to the new prompt payment and adjudication rules have dampened the immediate benefit of these legislative amendments. Statutory adjudication is not available for many complex projects still in-progress for which the procurement process predated October 2019.

There are those in the field who doubt adjudication will ever gain a foothold in Canada, for reasons beyond the transition rules. There have been sentiments expressed, anecdotally, that the established culture of lien litigation will impede adjudication's growth or that parties will be unwilling to risk disrupting a project or business relationships by initiating an adjudication.

Similar doubts were initially expressed in other jurisdictions which modelled their adjudication systems on that of the UK. However, in countries such as Singapore, Australia and Ireland, adjudication has nevertheless become widely used as a tool to enforce payment obligations and efficiently resolve disputes. Canada can look to these jurisdictions and learn from the challenges they have experienced with adjudication, particularly with respect to jurisdictional issues and judicial review. As time marches on and statutory adjudication will likely become an accepted option in the dispute resolution toolkit for construction disputes.

The remainder of this article will examine the genesis of adjudication in Ontario, the basic concepts of the Ontario scheme, early adoption statistics, and the first court case arising out of the process.

After many years of the industry lobbying for change, particularly by subcontractors not in contractual privity with owners, Ontario lawmakers eventually came around to the concepts of prompt payment and adjudication. As Mr. Glaholt noted in his paper, "*'Made in Ontario' Statutory Adjudication*", a process was developed for the Ontario construction industry, adjusting the UK framework to suit the province's needs.[24]

The types of disputes that can be referred to adjudication in Ontario are valuation of services or materials, payments due under a contract, including in respect of a change order, disputes related to notices of non-payment or holdbacks, and any other matter that the disputing parties agree to or that may be prescribed by the Regulations. As such, it may be possible to submit a broad scope of disputes to be resolved quickly, during the life of a project, on an interim basis.

The timeframes of statutory adjudication in Ontario are much like the UK process. The party wishing to commence an adjudication must submit a notice of adjudication form to the opposing party and to a governing body established by the Act, Ontario Dispute Adjudication for Construction Contracts ("ODACC"). The notice of adjudication is to include the name of a proposed adjudicator and select one of ODACC's pre-determined adjudication processes, designed to suit disputes of varying complexity and value. Once approved, all parties receive confirmation of the assigned adjudicator and approved adjudication process and timelines. The claimant has five days to deliver their statement and any supporting documentation on which they intend to rely. The responding party must also adhere to the procedural timeline established by the adjudicator for filing their materials. The adjudicator must typically deliver their written decision (a "determination") within thirty days from receipt of all parties' submissions.[25]

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[24] D.W. Glaholt & M. Rotterdam, "'Made in Ontario' Statutory Adjudication" (2017) *Guide to the Leading 500 Lawyers in Canada* at B-40.

[25] Glaholt Bowles LLP, "Guide to the Conduct and Enforcement of Adjudication in Ontario", online <https://www.glaholt.com/docs/default-

Although adjudications in Ontario are designed to address a single dispute, the parties and the adjudicator can agree otherwise. In cases where there three or more parties are involved, each adjudication can be filed separately and then consolidated. In this way, the adjudication serves the purpose of streamlining matters and quickly reaching a result.

A key distinction between the UK and Ontario regimes is that claimants in Ontario have a right to preserve and perfect a lien through the courts, in addition to and simultaneously with prompt payment and adjudication rights. It remains to be seen how many unpaid claimants will default to the familiar step of preserving a lien against a project, given the strict and unforgiving lien deadlines, rather than or in addition to initiating adjudication. Taking this cautious approach may end up negating the cash flow benefits of the new scheme.

In addition, unlike the UK, Ontario's system is established with a single public body overseeing all adjudications. ODACC has established a roster of adjudicators with backgrounds in project management, quantity surveying, engineering, architecture and law, created an online platform to submit disputes and manage documents, and developed standard procedures depending on the complexity and value of the dispute, and implemented a training program for would-be adjudicators. All disputes submitted to adjudication under the Act must be determined by ODACC adjudicators. A question for the future is whether the volume of adjudications will rise to the level where multiple adjudication bodies will be required to keep proceedings running efficiently.

This question is not yet pressing, given that many projects in Ontario are still not subject to adjudication due to the Act's transition provisions. Subsection 87.3(4) of the Act states that the adjudication provisions do not apply with respect to:

1. A contract entered into before October 1, 2019.

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source/default-document-library/gb-adjudication-guide-final.pdf?sfvrsn=689a3c44_2>.

> 2. A contract entered into on or after October 1, 2019, if a procurement process for the improvement that is the subject of the contract was commenced before that day by the owner of the premises.
>
> 3. A subcontract made under a contract referred to in paragraph 1 or 2 above.

Therefore, although adjudication was in effect in Ontario by October 1, 2019, the transition provisions ensured that adjudications would not begin immediately.

Given the language of section 87.3, it was expected that the issue of "which Act applies?" would take some time to reach the courts. Until recently, it was not clear whether a single improvement may have some contracts fall under the former *Construction Lien Act* and others under the new Act.

The decision by Associate Justice Robinson in *Crosslinx Transit Solutions Constructors v. Form & Build Supply (Toronto) Inc.*, issued in May 2021, has provided some clarification.[26] Associate Justice Robinson found that the intended effect of section 87.3 is that the same legislative scheme applies consistently to all parties involved in the same improvement:[27]

> All rights, obligations and remedies of all persons involved in that improvement are governed commonly and consistently by the same version of the act and regulations. That consistent application of the act and regulations is reasonably achieved by reference to the date of the procurement process for the improvement, where there is one, or a prime contract. Although the additional transition provisions in ss. 87.3(3) and (4) were not argued (since neither

[26] *Crosslinx Transit Solutions Constructors v Form & Build Supply (Toronto) Inc.*, 2021 ONSC 3396 at para 4.

[27] *Ibid* at para 23.

> the municipal interest exemption nor application of prompt payment and adjudication are at issue), both of those transition provisions appear consistent with such an interpretation.

As valuable as this decision may be in confirming that the same version of the Act applies to all contracts arising out of a given improvement, parties are still left to debate what procurement process or prime contract will trigger the application of adjudication rules as a result of section 87.3(4). It may be that adjudication will not apply to an improvement if, for example, a request for proposals for architectural services for an improvement was issued before October 1 2019, although the tendering process for the prime construction contract did not take place until the following year.

