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GLAHOLT BOWLES LLP
NEWSLETTER

IN THIS ISSUE

Summary Judgment and Section 37

Introduction

Summary judgment is a procedural tool intended to provide a fair and just alternative procedure, "without the expense and delay of a trial".[1] The *Construction Act* (the "*Act*") does not explicitly provide for the availability of summary judgment; however, it is widely accepted that parties may bring a motion for summary judgment in construction lien matters.[2] In fact, in *Industrial Refrigerated Systems Inc. v. Quality Meat Packers*, the court held that leave should rarely be refused, particularly when the motion has been heard on its merits.[3]

It remains to be seen, however, whether a summary judgment can satisfy section 37 of the *Act*. In this article, we argue that the answer is that summary judgment should satisfy section 37. Summary judgment is a dispositive procedure, which, once granted, disposes of the claim. If leave is granted under the *Act*, it can dispose of a claim for lien, leaving nothing to be set down for trial.

The purpose of section 37

Section 37 requires a lien claimant to set the lien action down for trial or obtain an order for trial within two years of commencement. Section 46(1) imposes a consequence for non-compliance: if the lien has expired under section 37, the court *must* declare the lien expired and dismiss the action. The provision serves a discipline-of-procedure

1. *Hryniak v. Mauldin*, 2014 SCC 7 at para 27.

2. *Michaels Engineering Consultants Canada Inc v. 961111 Ontario Ltd. (1996)*, 29 OR (3d) 273 (ON SC).

3. *Industrial Refrigerated Systems v. Quality Meat Packers*, 2015 ONSC 4545 at paras 72-75.

function. It ensures that lien claims are resolved as expeditiously as possible and is applied strictly.

The test for summary judgment and its application to lien claims

Rule 20.04(2)(a) of the Ontario Rules of Civil Procedure requires the court to grant summary judgment if there is no genuine issue requiring a trial with respect to a claim or a defence. Where the court finds that there is no genuine issue requiring a trial on the entirety of the plaintiff's claim, including a lien claim, and grants judgment accordingly, the result is a dispositive judgment that determines the lien claimant's entitlement and the owner's obligation to pay.

Supportive case authority

In *310 Waste Ltd. v. Casboro Industries Ltd.*, the Ontario Court of Appeal determined that a reserve judgment on the issue of the claimant's ability to lien does not suspend the operation of section 37 of the *Act*.[4] While the Court of Appeal determined that a reserve judgment did not suspend the operation of section 37, it expressly declined to decide whether there could ever be circumstances that would warrant non-strict compliance with section 37.[5] Specifically, the Court of Appeal found that the case before it was not a case of a legal or practical impossibility, and that it would not have been contemptuous for the claimant to set its action down for trial while the subject judgment was under reserve.[6]

While not deciding the issue, the Court of Appeal therefore left the door open for situations where strict compliance with section 37 of the *Act* may not be possible or appropriate. For example, where a summary judgment disposes of a lien claim and orders payment of the amount registered on the basis that there is no genuine issue requiring trial, it would be inappropriate for the lien claimant to then set the action down for trial or obtain an order for a trial of the action.

This is supported by the decision in *Built-Con Contracting Ltd. v. Lisgar Construction Company*, in which Master Wiebe (now Associate Justice Wiebe) left open the possibility of a default judgment satisfying section 37 of the *Act*.[7] In this case, Built-Con noted Lisgar in default for failing to deliver a Statement of Defence and obtained a Registrar's default judgment against Lisgar.[8] Master Wiebe determined that, because the Registrar does not have jurisdiction to issue default judgments for lien remedies, the default judgment in question was not a lien judgment; however, if *Built-Con* had moved before a judge for default judgment on both its contract and lien actions, section 37 would be met.[9]

A default judgment is dispositive of a claim. If *Built-Con* suggested that default judgment could satisfy section 37, with the proper authority, it would be open to a court to find that a summary judgment, granted with leave under the *Act*, would be dispositive of a lien claim and accordingly satisfy section 37.

Conclusion

A summary judgment granted on a lien claim, with leave under the *Act*, should satisfy section 37 where it disposes of the lien in its entirety within the statutory period. This conclusion is consistent with the statutory purpose of timely resolution, related jurisprudence, and the principles of proportionality and efficiency.

