



COUNTRY UPDATE: CANADA

Andrea Lee
Glaholt Bowles, Toronto

Introduction

Canada's construction law landscape continues to evolve at a brisk pace, with significant legislative reform, new adjudication and prompt payment regimes, and judicial guidance shaping dispute resolution.

Adjudication and prompt payment

Adjudication and prompt payment legislation, first introduced in Canada following an expert review of the former Construction Lien Act in Ontario in 2019, has proven to be a success and continues to rapidly spread throughout much of the country. Adjudication and/or prompt payment are now in effect in Alberta, Manitoba, Saskatchewan, Ontario and the Northwest Territories. New Brunswick, Nova Scotia and British Columbia have all drafted legislation implementing them, but that legislation is not yet in force.

As for adjudication case law, there is a steady stream of decisions of interest out of Ontario, the most recent one being *Sayers Foods Ltd v Gay Company Ltd*.¹ In that case, the court clarified a number of issues, including the treatment of evidence on judicial review and the question of whether complexity proceedings can oust an adjudicator's jurisdiction.

The court stressed that a judicial review is not a new hearing, and that attempts to re-argue the adjudication rather than explaining why the adjudicator's findings were unreasonable in light of the record will not be successful. The facts in a judicial review are derived from the adjudicator's determination, just as on appeal the factual record is derived from the lower court decision, and to overturn facts as established by an adjudicator requires palpable, overriding error. The Divisional Court rejected an argument that a more permissive standard for the introduction of fresh evidence should apply for judicial reviews of adjudications. Sayers argued that the short time frames for adjudication caused unfairness, but the Divisional Court declined to relax the general standard. It found that the proposed fresh evidence would not have impacted the outcome in any event, and that if Sayers had complied with its contractual obligations in a timely manner, it would have had the evidence prior to the adjudication. The Divisional Court also declined to admit the evidence because it contained impermissible material, including factual and legal argument, inadmissible opinion evidence and hearsay.

Next, the court rejected the argument that claims should not be subject to adjudication because of complexity, since it would defeat the prompt payment provisions if an owner could deprive an adjudicator of jurisdiction by raising, as a matter of defence to a 'single matter' dispute, a defence that raises 'multiple and complex' issues of fact and/or law. The subject matter of the arbitration does not change because of a defence raised by an owner, although the focus of the arbitration may turn out to be on the defence, if the affirmative claim is otherwise uncontested.

Finally, an argument that adjudications are akin to injunctions

and the 'serious issue to be tried' standard should apply to defences was also rejected. A prompt payment determination is not an interlocutory injunction; it is a comprehensive scheme for prompt adjudication of construction payment disputes, with the goal of seeing that funds flow to, and through, the construction pyramid promptly, to reduce cascading losses and delays on construction projects. The evidentiary burden is on a balance of probabilities, and the determination is without prejudice to the position of the parties in subsequent litigation.

Arbitration

In *CIMIC Morningstar Investments Ltd v Chandos Construction Ltd*,² the British Columbia Court of Appeal confirmed the very narrow scope of judicial review of arbitral awards.

The arbitration proceedings arose from a project in which CIMIC engaged Chandos as the general contractor in the construction of a four-storey building under a fixed-price contract. The central issue in the arbitration was responsibility for delay in the completion of the project. In a partial award, the arbitrator awarded Chandos damages of some \$7,018,000 for failure to make progress payments, failure to release holdbacks, delay and financing costs, plus interest and costs. In a final award released a month later, the arbitrator adjusted the total amount of damages to \$6,470,275, plus costs of \$1,621,852 and interest of \$1,013,317.

The arbitrator largely agreed with the position advanced by Chandos. She found that construction was delayed by acts or omissions of CIMIC and its agents; determined that Chandos complied with the contractual notice requirements applicable to its delay claims; and found CIMIC liable for delay and financing costs. The arbitrator ruled that CIMIC was estopped from advancing the

position that Chandos was disentitled to delay damages based on its completion of contract change forms indicating zero days of additional delay. The arbitrator also rejected CIMIC's position that it was entitled to invoke a liquidated damages clause when Chandos failed to finish the work by the substantial completion date.