Confusion around the transition rules, and the transition rules themselves, no doubt led to a tepid start to adjudication in Ontario, despite the initial fanfare. On October 1, 2020, ODACC released its first annual report (the "First Report").[28] The First Report provided key statistics on the adjudications conducted in ODACC's first year and demographic statistics on the adjudicator roster. ODACC reported that a total of thirty-two notices of adjudication had been submitted in the first year of the regime, meaning that the number of adjudications initiated averaged under three per month.

Of the thirty-two notices of adjudication delivered in ODACC's first year, twenty-two arose from residential projects, five were related to commercial projects, two involved public buildings, and three dealt with transportation and infrastructure projects. The higher number of residential sector adjudications aligned with expectations, given the lengthier procurement timelines of more complex projects and the Act's transition provisions.

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[28] ODACC, "2020 Annual Report", online <https://www.drhba.com/resources/Documents/ODACC-2020-Annual-Report-.pdf>.

The First Report noted that of the thirty-two adjudications, only three resulted in a determination by the adjudicator. The three determinations, two made in Durham Region and one in Essex, all involved residential projects. The total amount claimed was $487,275.20 (in comparison to the $1.8 million claimed in total under the five commercial sector adjudications) and the total amount ordered to be paid was $35,459.40. With such a small sample, it would be specious to draw any conclusions with respect to recovery rates.

The majority of adjudications initiated in the first year were settled prior to a determination, and three were terminated because the date of the construction contract pre-dated October 1, 2019. The prevalence of settlements seems to be consistent with that generally prevailing in dispute resolution processes, in that most parties would prefer the certainty of an agreed settlement to the uncertainty of a third-party decision. This concern may be heightened in adjudication, where the "pay now, argue later" process is designed to be fast-paced.[29]

When ODACC released its second annual report in 2021 (the "Second Report"),[30] the number of adjudications had increased. A table of the statistics from the First and Second ODACC Reports is appended for ease of comparison (Appendix A).

While not as sharp of a rise as seen in the UK, a total of fifty notices of adjudication were given in 2021, 56% higher than in 2020. Thirty-four adjudications were completed in 2021. The Second Report describes an increase in the number of individuals, businesses, and government entities using adjudication to resolve their construction related disputes, and also return to adjudication by the same parties in different

[29] N. McAndrew, "Construction Briefing: Rough Justice, Smoother Delivery", online <https://www.lawscot.org.uk/members/journal/issues/vol-65-issue-09/construction-briefing-rough-justice-smoother-delivery/

[30] ODACC, "2021 Annual Report", online <https://odacc.ca/wp-content/uploads/2021/10/2021_Annual_Report.pdf>.

construction-related disputes, indicating some degree of party satisfaction with the process.[31]

The majority of the adjudications conducted in the second year were undertaken in Toronto, and numbers were again highest in the residential sector. There was a greater increase in adjudications among commercial and transportation and infrastructure projects than in the industrial and public buildings sectors.

The total amount claimed across all adjudications in all sectors was $8,709,658.98, with the highest in the industrial sector ($3.7 million). The total amount awarded in the thirty-four completed adjudications was $908,122.83. The highest recovery rate appeared to be in the residential sector, being approximately 21% of the total amounts claimed. However, these numbers may not be representative, in that the data do not reflect withdrawn or settled matters. Of the fifty adjudications initiated, twelve were terminated prior to a determination and eight of those twelve were settled. Settlement amounts, if any, were not disclosed, which could impact perceived recovery rates across all sectors. If adjudication pressures encouraged party-to-party negotiations and early resolution of disputes, this should be seen as a side benefit of the process. Given the rapid pace of adjudication and the uncertainty arising from the "rough justice" approach, it may be that more disputes will be settled prior to determination in the future.

The ODACC reports provide an important glimpse into adjudication's growth in Ontario.[32] As the industry moves beyond the uncertainty of the section 87.3 transition provisions and becomes more familiar with adjudication, the uptake can be expected to accelerate.

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[31] *Ibid* at 1.

[32] See Appendix A: Comparison of ODACC Annual Reports from 2020 and 2021.

IV. ADJUDICATION ACROSS CANADA

Jurisdictions across Canada have taken different approaches toward adjudication. Citing Ontario's developments, many provincial construction associations lobbied for the adoption of prompt payment and adjudication legislation to ensure funds continue to flow on projects and to encourage more efficient dispute resolution. The British Columbia Construction Association announced that it was "working with industry stakeholders to urge the provincial government to introduce legislation immediately", noting that when "contractors don't get paid on time, it places a financial burden on small businesses and blocks cash flow in the economy".[33] Similarly, BILD Alberta, which represents the residential construction industry, pushed for prompt payment and adjudication legislation, having identified issues with payment timelines exceeding lien periods.[34] The status of consultations and legislative amendments is in flux; however, adjudication appears to be moving toward adoption in the majority of the provinces. The following is a snapshot as to each jurisdiction's position on adjudication as of early 2022, moving from West to East:

1. *British Columbia*

In May 2019, Bill M 223, the *Builders Lien (Prompt Payment) Amendment Act,* 2019 was introduced in British Columbia.[35] If passed into law, Bill M 223 will amend BC's *Builders Lien Act* to create prompt payment rules for builders, contractors, and subcontractors.

Bill M 223 provides for a prompt payment regime loosely based on Ontario's *Act*, but does not reference adjudication

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[33] British Columbia Construction Association, "Prompt Payment: Industry Priority", online <https://bccassn.com/industry-priorities/prompt-payment/>.

[34] BILD Alberta, "Prompt Payment", online <https://bildalberta.ca/prompt-payment-2/>.

[35] British Columbia Bill M 223, online <https://www.bclaws.ca/civix/document/id/bills/billsprevious/4th41st:m223-1>.

beyond an undertaking to conduct an adjudication that forms part of the notice of non-payment requirements.