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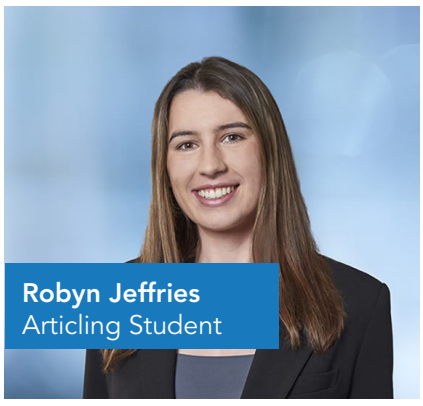

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4. *310 Waste Ltd. et al v. Casboro Industries Ltd. et al (2006)*, 83 OR (3d) 314 (ON CA) ("**310 Waste**") at para 3.

5. *310 Waste* at para 4.

6. *310 Waste* at para 5.

7. *Built-Con Contracting Ltd. v. Lisgar Construction Company*, 2016 ONSC 1720 ("***Built-Con***").

8. *Built-Con* at para 10.

9. *Built-Con* at para 31.

Privy Council Delivers a Hard Lesson in FIDIC Notice, Variations, and "Fairness"

Key Takeaways

- **Calling something a "variation" doesn't make it one.** Whether work is a variation requires an exercise of contractual interpretation, especially under a design-build, lump sum bargain.
- **Commercial parties will be held to the terms of the contract they freely agreed to; even if skewed heavily against them.** Parties should get legal advice on their contracts early to understand their risks. Push back if the risks are unacceptable or live with the consequences.
- **FIDIC 1999 Sub-Clause 20.1 is a true condition precedent.** Miss the 28-day notice, and the contractor's entitlement to additional payment is extinguished entirely.
- **Termination doesn't resuscitate time-barred claims.** Contractual notice obligations and accrued consequences remain effective despite termination. Termination operates prospectively; it does not wipe out notice obligations.
- **Waiver/estoppel cannot be an afterthought.** If a party wants to rely on arguments of unfairness or that the other party waived strict compliance, there must be contemporaneous evidence of representation, reliance, and detriment, and it must be pleaded.
- **The FIDIC Engineer cannot waive your notice requirements.** The FIDIC Engineer cannot amend the contract or relieve notice obligations; that has to be done by the opposing party.

The case

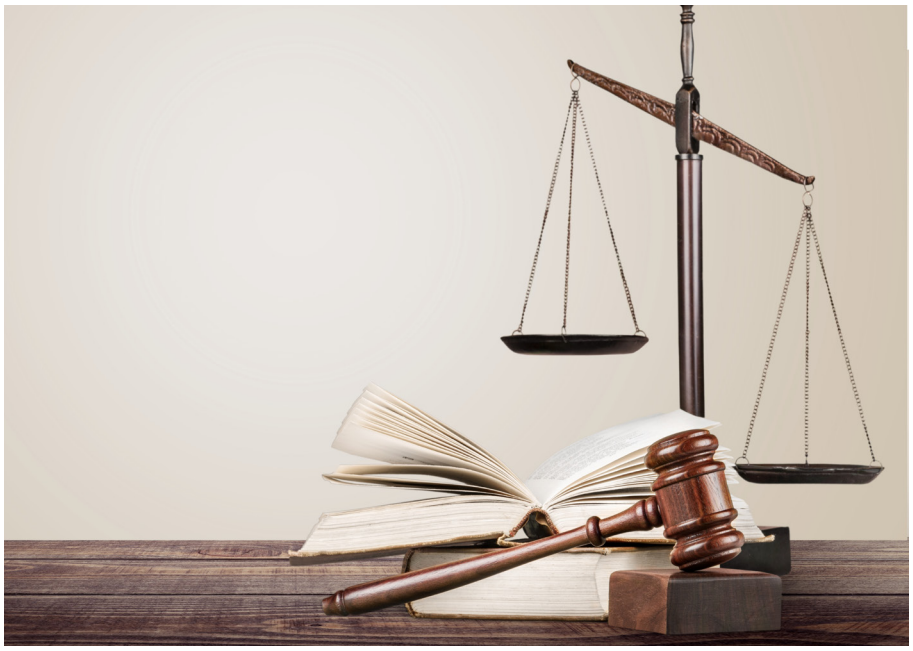
The Board of the Judicial Committee of the Privy Council's (the "Privy Council" or the "Board") decision in *Uniform Building Contractors Ltd v The Water and Sewerage Authority of Trinidad and Tobago*, [2026] UKPC 2 (January 22, 2026), is an important decision on the interpretation of construction contracts generally and FIDIC contracts particularly. Though the decision is not binding outside of jurisdictions for which the Privy Council is the highest court of appeal, courts and arbitrators around the world may follow its guidance.