Under the British Columbia Arbitration Act, a party to an arbitration may appeal to the Court of Appeal under section 59 of the Arbitration Act on any question of law arising out of an arbitral award, with leave. CIMIC argued that the arbitrator had erred on four questions of law: the interpretation of the contractual notice provision; the acceptance of the estoppel argument; the application of the prevention principle; and the misinterpretation of evidence.

The court found that none of those alleged errors rose to the level of an error in law. The interpretation of the notice provision was 'at best, a question of finding of mixed fact and law'. The findings on the estoppel argument, while framed as a question of law, were, in reality, a complaint about how the arbitrator applied the legal test for promissory estoppel to the facts of the case, as was the arbitrator's mixed fact and law finding that Chandos successfully engaged the extension provision in the contract. Finally, with respect to the misinterpretation of evidence, the court held that 'what CIMIC describes as a misapprehension of evidence amounting to an error of law is, in reality, a challenge to the arbitrator's weighing of the evidence. It follows that this ground of appeal does not raise a question of law'. This case is therefore the latest example of British Columbia courts finding that a mistake in weighing evidence does not amount to an error of law.

In *Aroma Franchise Company, Inc v Aroma Espresso Bar Canada Inc*,³

the Ontario Superior Court of Justice (Commercial List) addressed the grounds on which a court may set aside an international commercial arbitral award under Article 34 of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration, as adopted in Ontario through the International Commercial Arbitration Act, 2017.⁴

The court had to consider, among other matters, the consequences of the arbitrator's finding that Earl Gorman, the interim managing partner of Aroma Canada and an individual respondent in the arbitration, was not a proper party to the arbitration. With respect to procedural fairness, the applicants argued that they had been denied the opportunity to present their case when the arbitrator determined, without submissions from the parties, that Mr Gorman was not a proper party to the arbitration. The court accepted that this finding engaged Article 34(2)(a)(ii), as neither party had been afforded the opportunity to address the issue prior to the arbitrator making the determination.

While the court accepted that a breach of procedural fairness occurred when the arbitrator made a finding regarding the personal respondent's status without hearing submissions from the parties, it nonetheless declined to set aside the award because the breach was not material to the outcome. The court considered the significance of that breach in the context of the arbitral award as a whole, emphasising that not every procedural defect warrants setting aside an award. The arbitrator had already made substantive findings rejecting any basis for personal liability on the part of Mr Gorman, including findings that there was no oppression and no justification for piercing the corporate veil. In those circumstances, the additional statement that Mr Gorman was not

a proper party to the arbitration did not affect the outcome and was characterised as 'superfluous'.

The recent Quebec Superior Court decision in *Association des ressources intermédiaires d'hébergement du Québec (ARIHQ) c Santé Québec*⁵ is the first (at least in Canada) case in which an arbitral award was set aside because the award was written by artificial intelligence (AI).

The case concerned a dispute between a healthcare provider and the provincial health network about payments allegedly due under an agreement. The agreement stipulated a strict 90-day deadline for any notices of disagreement. The notice was not given within that time. The main issue before the arbitrator was whether the provider's claim was time-barred. The arbitrator held that it was.

In support of that finding, the arbitrator relied on an article allegedly published by the Québec Bar Association. That article did not exist. The arbitrator further relied on three decisions, two by the Court of Appeal and one by the Superior Court. None of those decisions existed either. Nor did another arbitral award that was cited. These 'authorities' were at the very core of the decision and were the only authorities cited for the main conclusion.

The court found that 'the preponderance of evidence therefore leads to the conclusion that the Arbitrator's authority was delegated and that he abdicated his role in reviewing the result. This conclusion is inescapable given that all the doctrinal and jurisprudential references on which the Arbitrator relies are non-existent and "hallucinatory"'.

While in Québec, an error of law, even on a matter of public policy, is not grounds for annulment, the court annulled the award on the basis that the arbitrator had failed to follow the agreed-upon arbitration procedure in delegating his decision-making function to AI.