The proposed process requires that a contractor must first provide a "proper invoice" to the owner, which then triggers the owner's payment obligation. Payment must be delivered within twenty-eight days, unless the owner issues a "notice of non-payment" within fourteen days.[36] If the owner does not pay the portion of a "proper invoice" from a contractor that relates to a particular subcontractor, the contractor still must either pay that subcontractor within thirty-five days of delivery of the invoice or deliver its own non-payment notice to its subcontractors and undertake to refer the matter to adjudication within twenty-one days of delivering the notices. Similar prompt payment and adjudication rules apply to subcontractors paying their own subcontractors.

While Bill M 223 does not specify any details about how adjudication would operate in BC, including the establishment of a governing authority or body or any procedural rules, the intent to adopt adjudication is clearly.

2. *Alberta*

In Alberta, Bill 37, the *Builder's Lien (Prompt Payment) Amendment Act, 2020* received royal assent on December 9, 2020 and came into force on August 29, 2022. The former Act will continue to apply to all contracts entered into before August 29, 2022. Parties to contracts entered into prior to that date and scheduled to remain in effect for longer than 2 years after that date have 2 years from that date to be amended so that their terms are in compliance with the new provisions and the Regulation.[37].

The prompt payment sections in the PPCLA mirror those of Ontario's *Act*. In general, proper invoices must be given to an owner at least every thirty-one days and the owner must pay a

[36] *Ibid*.

[37] Alberta Reg 23/2022, s. 37.

contractor within twenty-eight days after receiving a proper invoice, unless the owner issues a notice of dispute. If the contractor issues a notice of non-payment to one of its subcontractors due to non-payment by the owner, then the contractor must also undertake to refer the matter to adjudication within twenty-one days and provide the subcontractor with a copy of the owner's notice of dispute.

Notably, in contrast to Ontario's legislation, the Alberta provisions do not apply to public works as defined in the *Public Works Act*[38] and contracts with the Crown or agents of the Crown. Therefore, for projects that are arguably some of the most complex and costly undertaken in Alberta, prompt payment and adjudication will not be available.

3. *Saskatchewan*

In Saskatchewan, the *Builders' Lien (Prompt Payment) Amendment Act, 2019* and the *Builders' Lien Amendment Regulations, 2020* came into force on March 1, 2022, introducing a prompt payment and adjudication regime that closely mirrors the Ontario version, with the main exception that it will not apply to architects, engineers, or land surveyors; persons providing services or materials for any improvement with respect to a mine or mineral resource; and persons who enter into a contract for services or materials with respect to an improvement related to infrastructure in connection with the generation, transmission or distribution of electrical energy pursuant to *The Power Corporation Act*.[39] Questions remain about these exceptions. In particular, with respect to design professionals such as architects and engineers, it would seem

[38] Section 1 of the *Public Works Act*, RSA 2000, c P-46, defines "public works" as "the undertaking and all the works and property that may be acquired, made, built, constructed, erected, extended, enlarged, repaired, maintained, improved, formed, excavated, operated, reconstructed, replaced or removed pursuant to a contract entered into by the Minister on behalf of the Crown or by an agent of the Crown".

[39] Saskatchewan *Builders' Lien Act*, SS 1984-85-86, c B-7.1, s. 21.11; *Builders' Lien Regulation*, R.R.S. c. B-7.1, Reg. 1, s. 5.1.

that these key members of the industry should enjoy similar rights and remedies as other stakeholders.

4. *Manitoba*

On April 11, 2018 a private member's bill, Bill 218, *The Prompt Payments in the Construction Industry Act*, was introduced in Manitoba's legislature. Bill 218 passed Second Reading on April 24, 2018, but to date no legislation has passed.[40]

Later that year, the Manitoba Law Reform Commission published *The Builders' Liens Act: A Modernized Approach*.[41] In that report, the Commission recommends the implementation of a prompt payment regime and private adjudication system akin to the adjudication system established in Ontario.

Like Saskatchewan's legislation, Manitoba's *Builders' Lien Act* does not apply to the professional services of architects and engineers, but during the consultation process it became clear that the Manitoba Association of Architects (MAA) sought to reexamine this exemption with the thought that lien rights would assist them in collection of their fees. The engineering profession of Manitoba did not offer a submission during the consultation period.

For now, the Commission has recommended restricting the application of the *Builders' Lien Act* to only participants in the "actual process of construction" and not design professionals.[42] The Commission notes that design professionals have the benefit of privity of contract with owners, and therefore already

[40] J. Martens & D. Chicoine, "Proposed Changes to the Builders' Lien Act in Manitoba", online<https://www.mltaikins.com/construction/proposed-changes-to-the-builders-lien-act/>.

[41] Online <http://www.manitobalawreform.ca/pubs/pdf/136-full_report.pdf>.

[42] *Ibid* at 29.

have sufficient protection in case of non-payment, unlike the subcontractors who have been pushing for reform since 2009.

As for adjudication, the Commission has recommended incorporating adjudication into any prompt payment regime. The suggestion is that the fast pace of adjudication will deter undesirable payment behaviours.

The Commission describes two options: a private form of adjudication similar to Ontario's or a form of adjudication integrated into the Manitoba courts, such as the Small Claims Division of the Queen's Bench.[43] The Commission expresses its strong preference for private adjudication, given Manitoba's scarce court resources. However, it also captures stakeholder concerns that Manitoba simply does not have a sufficient number of qualified individuals to staff an adjudicative body while avoiding conflicts of interest.[44] To address this shortfall, the Commission recommends that Manitoba seek out opportunities for extra-provincial agreements or an agreement with the federal government to create and implement extra-provincial adjudicator pools.

Although the Commission's report setting out eighty-seven recommendations for reform of Manitoba's *Builders' Lien Act* was published in November 2018, no formal changes have been made to date.

5. *Québec*

Bill 108, which received royal assent on December 1, 2017, amended the *Act respecting contracting by public bodies*, among other legislation.[45] The amendment led to the implementation of a prompt payment pilot program on publicly procured

[43] *Ibid* at 83.

[44] *Ibid* at 89.

[45] Online <http://legisquebec.gouv.qc.ca/en/pdf/cs/C-65.1.pdf>.

projects (the "Pilot Project").[46] Effective as of July 3, 2018, the use of payment calendars and resolution of disputes by adjudicators were mandated. Any public body whose contract is subject to the Pilot Project is required to state as such in a call for tenders.[47] The Pilot Project was initially intended to last for three years; however, *An Act respecting the acceleration of certain infrastructure projects* was enacted, extending the Pilot Project to many more projects and contracts entered into no later than December 11, 2024.