WASA (the public water authority in Trinidad and Tobago) contracted with Uniform Building Contractors Ltd ("UBC") in 2007 for a design, supply, and installation pipeline project. The contract incorporated FIDIC Design-Build ("Yellow Book") general conditions and bespoke particular conditions, and the prices were lump sum.

Disputes followed, and WASA terminated UBC in 2009.

UBC sued in 2013 seeking about TT$13.9 million (CA$2.8 million) for four items of work: laying pipework in the roadway (as opposed to the verges), removal of unsuitable backfill, importation of backfill, and night work. UBC framed its claim as payment for four alleged "variations" said to have been instructed on site by the FIDIC Engineer (who is an independent consultant/contract administrator). Yet UBC did not follow the variation procedure or give notice of claim.

At trial, UBC lost. The High Court held that UBC should be held to



the terms of the FIDIC contract and considered the fixed price of the contract to account for the circumstances which occurred during the project. The Court of Appeal reversed that decision and awarded UBC the TT$13.9M, leaning heavily on the FIDIC Engineer's evidence that the items of work were variations and its evidence about how the contract was "actually operated" on site, concluding that contractual notice requirements had effectively been "waived."

The Privy Council allowed WASA's appeal, reversed the Court of Appeal, and dismissed UBC's claim.

The decision

1. **"Variations" are what the contract says they are, not the Engineer**

The Privy Council emphasized a point that construction lawyers know but project teams sometimes forget in the heat of delivery: a "variation" is whatever the contract says it is, not whatever someone on site later describes it to be.

Here, the contract defined "Variation" by reference to changes instructed/approved under clause 13, and the Privy Council concluded that none of the four disputed items met the definition because (i) the broader contract risk allocation in the FIDIC general conditions and the particular conditions required UBC to price comprehensively, and (ii) the specific documents and specifications expressly contemplated the kinds of work UBC later claimed were extra.

Critically, this was despite the FIDIC Engineer himself giving evidence that he approved the additional works with the payments to be made later, and he agreed they were variations.

The Privy Council's analysis is steeped in the commercial logic of the lump sum design-build deal. If the work is expressly or impliedly included in what the contractor promised to deliver for the lump sum, it is not miraculously converted into a payable extra because it turned out to be more costly than anticipated. The contractor cannot escape the contract into which it freely entered.

2. **Even if they were variations, notice was required**

The Board went further. Even if the disputed items could have been treated as variations, UBC still faced fatal procedural problems.

If the FIDIC Engineer had instructed UBC to carry out a variation, the next step in the process would have been for UBC to seek a determination from the FIDIC Engineer under clause 3.5 on the value of the extra work. The determination by the FIDIC Engineer is what gives rise to an entitlement to be paid additional monies. UBC failed to follow the contractual procedure and so was not entitled to payment.

Further, had UBC requested a determination, but the FIDIC Engineer failed to give one or UBC disagreed with it, FIDIC Sub-Clause 20.1 required the Contractor to give notice of a claim within 28 days or it "shall not be entitled" to additional payment and the Employer is discharged from liability.

The Board treated the FIDIC contract language as classic condition-precedent drafting: "no notice, no claim."

3. **Termination does not revive what the time bar already killed**

The Court of Appeal treated termination as a reason why Sub-Clause 20.1 did not apply. The Board rejected that. Termination is generally prospective, and it does not wipe out accrued rights, obligations, and consequences that arose before termination.

In this case, the time to notify had expired long before termination. Termination could not resurrect a claim that had already become unavailable by contract.

4. **"Fairness", waiver, and estoppel cannot be smuggled in on appeal**

The Board dealt sharply with the Court of Appeal's "fairness" approach. If a Contractor wants to avoid the consequences of non-compliance by saying the Employer waived strict rights or is estopped from relying on them, that case must be pleaded, and it must be supported by evidence of representation, reliance, and detriment.

UBC first raised waiver/estoppel in submissions at the Court of Appeal. That was too late.

