Implementing Alberta's Prompt Payment Act – Lessons learned from decades of adjudication.

Dr. Franco Mastrandrea distils the lessons learned from decades of the adjudication process as Alberta follows other provinces and jurisdictions with reforms designed to enforce prompt payment in the construction industry.

A fast-track, confidential and comparatively low-cost avenue for resolving disputes over payment is a boon for the construction industry. Alberta's Prompt Payment and Construction Lien Act 2022 ("the Act"), which requires that new contracts provide for adjudication, should help improve cashflow – the lifeblood of the industry[1] – and enfranchise many more claimants.

However, its success depends not only on acceptance by the construction community and the support of the courts, but also on the quality and conduct of adjudicators. Adjudication procedures will be established by the Nominating Authority[2] and adjudicators will be required to comply with its code of practice.

---

[1] Denning LJ in *Modern Engineering (Bristol) Ltd v Gilbert-Ash (Northern) Ltd* (1973) 71 LGR 162. In the UK this prompted the Latham Report ***Building the Team*** in which adjudication was first canvassed, and led to the passing of the ***Housing Grants, Construction and Regeneration Act***, 1996, as amended in 2009, albeit that the UK Act is concerned with construction disputes generally, and is not limited to payment disputes.
[2] The first such Nominating Authority is understood to be ARCANA (AB) - a partnership of the Alternative Dispute Institute of Alberta (ADRIA), Alternative Dispute Resolution Institute of Canada (ADRIC), and Royal Institution of Chartered Surveyors (RICS). The acronym stands for the ADR Institutes / RICS Construction Adjudication Nominating Authority (Alberta).

Meanwhile, in-house counsel and lawyers representing owners and companies in the construction supply chain need to be alert to the deadlines and stipulations in the Act, as well as the nuances of the adjudication process.

An adjudicator must be even-handed in all dealings with the parties, including communications. These should be written, as opposed to oral. When communicating with the adjudicator, the parties should be directed to copy their correspondence to the other party at the same time and in the same form.

An adjudicator must be even-handed in all dealings with the parties, including communications.

Lawyers are well placed to provide this structured and disciplined approach. But lay representation is to be permitted in Alberta, as it is in many other jurisdictions. While the adjudicator may afford some latitude to such a party, care must be taken to avoid any inappropriate aid or perception of bias.

Issues of jurisdiction are likely to arise. Any claim for prompt payment must be based on a "proper invoice" (whose scope may be tested in the courts) issued under a contract.[3] If there is no contract, the claim may be precluded at adjudication.

Other jurisdictions limit the production of documents and information to what is provided voluntarily by the parties or requested by the adjudicator, and any additional material they may deem necessary to resolve the dispute. Discovery is therefore unlikely.

What of the role of experts? Experts are commonly involved in adjudication where the issues are complex or involve technical matters. Typical disciplines are delay and quantum, and specialist engineering, architecture and construction experts for technical disputes. The standards expected of experts in adjudication should be no lower than those in arbitration or litigation.

Given the time constraints inherent in adjudication and the tight time-limited stages defined in the Act, the adjudicator's control of the process is critical. Complex disputes may deserve some concessions when it comes to time. A degree of flexibility might be thought acceptable, for example, to allow an expert to respond to the claimant's delay or quantum expert reports (as opposed to developing a standalone report from first principles).

In a complex dispute that cannot be disposed of within the statutory limits, it is essential in the interests of natural justice to negotiate a realistic timetable. If parties are not amenable, a competent adjudicator will seek to persuade the parties, with resignation a last resort (perhaps making it clear to the parties/ the Nominating Authority that they are willing to be re-appointed to a fresh adjudication).

As claimants instigate the process, responding parties need to be prepared, typically with the support of external experts and legal input. Disputes should be well-defined before referral to adjudication, reducing the scope for ambush. But an adjudication may be launched at an inopportune time, so it is

[3] A proper invoice is "a written bill or other request for payment for the work done or materials furnished in respect of an improvement **under a contract**…": Section 32.1(1) of the Act.

imperative to be ready. This means keeping relevant records and being able to assemble and analyse them efficiently for prompt presentation. When an owner who has been invoiced fails to issue a valid notice of dispute, they leave themselves open to a “smash and grab” adjudication and the obligation to pay the sum demanded by the contractor. Attempts to resist payment on the basis that the bill fails to meet the Act’s criteria for a proper invoice are likely contenders for early consideration by the courts.

Adjudication meetings or hearings should not be needed in most cases, unless they materially advance the adjudicator’s understanding. Then, the adjudicator will set the agenda. A topic should only be added at the behest of one of the parties if, again, the adjudicator’s decision-making would be informed by exploring this.