Under the Pilot Project, any dispute not settled amicably may be referred to an adjudicator if the dispute arises from the performance of the contract or a subcontract subject to the Pilot Project. Division III of the statute, entitled "Settlement by an Adjudicator", describes the types of matters that may be adjudicated and the procedure for seeking resolution under this regime.[48] The pilot project establishes the Institut de médiation et d'arbitrage du Québec ("IMAQ"), the counterpart of ODACC in Ontario, as the entity responsible for the training and selection of adjudicators in Quebec.

There are notable distinctions between the Québec adjudication scheme and that of Ontario. According to a guide published by IMAQ for adjudication under the Pilot Project, any dispute submitted to IMAQ cannot then be submitted to a court or arbitration panel without first receiving an opinion from an IMAQ adjudicator, also described as an "expert".[49] If a party fails

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[46] Quebec Bill 108 at 3, online <http://www2.publicationsduquebec .gouv.qc.ca/dynamicSearch/telecharge.php?type=5&file=2017C27A.PDF

[47] *Ibid*.

[48] *Ibid*.

[49] Institut de médiation et d'arbitrage du Québec, « Projet pilote pour faciliter les paiements dans l'industrie de la construction », online <http://imaq.org/wp-content/uploads/2020/06/GUIDE-IMAQ-GRANDES-LIGNES-PROJET-PILOTE-2.pdf>.

to make payment within 10 days based on the decision then they could be subject to a fine.[50]

In Québec, outside lawyers, if consulted, can only assist and cannot make representations to the adjudicator on behalf of a party.[51] Further, every party involved in the adjudication is expressly required to simultaneously inform all of its subcontractors, stating the nature and providing a description of the dispute, and every person so informed must also inform its subcontractors, and so on.[52] Another distinction between Québec's regime and that of Ontario is that parties are explicitly prohibited from referring the same dispute a second time to another adjudicator.[53]

Finally, there is a survey required to be completed following the adjudication under Division IV Accountability Reporting.[54] Participants must address whether they were satisfied with the conduct of the "intervention" by the expert, if the timelines of the process are appropriate, and what changes would they like to see to the intervention procedure.

A report on the Pilot Project was published on March 3, 2022. The report concluded that the prompt payment mechanism and the dispute settlement processes were generally successful and permitted quick and effective dispute resolution. The report highlighted key areas for improvement, including that parties could be required to first hold a negotiation session before submitting disputes to be determined by the expert, that it should be possible for parties to submit multiple disputes to the expert and for the expert to extend timetables for the intervention process, and that the

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50 *Ibid*.

51 Pilot Project, *supra* note 45 at s 32.

52 *Ibid* at s 2.

53 *Ibid* at s 35, online <http://legisquebec.gouv.qc.ca/en/ShowDoc/cr/C-65.1,%20r.%208.01%20/>.

54 *Ibid* at sched 2.

scope of disputes referred to intervention should be broadened.[55] The Québec government has since confirmed their intention to continue collaborating with stakeholders involved with the Pilot Project with the aim of implementing a prompt payment and adjudication regime for the construction industry.

6. *Newfoundland and Labrador*

Newfoundland and Labrador's Mechanics' Lien Act does not provide for prompt payment or adjudication regimes. In December 2018, the Newfoundland and Labrador Construction Association hosted an information session regarding Ontario's Act and potential amendments to its own statute to address prompt payment, adjudication, mandatory bonding and other issues.[56] However, no significant changes to legislation have been made to date.

7. *New Brunswick*

In December 2017, the Legislative Services Branch of the New Brunswick Office of the Attorney General published Law Reform Note No. 40. The Law Reform Note tackled criticism of New Brunswick's *Mechanics' Lien Act* as outdated, in particular for failing to address payment delay in the construction pyramid.[57]

Separately, in May 2018, Law Reform Note No. 41 was published, which addressed prompt payment and adjudication:

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[55] "Rapport sur la mise en œuvre d'un projet pilote sur les délais de paiement dans l'industrie de la construction", online <https://www.tresor.gouv.qc.ca/fileadmin/PDF/faire_affaire_avec_etat/rapport-mise-oeuvre-projet-pilote-delais-paiement-contruction-2022.pdf>.

[56] Newfoundland and Labrador Construction Association, "Prompt Payment Legislation: How will it affect your business?", online <https://nlca.ca/app/uploads/2018/11/prompt_payment_2018.pdf>.

[57] New Brunswick Office of the Attorney General, "Law Reform Note No 40" at 4, online <https://www2.gnb.ca/content/dam/gnb/Departments/ag-pg/PDF/en/LawReform/Notes40.pdf>.

> In our view, a prompt payment scheme similar to that in Ontario should be adopted in New Brunswick. As in Ontario, it should apply to both the public and private sector, to all construction projects (from small home renovations to P3s), at all levels of the construction pyramid (with the exception of wages).[58]

While the Legislative Services Branch agreed that adjudication or another form of expedited dispute resolution mechanism is needed, there was a concern that the Ontario model is not well suited to New Brunswick. Similar to Manitoba, the fear is that New Brunswick is too small of a jurisdiction and therefore less likely to have sufficient qualified adjudicators free of conflicts to make adjudication feasible. Law Reform Note No. 41 highlights the stark difference in volume and costs of construction in New Brunswick, where construction industry's total annual value is $1.4 billion compared with Ontario's $38 billion.[59]

Despite these concerns, in July 2019, Law Reform Note No. 42 was issued, describing the intention to move forward with two-phase reform: first modernizing the current Act then later introducing prompt payment and adjudication. Interjurisdictional cooperation was described as a favourable option to ensure New Brunswick can reap the benefits of adjudication.

Published in April 2020, Law Reform Note No. 43 declared that a proposal had been submitted to repeal and replace New Brunswick's Mechanics' Lien Act with a new Construction *Remedies Act*. After modernization of the legislation, prompt payment and adjudication options will be explored.

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[58] New Brunswick Office of the Attorney General, "Law Reform Note No 41" at 9, online <https://www2.gnb.ca/content/dam/gnb/Departments/ag-pg/PDF/en/LawReform/Notes41.pdf>.