5. **The FIDIC Engineer cannot waive the contractual requirements**

Crucially, even if UBC had tried to frame waiver around site-level conduct, FIDIC clause 3.1 constrained the FIDIC Engineer's authority. The FIDIC Engineer had no authority to amend the contract or relieve either party of contractual obligations. He was not a party to the design-build contract nor was he the Employer's duly authorized agent, but had a quasi-independent role.

The notion that the FIDIC Engineer can "waive" compliance with the variation/claims machinery (including Sub-Clause 20.1) runs headlong into the contract's express structure.

The FIDIC Engineer administers; the parties bargain.

Why this matters for owners/ Employers, contractors, and contract administrators

This decision is a reminder that, in FIDIC projects, notices are not paperwork theatre.

For contractors: if you believe an instruction or circumstance entitles you to time or money, treat the notice requirement as an emergency procedure. Do not be led astray by informal assurances, even if they come from the FIDIC Engineer. If the FIDIC Engineer is unresponsive, the Privy Council pointed out that Sub-Clause 20.1 exists precisely to "unlock" the issue. Use it.

For owners/Employers and FIDIC Engineers: this judgment reinforces that the project's on-site "we'll sort it out later" culture can magnify disputes. Bending the rules on site does not rewrite the contract. Eventually, the disputes come back with a vengeance and the contract you have been skirting will apply.

And for everyone: if you intend to rely on waiver/estoppel, plead it early and build the evidentiary foundation. Courts (and appellate courts) are not obliged to rescue a party from its contract on "fairness" alone.

APPENDIX – RELEVANT FIDIC DESIGN-BUILD (YELLOW BOOK) 1999 PROVISIONS

Provisions on Scope

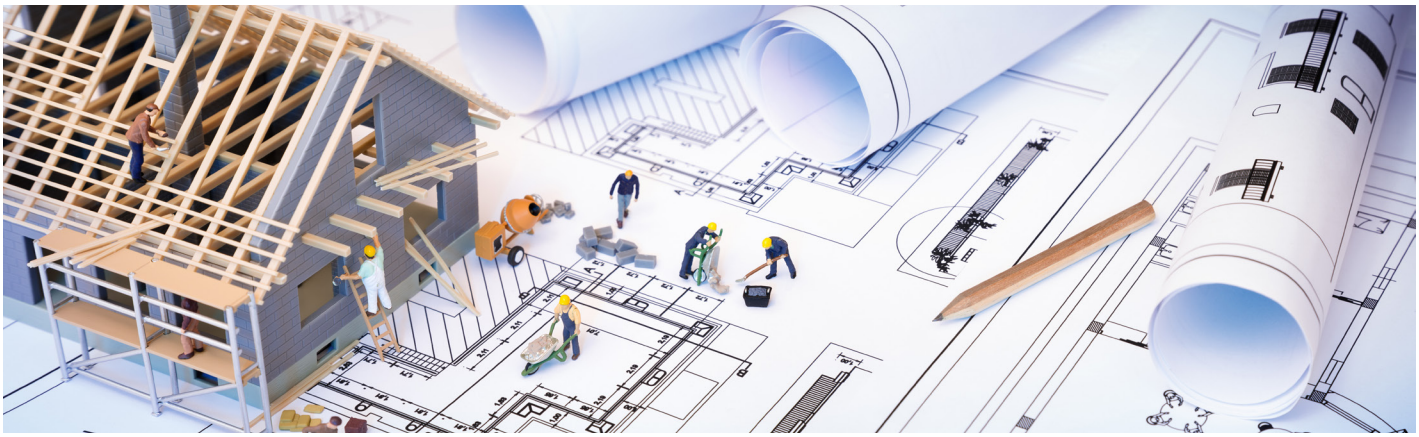
Clause 4.11 of the FIDIC Design-Build (Yellow Book) conditions provide:

> *"The Contractor shall be deemed to:*
>
> *(a) have satisfied himself as to the correctness and sufficiency of the Accepted Contract Amount, and*
>
> *(b) have based the Accepted Contract Amount on the data, interpretations, necessary information, inspections, examinations and satisfaction as to all relevant matters referred to in Sub-Clause 4.10 [Site Data] and any further data relevant to the Contractor's design.*
>
> *Unless otherwise stated in the Contract, the Accepted Contract Amount covers all the Contractor's obligations under the Contract (including those under Provisional Sums, if any) and all things necessary for the proper design, execution and completion of the Works and the remedying of any defects."*