Hearings only require the attendance of those who would be able to address any further enquiries from the adjudicator. Neither presentations, examination nor cross-examination should ordinarily be allowed as they are unlikely to be helpful. Repetition rarely improves the force of an appropriate written submission.

While most adjudications will not involve meetings, adjudicators may draw adverse inferences from the failure of a witness of fact to attend without justifiable reason. (Just as an adjudicator will take a dim view of a party’s failure to produce requested information or documents.) An adjudication may proceed *ex parte* if the adjudicator deems it appropriate, having provided the recalcitrant party some latitude and clear advance warning.

Adjudicators need to take great care, however. They may be accused of descending into the arena by making one side’s case or introducing issues not raised by the parties.

An inquisitorial approach can be beneficial, by promoting efficiency and saving time. Within such a streamlined process, an adjudicator well versed in the issues can – by asking relevant and focussed questions – get to the nub of matters not covered (whether deliberately or not) in submissions.

Adjudicators need to take great care, however. They may be accused of descending into the arena by making one side’s case or introducing issues not raised by the parties. A nervous adjudicator (perhaps more used to adversarial forums) may rely solely on the party submissions for fear of their decision being faulted. However, if a potentially relevant issue is left unresolved, then that decision may be unjust. Adjudicators need the confidence in such situations to proceed in a still proper way that will achieve a fair resolution.

Where facts and opinions need to be tested, the competent adjudicator will want to see and examine the relevant witnesses. Hot-tubbing has the advantage of securing both parties’ evidence in response to precisely the same question, and their responses appear conveniently adjacent in the record of proceedings.

Adjudicators can apply their own knowledge and expertise, but must beware the requirements for natural justice. The parties should not be denied the opportunity to consider any principle or matter that the adjudicator may regard as determinative or influential upon the outcome – it may not have been declared or its significance may not be obvious to the parties.

There is no reason in principle why an adjudicator may not consult a trusted contact – a philosopher friend – to test a particular view or hypothesis in abstract and anonymised terms. This may lead to further enquiries or exchanges with the parties before the adjudicator reaches a final decision.

Adjudicators should provide reasons for their decisions. This is for the benefit of both parties, but especially the loser, as an aid to future conduct as well as a full understanding of the current dispute's outcome.

Mistakes are made in adjudication as in other dispute resolution forums. An adjudicator can correct slips after a decision is issued without impacting its validity. These are typically limited to textual or typographical errors (transposing the names of parties is a commonplace example) or mistakes in calculation. However, changes may not take new matters into consideration or give effect to any second thoughts of the adjudicator.

> Adjudicators should provide reasons for their decisions.

Adjudication decisions are binding even when flawed on the merits of the case whether due to errors in law or of fact. At least temporarily, until they are overturned by an arbitrator (where the contract allows for arbitration) or in court.

More than 25 years' experience of adjudication in the UK and other jurisdictions has proven that the process is highly effective and beneficial to the construction industry when followed responsibly.

Clarity on jurisdiction, good practice and procedures, and attention to the rules of natural justice are prerequisites. Adjudicators must give each party a fair opportunity to advance its case and challenge the opposing one. They should avoid being drawn into other lines of enquiry not raised by the parties. But where it could potentially illuminate the crux of a dispute, a different hypothesis can be explored and natural justice protected by giving both parties a proper opportunity to consider the matter.

In the early days of adjudication, many in the UK's construction community and its legal practitioners doubted that such a streamlined process could produce sound decisions. Various legal arguments were deployed against them. But, far from hedging in adjudication, the courts supported this alternative form of dispute resolution. Thousands of voluntary as well as contractual or statutory adjudications are testimony to its effectiveness. So may it prove in Alberta and more widely in Canada as more provinces adopt similar reforms.

HKA Partner Dr Franco Mastrandrea is a Chartered Quantity Surveyor and Chartered Arbitrator with over 40 years of experience in the construction industry. He has acted as expert on more than 50 international project management, delay and quantum-related disputes.

This article is based on his presentation to the Construction Adjudication Prompt Payment symposium held in Alberta, Calgary, in April 2023.

Contact details

Dr. Franco Mastrandrea
Partner
francomastrandrea@hka.com
Ph: + 44 20 7618 1200

This publication presents the views, thoughts or opinions of the author and not necessarily those of HKA. Whilst we take every care to ensure the accuracy of this information at the time of publication, the content is not intended to deal with all aspects of the subject referred to, should not be relied upon and does not constitute advice of any kind. This publication is protected by copyright © 2023 HKA Global Ltd.

HK>A