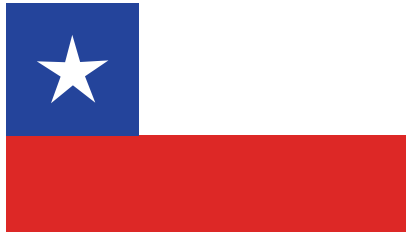
Conclusion

These recent court decisions give a glimpse into the otherwise confidential realm of alternative dispute resolution (ADR) in Canada. In Ontario, recent legislative amendments have resulted in the requirement that statutory adjudication decisions be published, albeit with identifying information anonymised. While adjudication decisions are not to serve as binding precedent, the move is meant to provide greater transparency to the public.⁶ These trends show that the construction industry has embraced and continues to rely on ADR as an efficient means of achieving resolution.

Notes

- 1 2026 ONSC 918 (Div Ct).
- 2 2026 BCCA 2.
- 3 2026 ONSC 768.
- 4 SO 2017, c 2, sch 5.
- 5 2026 QCCS 1360.
- 6 As pointed out in the review leading to the most recent amendments: 'The suggestion is not that prior determinations be in any sense binding or even persuasive. The suggestion is that to be credible, the adjudication system must be transparent.' See D W Glaholt, *2024 Independent Review: Updating the Construction Act*, <https://ontarioconstructionactreview.ca/final-report/> accessed 14 August 2026.

Andrea Lee is Managing Partner at Glaholt Bowles in Toronto. She can be contacted at AndreaLee@glaholt.com.



COUNTRY UPDATE: CHILE

Compensation for Covid-19-related construction costs denied to the Santiago International Airport concessionaire

Elina Mereminskaya
Arbitra International, Santiago

On 22 May 2026, an ad hoc arbitral tribunal rendered an award resolving a dispute between the concessionaire of Santiago's Arturo Merino Benítez International Airport and the Chilean Ministry of Public Works concerning the recovery of additional costs allegedly incurred by the claimant during the construction of the airport expansion works as a result of the Covid-19 pandemic.

Although the dispute was, as a matter of law, a domestic arbitration, the concessionaire's shareholders are foreign companies, giving the case broader international significance. The shareholders of the claimant Nuevo Pudahuel SA (the 'Concessionaire') are Aéroports de Paris Management SA (45 per cent), VINCI Airports SAS (40 per cent) and Astaldi Concessioni SpA (15 per cent).

Parties' main arguments

The Concessionaire brought a claim for damages against the Chilean Ministry of Public Works (the 'MOP'). It requested the arbitral tribunal to declare that the measures

adopted by the MOP in response to the Covid-19 pandemic had adversely affected the execution of the construction works under the Concession Agreement, rendering their performance significantly more costly and causing the Concessionaire to suffer losses exceeding US\$40m, and to order the MOP to compensate for those losses.

The Concessionaire's central argument was that the MOP had instructed it to continue the construction works throughout the pandemic, despite the numerous restrictions and public health measures that substantially increased construction costs, while also giving rise to additional prolongation costs and losses of productivity. The MOP's Contract Administrator (Inspector Fiscal), however, granted only a 66-day extension of time on account of the pandemic and rejected any entitlement to monetary compensation.

In its Statement of Claim, the Concessionaire expressly denied that the Covid-19 pandemic constituted a force majeure event. Instead, it argued that the Concession Agreement had been affected by extraordinary circumstances which, although they did not render performance impossible, made it substantially more onerous. On that basis, it contended that it was entitled to financial compensation.

In response, the MOP argued that Article 22 of the Chilean Public Works Concessions Law (Supreme Decree No 900 of the Ministry of Public Works) (the 'Concessions Law') allocates the entire construction risk to the concessionaire during the construction phase. It further submitted that it was the Concessionaire itself that had sought the classification of the airport construction works as a critical activity, thereby enabling the project to continue notwithstanding the restrictions imposed during the pandemic.