Variations

FIDIC contract dealing with variations include as follows:

> *"1.1.6.9 "**Variation**" means any change to the Employer's Requirements or the Works, which is instructed or approved as a Variation under Clause 13 [Variations and Adjustments].*
>
> *"13.1 Right to Vary*
>
> *Variations may be initiated by the Engineer at any time prior to issuing the Taking-Over Certificate for the Works, either by an instruction or a request for the Contractor to submit a proposal.*
>
> *…*
>
> *13.3 Variation Procedure*
>
> *…*
>
> *Upon instructing or approving a Variation, the Engineer shall proceed in accordance with Sub-Clause 3.5 [Determinations] to agree to determine adjustments to the Contract Price and the Schedule of Payments. These adjustments shall include reasonable profit, and shall take account of the Contractor's submissions under Sub-Clause 13.2 [Value Engineering] if applicable."*



"3.5 Determinations

Whenever these Conditions provide that the Engineer shall proceed in accordance with this Sub-Clause 3.5 to agree or determine any matter, the Engineer shall consult with each Party in an endeavour to reach agreement. If agreement is not achieved, the Engineer shall make a fair determination in accordance with the Contract, taking due regard of all relevant circumstances.

The Engineer shall give notice to both Parties of each agreement or determination, with supporting particulars. Each Party shall give effect to each agreement or determination unless and until revised under Clause 20 [Claims, Disputes and Arbitration]."

Contractor's Obligation to Give Notice of Claim

Clause 20.1 of the FIDIC Yellow Book provides:

"If the Contractor considers himself to be entitled to any extension of the Time for Completion and/or any additional payment…the ***Contractor shall give notice*** *to the Engineer…as soon as practicable,* ***and not later than 28 days*** *after the Contractor became aware, or should have become aware of the events or circumstances.*

If the Contractor fails to give notice *of a claim within such period of 28 days, the T****ime for Completion shall not be extended, the Contractor shall not be entitled to additional payment****, and the* ***Employer shall be discharged from all liability in connection with the claim****…*

…If the Contractor fails to comply with this or another Sub-Clause in relation to any claim, any extension of time and/or additional payment shall take account of the extent (if any) to which the failure has prevented or prejudiced proper investigation of the claim…" (Emphases added)

The Engineer's Authority

"3.1 Engineer's Duties and Authority

The Employer shall appoint the Engineer who shall carry out the duties assigned to him in the Contract….

The Engineer shall have no authority to amend the Contract.

The Engineer may exercise the authority attributable to the Engineer as specified in or necessarily to be implied from the Contract….

However, whenever the Engineer exercises a specified authority for which the Employer's approval is required, then (for the purposes of the Contract) the Employer shall be deemed to have given approval."

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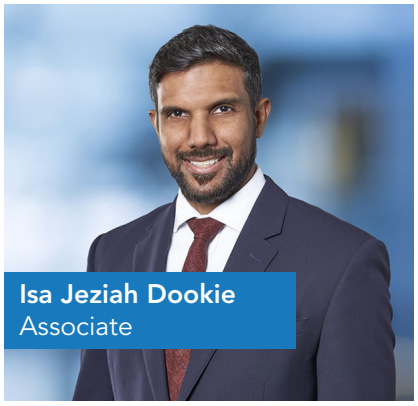

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Procedural Fairness in *Construction Act* Adjudications

The standard of procedural fairness in the context of adjudications initiated under the *Construction Act* is still nascent. Since the introduction of the adjudication process in 2019, very few matters have been brought to judicial review—the prescribed appeal mechanism—on the basis of procedural fairness. Adding to the significance of this question is the greater availability of adjudication since Bill 216: Building Ontario For You Act (Budget Measures) came into force in 2024 and permitted "a party to a contract [to] refer a dispute with the other party to the contract respecting any prescribed matter or any matter agreed to by the parties to adjudication."

Despite a lack of established law, parties to an adjudication may still wish to evaluate judicial review of an adjudicator's decision. This article discusses the available resources that counsel can consider in order to provide guidance on whether procedural fairness is a live issue arising out of an adjudicatory decision.

