



By Duncan W. Glaholt

# Adjudication: THE NEXT BIG DEAL!

They say you know you are going crazy when you do the same thing over and over again and expect different results. We seem to have lost sight of this in the construction industry here in Canada. We keep running into the same issues of performance and payment and we keep putting off making any binding decisions until it is too late, cash flow is blocked, the parties are in a “hurting stale-mate” and we keep expecting it to turn out differently the next time.

**N**ot that we haven't tried to solve this problem. We have ADR (alternative dispute resolution) in all its wonderful forms, including arbitration, mediation and dispute review boards. We have lien legislation. We have statutory construction trusts in most jurisdictions. We have a private contract bonding industry. But we still have cash flow problems. Why? We still have contracts slowed to a crawl by escalating disputes over scope, price and time. Why? We still see brinksmanship being used as a last resort when misunderstandings have been allowed to accumulate. Why?

The answer is simple. We keep trying to “unscramble the egg” after the fact, with lawyers and consultants, instead of dealing with issues conclusively during the life of the project, when it matters most and when the parties can do it themselves.

Bonds and dispute review boards help, but they are not enough. Bonds have their own complexities, and you have to agree to a dispute board. Neither is mandatory. Neither does anything binding, in the sense of being supported by courts during the contract.

They seem to have found the answer in the U.K. The answer is statutory adjudication.

The three key elements of statutory adjudication are: immediate judicial enforceability of summarily “adjudicated” determinations during the course of the project; the right to suspend performance with impunity in the event of non-compliance with an adjudicated determination; and immunity and non-compellability of all independent, impartial adjudicators (who are usually non-lawyers).

The United Kingdom, Singapore, New Zealand and all but two Australian states have schemes like this. The U.K. has seven years' experience with their scheme. It works. The nay-sayers (and there were many) have been proven wrong.

The basic U.K. scheme allows parties to a construction project to refer “disputes” to an “adjudicator” for summary determination (28 days in the U.K.), while work on the project continues. By December of 2003, there had been between 9,000 and 12,000 notices of adjudication filed in the U.K., but only 172 judgments in proceedings connected with adjudication, meaning that less than two per cent of these adjudications end up in the court system. Not bad.

We need this here in Canada. We need a Canadian version of this

scheme that applies to all construction contracts (public and private), all stakeholders (including bonding and insurance companies, lenders and consultants), and all issues, in all circumstances of solvency, insolvency and reorganization. We need a scheme that accommodates all existing private and public remedies, including lien and bond remedies, so that at the end of the project any party that has complied with all adjudicated determinations can pursue any remedy they may have using any process that is available to them.

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We could make it even better. We could add statutory protection for all adjudicators; broad ancillary jurisdiction for the adjudicators; allow multiple referrals; require reasons for all determinations; expressly allow adjudicators to open up certificates if necessary; and provide that adjudicators are not compellable in any subsequent proceeding.

Canada's scheme could eliminate “pay if/when paid” clauses, as many U.S. states have done, because, with adjudication, cash flow right down the line would be protected so that no-one would have an obligation to pay without their right to receive a corresponding payment having been adjudicated and enforced.

Canada's scheme would need provincial legislation that was harmonized with all federal insolvency and reorganization legislation.

We need to cut through our existing patchwork of rights and remedies and make a truly responsive national scheme that keeps working capital out of court. If we take this bold step, we have the assurance of the U.K. experience that it will invigorate our domestic construction industry. **B**

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