[59] *Ibid* at 14.

Subsequent to the series of Law Reform Notes, the *Construction Remedies Act* was introduced into the New Brunswick legislature for first reading in June 2020.[60] On December 18, 2020, the Legislative Assembly of New Brunswick passed the *Construction Remedies Act*. The new legislation does not have an effective date but, once announced, the legislation will replace the existing *Mechanics' Lien Act*. The new Act does not include prompt payment or adjudication provisions, although these may be considered in the future, as outlined in Law Reform Note No. 43.

8. *Nova Scotia*

Nova Scotia has embarked on modernizing its legislation with the introduction of Bill 119, which includes prompt payment and adjudications regimes. Bill 119 introduced amendments to the *Builders' Lien Act*, passed all readings, and received Royal Assent in less than a month, on April 12, 2019.

Nova Scotia's approach is somewhat narrower than Ontario because the availability of adjudication will be limited to disputes that are the subject of a notice of non-payment. Still, the Construction Association of Nova Scotia and the Nova Scotia Prompt Payment Coalition have expressed strong support for the changes and the immediate impact they will have on the construction industry.[61] An industry survey had revealed that stakeholders were experiencing delayed payment on most of their jobs, and this was increasing the cost of doing business.[62]

As of the date of writing, Bill 119 has not yet been proclaimed.

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[60] Online, <https://www.gnb.ca/legis/bill/FILE/59/3/Bill-44-e.htm>.

[61] Construction Association of Nova Scotia, "Prompt Payment Legislation Coming to the Nova Scotia Construction Industry", online <https://www.cans.ns.ca/prompt-payment-legislation-coming-to-the-nova-scotia-construction-industry/>.

[62] *Ibid*.

9. *Prince Edward Island*

Prince Edward Island has not taken any action describing its position on adopting prompt payment and adjudication. There are no revisions to the PEI *Mechanics' Lien Act* being publicly contemplated at this time.

10. *Territories*

In the Northwest Territories, the *Mechanics' Lien Act* does not allow for adjudication but requires that payment disputes be resolved either by court action or arbitration.[63] Furthermore, subcontractors' claims should be resolved by arbitration.[64] Nunavut has adopted the Northwest Territories' legislation.

The Yukon *Builders' Lien Act*[65] is nearly identical to the Northwest Territories statute and does not provide for adjudication.

The stance of the territories on adjudication is unknown, but new federal law will soon require payment disputes arising from federal projects to be resolved through adjudication. Many of the projects being undertaken in the territories are in partnership with the federal government, and these projects will be subject to the federal law.

11. *Federal*

In a June 2018 report, construction law experts outlined the value of introducing federal prompt payment legislation:

> Assure the orderly and timely building of federal construction projects by ensuring that cash flows down the construction pyramid quickly, thereby

[63] RSNWT 1988, c M-7, s 13.

[64] *Ibid* at s15.

[65] RSY 2002, c18.

> avoiding the disruptive effects of delayed payment, and potentially non-payment;
>
> Avoid increased construction costs caused by trade contractors adding contingencies to their bid prices on federal project to make up for the cost to them of slow payment; and
>
> Reduce the risk of disruption on federal construction project attributable to the insolvency of contractors and subcontractors.[66]

The Federal Prompt Payment for Construction Work Act addresses non-payment of contractors and subcontractors performing construction work for federal construction projects.[67]

Although assent was given to the statute in 2019, it remains to be seen when the Governor in Council will make an order fixing the day it is to come into force. Similar to the Ontario scheme, an Adjudicator Authority is intended to oversee and carry out the adjudications, the adjudication is to be commenced by notice of adjudication, and the adjudicator's determination is binding on the parties to the dispute unless they come to a written agreement or the determination is set aside by a court order or arbitral award. Two key differences are that the scope of adjudication in the federal scheme will be limited to any dispute over non-payment of sums due under the contract; and there is no express time period within which the adjudicator is to issue their determination.

V. THE FUTURE OF CONSTRUCTION ADJUDICATION IN CANADA

If the growth pattern of adjudication internationally is indicative of its future in Canada, it may take some time for the

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66 R.B. Reynolds & S.C. Vogel, "Building a Federal Framework for Prompt Payment and Adjudication", online <https://www.cca-acc.com/wp-content/uploads/2018/08/Building-a-Federal-Framework-Report.pdf>.

67 SC 2019, c 29, s 387, online <https://laws.justice.gc.ca/eng/acts/F-7.7/FullText.html>.

dispute resolution process to take hold. However, as in other jurisdictions, adjudication will likely become widespread after these initial growing pains.

In Ireland, it took approximately five years after adjudication was introduced for the new dispute resolution process to gain traction.[68] The Construction Contracts Act 2013 came into force for certain construction contracts entered into after July 25, 2016. At the time, there were 51,568 enterprises in the Irish construction industry[69] (compared with 376,769 in Canada).[70] An early impediment to industry uptake was perceived to be that the smaller size of the Irish construction market did not lend itself to a culture of fast-paced dispute resolution that could lead to "rough justice" outcomes.[71] In the government's fifth annual report on implementation of the Construction Contracts Act, 2013, it was noted that 48 adjudications had been commenced and that the statutory protections provided by the Act were working as intended, illustrated by the fact that the referring party had been successful or partially successful in 85% of the decisions reported.[72]

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[68] Eversheds Sutherland, "The Adjudication Situation: 5 Years of the Construction Contracts Act", online <https://www.eversheds-sutherland.com/global/en/what/articles/index.page?ArticleID=en/global/ireland/the-adjudication-situation>.

[69] Statista, "Total number of enterprises in the construction industry in Ireland from 2008 to 2018 ", online <https://www.statista.com/statistics/959435/number-enterprises-construction-industry-ireland/>.

[70] IbisWorld, "Sector Trends 2022 – Construction Sector in Canada", online <https://www.ibisworld.com/canada/sector-profiles/construction/

[71] Eversheds Sutherland, "The Adjudication Situation: 5 Years of the Construction Contracts Act", *supra* note 70.27.