Nature of Adjudication in Ontario

Procedural fairness refers to the obligation that decision-makers owe affected parties to ensure that administrative decisions are made using a fair and open procedure. In *Baker v. Canada (Minister of Citizenship and Immigration)* ("***Baker***"), the Supreme Court of Canada pointed out that the "duty of fairness is flexible and variable, and depends on an appreciation of the context of the particular statute and the rights affected…".[1] Therefore, the degree of procedural fairness is highly contextual. A process sufficient for one kind of statutory decision may be insufficient for another.

Against this backdrop, it is worth noting two fundamental characteristics of the adjudication regime.

First, the *Construction Act* creates an adjudicatory process that is designed to provide quick determinations. Speaking in the legislature when Bill 142 was introduced,[2] Ontario's then Attorney General stated that adjudication "is the key to speeding up the dispute resolution process."[3] This objective is clear from the short timelines under which determinations must be issued—adjudicators must provide their determination within 30 days unless the parties consent to a longer timeline.[4]

Second, beyond speed, the adjudication regime generates only interim determinations. Explaining the reasoning behind this decision, Ontario's Attorney General noted that adjudicators' decisions are "binding on the parties on an interim basis to keep the project moving. That means that either party would still have the option of taking the dispute to court or arbitration for a final determination."[5] By its nature, an adjudication decision may not be the final word on a dispute, a factor that influences the extent to which the parties are afforded procedural fairness protections.

As noted in *Baker*, the "closeness of the administrative process to the judicial process should indicate how much of those governing principles should be imported into the realm of administrative decision making."[6] Decisions for which no statutory appeal procedure is available, or where the decision is determinative of the issue, attract greater procedural protections. Conversely, an interim decision which is not dispositive of the underlying dispute points towards lighter obligations of procedural fairness.[7]

Appeal under the *Construction Act*

While the factors discussed above suggest a lower standard for procedural fairness in adjudications, it is important to consider the text of the Construction Act. In particular, the way in which procedural fairness is discussed throughout the process.

Section 13.18(5) of the Act contemplates the narrow grounds for an appeal for judicial review from an adjudicatory decision:

> The determination of an adjudicator 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.

1. *Baker v. Canada (Minister of Citizenship and Immigration)*, 2 SCR 817 ("***Baker***") at para 22.

2. Bill 142 is the *Construction Lien Amendment Act*, 2017, through which the original adjudication regime was established.

3. *Hansard*, Parliament 41, Session 2, December 4, 2017, p 1410.

4. *Construction Act*, RSO 1990, c C.30, ss. 13.13(1), (2).

5. *Hansard*, Parliament 41, Session 2, December 4, 2017, p 1410.

6. *Baker* at para 23.

7. *Baker* at para 24.

2. Repealed: 2024, c. 20, Sched. 4, s. 22(2).

3. The determination was of a matter that may not be the subject of adjudication under this Part, 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.

7. The determination was made as a result of fraud.[8]

Procedural fairness is therefore explicitly described as grounds for judicial review of an adjudicator's decision. In *Ledore Investments v. Dixin Construction, 2024 ONSC 598 ("Ledore")*, the Divisional Court noted that "judicial review is available for breaches of procedural fairness" on the basis of subsection 13.18(5)5.[9] The court affirmed the

statutory presence of procedural fairness by observing that section 13.6 of the Act requires adjudications to be conducted in accordance with the procedures, at that time set out in Regulation 306/18, and since that regulation's revocation on January 1, 2026, in Regulation 264/25 (the "Regulation"). The Regulation in turn creates a "floor" by setting out:

> 7. (1) The Authority[10] shall establish and maintain a code of conduct for adjudicators, and shall make the code of conduct publicly available on its website.
>
> (2) The code of conduct shall address, at a minimum, the following matters:

1. Conflicts of interest and related procedural matters.

2. Principles of proportionality in the conduct of an adjudication, and the need to avoid excess expense.

3. Principles of civility, procedural fairness, competence and integrity in the conduct of an adjudication.

4. The confidentiality of information disclosed in relation to an adjudication.

5. Procedures for ensuring the accuracy and completeness of information in the adjudicator registry.[11]

In turn, ODACC has published an Adjudicators' Code of Conduct, with the latest version thereof being effective July 7, 2025. Therein, ODACC provides that Adjudicators

8. *Construction Act*, RSO 1990, c. C. 30, s. 13.18(5).