[72] Construction Contracts Adjudication Panel, "Fifth Annual Report of the Implementation of the Construction Contracts Act" 12, online <https://enterprise.gov.ie/en/Publications/Publication-files/Fifth-Annual-Report-of-the-implementation-of-the-Construction-Contracts-Act-2013.pdf>.

In Australia, the adjudication process also saw initially slow but increasing uptake following its introduction in 2005. One study revealed that by the seventh year of construction adjudication in Australia, 208 applications worth $228 million were adjudicated.[73] Significant take-up rates of statutory adjudication led to the process being employed to resolve disputes of all sizes:

> The data shows that, to varying degrees in each jurisdiction, the legislation is achieving its objective of improving cash flow within the construction industry as the number and total value of payment claims determined in adjudication has increased annually. This increase has been particularly marked in NSW and Queensland where, by 2008/09, the number of annual adjudication applications in each jurisdiction had reached approximately 1000, and total value of payment claims in adjudication approximately $200 million. 31 In WA there were 105 adjudication applications 32 made in 2008/09 and a total value of payment claims in adjudication of approximately $36 million (Construction Contracts Registrar 2009).[74]

In Singapore, the Building and Construction Industry Security of Payment Adjudication Act (the "SOP Act") was introduced in April 2005. In the first year of the SOP Act, only three adjudications were conducted, however initial

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[73] Building Commissioner of Western Australia, "Evaluating the Adjudication Process: Review of the Construction Contracts Act 2004 (WA) (10 June 2014, online <https://www.compositelaw.com.au/construction-law/evaluating-the-adjudication-process-review-of-the-construction-contracts-act-2004-wa/>.

[74] J. Coggins, R. Fenwick Elliott & M. Bell, "Towards Harmonisation of Construction Industry Payment Legislation: A Consideration of the Success Afforded by the East and West Coast Models in Australia – plus Addendum" (2010) 10:3 *Australasian J Constr Econ & Bldg* 14, online <http://www.austlii.edu.au/au/journals/UMelbLRS/2010/21.pdf>.

observations were that the process was working well.[75] By 2010, at the first National Conference on Construction Adjudication – Tactics & Strategies, Justice Lee Seiu Kin in his keynote address stated that the fast and low cost adjudication statutory scheme had effectively eliminated an avenue for delaying payments without justification.[76] In 2015, author Goh Ngan Hong noted in his article on adjudication:[77]

> Looking at the statistics, the influence of the SOP Act has been remarkable. Between April 2005 and December 2013, the number of adjudication applications filed at Singapore Mediation Centre (SMC) is 999 cases. The number of review adjudication adjudications filed is quite small, with a total of 30 filed as at December 2013.
>
> These statistics convey significant information. First, out of a total of 999 adjudication applications that have been filed as at December 2013, 240 were eventually withdrawn, representing 24% of all adjudication applications filed. Furthermore, out of 531 valid cases that were determined under the SOP Act, about 94% of these cases were resolved without further review of adjudication determination. In monetary terms, the value of claims adjudicated under the SOP Act as at December 2013 is about $910 million.

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[75] Singapore Construction Law Newsletter, "Chairman's Message", online <https://www.scl.org.sg/images/newsletters/scl%20newsletter%20issue%203%202006apr.pdf>.

[76] "Fewer unjustified construction payment delays due to adjudication scheme", online <https://www.sal.org.sg/Newsroom/News-Releases/NewsDetails/id/368>.

[77] G. Ngan Hong, "Adjudication as an alternative dispute resolution Mechanism: An Analysis of the Adjudication Statistics in Singapore" 2015 PAQS Congress Proceedings, Yokohama, Japan, online <https://icoste.org/wp-content/uploads/2010/09/019.pdf>.

> But the statistics may not capture the full impact and influence of the SOP act. By providing a low cost and efficient adjudication mechanism, the SOP Act has effectively eliminated an avenue for delaying payments without justification. The regime has achieved considerable success in achieving its target of facilitating cash flow within the construction industry.

In 2016, another author concluded that it was clear that adjudication was working as intended by parliament and the administering body, the Singapore Mediation Centre, and that determinations by adjudicators were being routinely upheld by the courts.[78]

Canada will likely see adjudication become prevalent over the next five years in Ontario, and over the following ten years in the other Canadian jurisdictions presently debating the concept or amending their construction legislation. Growth could be even faster if other Canadian jurisdictions avoid a complex and lengthy transition period like the one in Ontario.

In the meantime, the Canadian construction industry can learn from its international counterparts by observing trends and challenges in adjudication. While adjudication decisions are confidential, publicly available court decisions arising from challenges to adjudicators' decisions provide insight into the issues Canada may soon encounter.

In the UK, a common challenge to adjudicators' determinations brought to the Technology and Construction Court ("TCC"), which hears such matters, is the threshold issue of an adjudicator's jurisdiction.[79] This issue often arises in the

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[78] J. Lim, "Enforcing payment for construction work in Singapore under the Building and Construction Industry Security of Payment Act" (Practical Law, October 2016), online < https://ca.practicallaw.thomsonreuters.com /2-634-6805>.

[79] Adjudication Society & Chartered Institute of Arbitrators, "Construction Adjudication Practice Guideline: Jurisdiction of the UK Construction

context of determining whether the dispute arises out of a "construction contract". A construction contract is defined by the UK legislation (the HGCRA) as an agreement for the carrying out of construction operations or providing labour for the carrying out of construction operations.[80] it may include an agreement for design services, surveying or landscaping works.[81] As can be seen, "construction operations" encompasses many activities, such as the construction, alteration, repair, maintenance, extension, demolition, or dismantling of buildings and structures, site clearance and earthworks, among others.[82]

Difficulties can arise when a contract is for the performance of work that falls within the scope of the HGCRA and work that does not. In Severfield (UK) Limited v Duro Felguera UK Limited,[83] the court dealt with such a "hybrid contract" for the design, supply, and erection of steel structures related to two power generation plants. The court determined that different regimes applied in respect of different portions of the contract, as power generation was excluded from the scope of the HGCRA. As a result, the court split the payment and dispute resolution mechanisms in the contract into two separate parts, noting that the Parliament's decision to exclude certain matters from the HGCRA was a "recipe for confusion".