9. *Ledore Investments v. Dixin Construction, 2024 ONSC 598* ("**Ledore**"), para 24. The court observes here that section 13.6 of the Act states that adjudications shall be conducted in accordance with the procedures set out in the regulations and that Regulation 306/18 provides that the code of conduct for adjudicators shall include principles of procedural fairness. (para 25)

10. The "Authority" is defined under the Act as follows: "The Minister responsible for administration of this Act may designate an entity to act as Authorized Nominating Authority for the purposes of this Part." *Construction Act*, RSO 1990, c. C. 30, s. 13.2. The entity so-designated is the Ontario Dispute Adjudication for Construction Contracts ("**ODACC**").

11. *Adjudications Under Part II.1 of the Act*, O Reg 264/25, s. 7(1), (2).

shall ensure the parties are informed of the procedural aspects of the adjudication process, listen and read carefully the views and submissions of the parties, and make determinations on the merits of the case.

Content of Procedural Fairness in Adjudications

Ledore, addressed above, is the first case that contains a substantive discussion of the content of procedural fairness in the context of *Construction Act* adjudications. In that case, a dispute arose over unpaid subcontract invoices where the non-payor and respondent, Dixin Construction, had not issued notices of non-payment. The adjudication proceeded on an expedited, documentary basis with no opportunity for oral submissions. The adjudicator ultimately dismissed Ross Steel Fabricators & Contractors' ("Ross Steel") claim on the basis that Dixin had not issued a "proper invoice" to the owner and therefore the relevant prompt payment provisions were not engaged. The adjudicator reached this conclusion despite that issue not having been raised in either party's submissions.

On judicial review, the court made several comments regarding the applicable content of procedural fairness in *Construction Act* adjudications. Predictably, the court found that Ross Steel was "not entitled to the full range of procedural protections that would apply, for example, in a final arbitration or court hearing."[12] However, "the right to be heard on the determinative issue is a central component of even more limited procedural protections."[13] On that basis, the court sided with Ross Steel and remitted the matter to the adjudicator for re-determination.

Post-*Ledore*, the court considered adjudicatory procedural fairness in *Feldt Electric Ltd. v. Gorbern Mechanical Contractors Limited*, 2025 ONSC 4150 ("*Feldt*"). *Feldt* was not a case of judicial review, but rather a motion by Gorbern Mechanical Contractors Limited ("Gorbern") seeking a stay of Feldt's lien action and returning the lien security on the grounds that *Feldt* had failed to pay the determination of an adjudicator arising out of the same matter. Though not a case of judicial review or a matter in which a decision of an adjudicator was overturned, the discussion by the Court in Feldt in refusing the stay is helpful in understanding the developing content of adjudicatory procedural fairness.

Feldt raised several concerns with the adjudication process:

(a) the adjudicator found that he had jurisdiction to deal with the dispute despite Feldt specifically objecting to the adjudicator's jurisdiction on the basis that the proposed adjudication was not merely a matter of payment, but rather a contractual dispute that required determination of the parties contractual rights and scope of work under the subcontract before any determination could be made on amounts to be paid;

(b) the adjudication dealt with issues beyond the scope of those permitted by s. 13.5(1) without Feldt's consent;

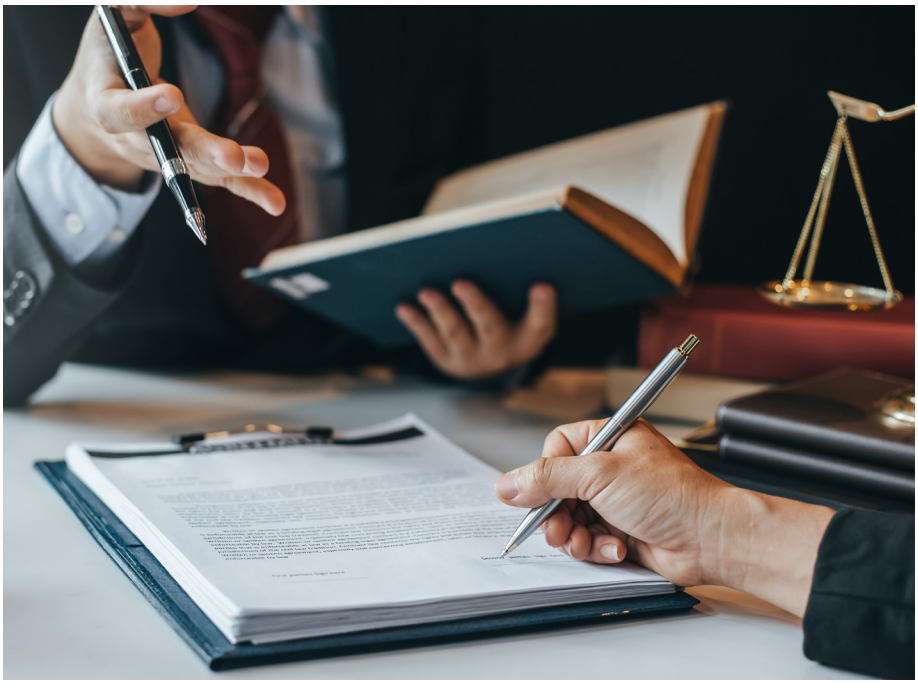
(c) the adjudicator proceeded with the adjudication in the absence of evidence from or participation by Feldt; and