There will likely be similar challenges to adjudicators' jurisdiction in Canada based on whether a dispute is governed by the relevant construction legislation. Such challenges are particularly likely in provinces such as Manitoba where the services of certain project participants, principally design professionals, are excluded from the scope of legislation, or in jurisdictions such as Ontario where there have been recent

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Adjudicator" (2016), online <https://www.adjudication.org/resources/news/guideline-jurisdiction-uk-construction-adjudicator-2016>.

[80] HGCRA, *supra* note 17 at ss 104, 105.

[81] *Ibid* ss 104(1), (2).

[82] *Ibid* s 105

[83] [2015] EWHC 3352 (TCC).

changes to the definitions of the "materials" or "supply of services" which attract lien and adjudication rights under the Act.

Another issue which is often the subject of court challenge in the UK is whether an adjudicator's decision is binding on a subsequent adjudicator. The Scheme provides that an adjudicator must resign if the dispute referred to them is "the same or substantially the same as one which has previously been referred to adjudication" and a decision was rendered in that previous adjudication.[84] This issue, which has been interpreted to mean that a determined dispute cannot be determined again, affects the jurisdictional competence of any subsequently appointed adjudicator. This will undoubtedly cause confusion in the industry as to whether common disputes which repeatedly arise during the span of a project, such as those concerning the valuation of work performed to date, may be addressed in multiple adjudications by different adjudicators.

In *Quietfield Ltd. v Vascroft Construction Ltd.*, there were two adjudications at issue.[85] The first related to a contractor' request for extension of time, which was denied, and the second concerned the owner's claim for liquidated damages. The adjudicator in the second adjudication refused to consider the contractor's defence, on the ground that extension of time had been determined in the first adjudication. The court held that if a contract permits successive applications for an extension of time on different grounds, then that issue can be referred to successive adjudications. However, if successive applications for extensions of time are made on the same ground, a subsequent adjudicator cannot undo an earlier decision. Further, if a contractor's defence in the second adjudication relies upon an alleged entitlement to an extension of time, which

[84] *The Scheme for Construction Contracts (England and Wales) Regulations 1998*, Schedule, s 9(2).

[85] [2006] EWHC 174 (TCC).

has already been considered and rejected in a previous adjudication, the defence cannot be considered.

This decision stands in contrast to Global Switch Estates 1 Ltd. v Sudlows Ltd.[86] In this case, the court held that a first adjudication decision which awarded an extension of time based on two specific contractual events did not preclude a subsequent adjudicator from reaching opposite conclusions as to whether those two specific events qualified as contractual events, although the subsequent adjudicator recognized he was bound by the extension of time previously granted.

Given the lack of Canadian jurisprudence, one can expect that parties and courts will turn to TCC decisions for guidance on the extent to which adjudication decisions are binding on subsequent adjudicators. The analysis of whether an earlier decision will tie the hands of the next adjudicator will likely be a fact-driven exercise, guaranteeing continued uncertainty.

A third issue which is reasonably certain to find its way into Canadian adjudication is that of enforcement. The UK experience has shown that adjudicators' decisions are generally upheld by courts unless it is clear that the adjudicator had no jurisdiction or there was a material breach of natural justice. UK courts have declined to interfere if the adjudicator merely made an error in procedure, law, or fact-finding.

Irish courts have followed in the footsteps of the UK, as demonstrated in the January 2022 decision in John Paul Construction v Tipperary Co-operative Creamery Ltd.[87] Similar to Ontario's Act, Ireland's Construction Contracts Act 2013 provides that the decision of an adjudicator shall be binding unless and until a different decision is reached on the reference of the payment dispute to arbitration or in proceedings initiated in a court in relation to the adjudicator's decision, or the parties

[86] [2020] EWHC 3314 (TCC).

[87] [2022] IEHC 3.

finally settle the dispute.[88] An adjudicator's decision can, with leave of the court, be enforced in the same manner as a judgment or court order.[89]

In John Paul Construction, the owner resisted enforcement of the adjudicator's decision by arguing, among other things, that the adjudicator failed to comply with the requirements of fair procedures and natural justice because he failed to consider the owner's defence and he allowed the contractor to introduce a new claim during the adjudication process.

The court held that it was readily apparent from the adjudicator's decision that he fully understood the owner's defence. The court stated that it would not be "drawn into a detailed examination of the underlying merits of an adjudicator's decision under the guise of identifying a breach of fair procedures". Regarding the alleged new claim, the court considered this to simply be a better-drafted version of the original claim. The court concluded that although the adjudicator's decision was not final, it nevertheless gave rise to an immediate payment obligation. The contractor was entitled to enforce the adjudicator's decision by invoking a summary procedure, however the grant of leave to enforce did not preclude the owner from subsequently pursuing the matter through arbitral or court proceedings. If the owner succeeded, it could then recover any overpayment from the contractor.

At the end of its decision, the court briefly considered the contractor's submission that the owner's resistance of its application for leave to enforce was a thinly disguised request for judicial review of the adjudicator's decision. The court noted that whereas the Construction Contracts Act 2013 expressly contemplates that court proceedings may be initiated in relation to an adjudicator's decision, it does not stipulate that such proceedings must be by way of judicial review. However, given its conclusion that there was no breach of fair procedures or natural justice, the court stated that the "difficult issue" of

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[88] *Construction Contracts Act 2013*, ss 6(10), 6(11).

[89] *Ibid* s 6(11).

whether adjudication decisions are amenable to judicial review did not need to be addressed.

It is worth noting that Ontario's Construction Act establishes clear rules for judicial review of an adjudicator's decision. Section 13.18 provides that an application for judicial review may only be made with leave of the Divisional Court,[90] that any application must be served and filed within 30 days of the determination being communicated to the parties,[91] that no appeal lies from an order on a motion for leave to bring an application,[92] and that an adjudicator's determination may only be set aside on an application for judicial review if the applicant establishes one or more of the following grounds:

1. The applicant participated in the adjudication while under a legal incapacity;
2. The contract or subcontract is invalid or has ceased to exist;
3. The determination was of a matter that may not be the subject of adjudication under the Act, or of a matter entirely unrelated to the subject of the adjudication;
4. The adjudication was conducted by someone other than an adjudicator;
5. The procedures followed in the adjudication did not accord with the procedures to which the adjudication was subject under this Part, and the failure to accord prejudiced the applicant's right to a fair adjudication;
6. There is a reasonable apprehension of bias on the part of the adjudicator; or
7. The determination was made as a result of fraud.[93]

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[90] Ontario *Construction Act*, *supra* note 16 at s 13.18(1).

[91] *Ibid* s 13.18(2).

[92] *Ibid* s 13.18(4).

[93] *Ibid* s 13.18(5).

The grounds established by the Act for judicial review of an adjudicator's decision are narrow and essentially mirror those grounds on which arbitral awards can be set aside.[94]

Following Canada (Minister of Citizenship and Immigration) v Vavilov,[95] there has been commentary noting the higher degree of scrutiny which may be applied by a reviewing court to an administrative decision-maker's reasoning.[96] It remains to be seen what approach will be taken to the judicial review of construction adjudicators' decisions in Ontario, given the legislative intent behind statutory adjudication and the interim binding nature of the decisions.

Of note, the Ontario Divisional Court has recently ruled that without payment of determinations made by adjudicators or a request for a stay while pursuing judicial review, leave will not be granted to challenge those determinations.[97] The Court highlighted key principles to bear in mind: first, "prompt payment is integral to the scheme of the Construction Act" and second, "failure to pay in accordance with the prompt payment requirements of the Act may lead this court to refuse leave" to seek judicial review.[98] As of the date of writing, this is the only reported decision on adjudication in Canada.

Parties who are dissatisfied with an adjudicator's decision may well learn to heed the words of Lord Justice Chadwick in Carillion Construction Ltd. v Devonport Royal Dockyard Ltd., who warned dissatisfied parties not to bring baseless challenges, "simply scrabbling around to find some argument,

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[94] *Arbitration Act, 1991*, SO 1991, c. 17, s. 46.

[95] 2019 SCC 65.

[96] See, eg., Lorne Sossin, "The Impact of Vavilov: Reasonableness and Vulnerability" (2021) 100 *Supreme Court Law Review* 266.

[97] *SOTA Dental Studio Inc. v Andrid Group Ltd.*, 2022 ONSC 2254 (Div. Ct.)

[98] *Ibid* at para 12.

however tenuous, to resist payment".[99] Chadwick LJ summed up the court's support for adjudication in striking terms:[100]

> The objective which underlies the Act and the statutory scheme requires the courts to respect and enforce the adjudicator's decision unless it is plain that the question which he has decided was not the question referred to him or the manner in which he has gone about his task is obviously unfair… It is only to easy in a complex case for a party who is dissatisfied with the decision of an adjudicator to comb through the adjudicator's reasons and identify points upon which to present a challenge under the labels "excess of jurisdiction" or "breach of natural justice". It must be kept in mind that the majority of adjudicators are not chosen for their expertise as lawyers. Their skills are as likely (if not more likely) to lie in other disciplines. The task of the adjudicator is not to act as arbitrator or judge. The time constraints within which he is expected to operate our proof of that. The task of the adjudicator is to find an interim solution which meets the needs of the case. Parliament may be taken to have recognized that, in the absence of an interim solution, the contractor (or sub-contractor) or his sub-contractors will be driven into insolvency through a wrongful withholding of payments properly due. The statutory scheme provides a means of meeting the legitimate cash flow requirements of contractors and their subcontractors. The need to have the "right" answer has been subordinated to the need to have an answer quickly.

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[99] [2005] EWCA Civ 1358 at para 85.

[100] *Ibid* at paras 85- 86.

Construction in Canada continues to grow steadily, with near monthly announcements of awards of major public transportation, energy and infrastructure projects, increased demands to rapidly supply housing across the country, and persistent calls to build or retrofit entire sectors to respond to climate change and the need for energy transition.

Undoubtedly, there will be tension arising from the competing interests of project stakeholders. The industry will likely learn to embrace adjudication as a quick and efficient means of resolving disputes on an interim basis, as in every other common law jurisdiction that has adopted construction adjudication. While a little rain may fall into the dynamic relationships of the parties involved in creating the built environment, this decade may reveal that adjudication is just the umbrella Canada needs to shield it from the deleterious progress and cash-flow impacts of disputes and from costly end-of-project litigation or arbitration.

Appendix A: Comparison of ODACC Annual Reports from 2020 and 2021

Industry Sector	**No. of Notices Given in**		**Total Amount Claimed in**		**Average Amount Claimed in**	
	2020 *	**2021 ***	**2020**	**2021**	**2020**	**2021**
Residential	22	19	$487,275.20	$508,799.49	$22,148.87	$26,778.92
Commercial	5	10	$1,806,746.84	$996,466.43	$361,349.37	$99,646.64
Industrial	0	3	$0	$3,738,322.23	$0	$1,246,107.41
Public Buildings	2	3	$240,348.78	$97,895.35	$120,174.39	$32,631.78
Transportation and Infrastructure	3	15	$372,143.48	$3,368,175.48	$124,047.83	$224,545.03
All sectors	**32**	**50**	**$2,906,514.30**	**$8,709,658.98**	**$90,825.57**	**$174,193.18**

**In 2020, twenty-one of the thirty-two adjudications were terminated. Of these twenty-one adjudications, only one had had an adjudicator appointed. The other adjudications were terminated before an adjudicator consented to adjudicate the matter. Fourteen of the twenty-one adjudications that were terminated were due to settlement between the parties.*

No. of Determinations Made in		**Total Amount Ordered to be Paid in**		**Average Amount Ordered to be Paid in**	
2020	**2021**	**2020**	**2021**	**2020**	**2021**
3	11	$35,459.40	$105,416.40	$11,819.80	$9,583.31
0	5	$0	$148,620.47	$0	$29,724.09
0	1	$0	$0	$0	$0
0	3	$0	$41,782.03	$0	$13,927.34
0	14	$0	$612,303.93	$0	$43,736.00
3	**34**	**$35,459.40**	**$908,122.83**	**$11,819.80**	**$26,709.50**

***In 2021, twelve of the fifty adjudications were terminated. Of these twelve adjudications that were terminated, an adjudicator had been appointed in six of the adjudications. The other adjudications were terminated before an adjudicator consented to adjudicate the matter. Eight of the twelve adjudications that were terminated were due to settlement between the parties.*