(d) the adjudicator ignored Feldt's opinion report… on Feldt's scope of work.[14]

While the Court focused on the first of Feldt's concerns, it noted that all

12. *Ledore* at para 27.

13. *Ledore* at para 28.



14. *Feldt Electric Ltd. v. Gorbern Mechanical Contractors Limited*, 2025 ONSC 4150 ("***Feldt***") at para 44.

four claims at least had merit.[15] In light of Feldt's fourth concern, it is worth noting that failure by an adjudicator to consider a relevant piece of evidence may give rise to procedural unfairness claims. The Court also noted that Feldt had objected to the scope of the adjudication consistently and from the outset.[16] In fact, the adjudicator acknowledged Feldt's objection in his decision, however made no attempt to address the issue substantively.[17]

The comments in *Feldt* further emphasize that, despite the legislative objectives set out above, courts are carefully attuned to procedural fairness concerns and failure of an adjudicator to take them into consideration can compromise further steps in the dispute. As the court pointed out, "[r]egardless of whether judicial review was pursued, both the adjudicator's finding on jurisdiction and ultimate determination are in question. In the circumstances of this case, it would only exacerbate procedural unfairness to Feldt if [the Court] were to turn a blind eye to those concerns when deciding the appropriateness of staying Feldt's lien action for non-payment of the adjudicator's determination."[18]

Practical Guidance

Thus far, the content of procedural justice in adjudications has focused on the right to be heard. In *Ledore*, the applicant benefitted (at judicial review) from the fact that it could not make submissions on what ended up being the dispositive issue for the adjudicator. Even at a lower standard of content for procedural fairness, this is a clear indication that a decision is reviewable. Since *Ledore*, amendments to the *Construction Act* provide that parties must raise an objection if a matter is not subject to adjudication when the party first makes submissions, or if the objection pertains to the adjudicator exceeding their jurisdiction, as soon as the matter is raised.[19] *Feldt* additionally offers some indication that less blatant instances in which a party is deprived of the right to be heard—by, for example, the adjudicator's lack of consideration of relevant documents—may give rise to relief under the procedural fairness ground of review.

Overall, the content of procedural fairness in adjudications remains on the lower end of the scale. The decision in *Feldt* indicates that the right to be heard may go beyond bare inability to respond, and include situations where a party is not able to raise materials relevant to their case, or where jurisdiction is explicitly challenged. Adjudicators should be aware that an expedited process is not one without procedural fairness obligations.

In practical terms, counsel should focus on the statute, the record, and any tangible prejudice in considering whether to appeal an adjudicator's decision on the grounds of procedural fairness. Objections to scope should be made early and consistently to establish a documentary record of a party's objection. If the objection is as to jurisdiction, by statute such objection must be raised when the party first makes submissions. And in the case of an adjudicator exceeding their jurisdiction, such objection must be made under statute at the time it arises. It is worth noting that even though *Feldt* was clearly in violation of the adjudicator's determination and came to the proceeding with less than clean hands, the violation of procedural fairness in the adjudication significantly softened the impact of that violation. Feldt certainly does not provide carte blanche for parties to simply not pay adjudicatory awards if they feel the process was unfair. However, the courts take procedural fairness in adjudications seriously and a lower standard should not be reason to avoid judicial review in cases where a party has been significantly prejudiced.

15. *Feldt* at para 55.

16. *Feldt* at para 47.

17. *Feldt* at para 50.

18. *Feldt* at para 55.

19. *Construction Act*, s. 13.12.1(2).

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UK Supreme Court Clarifies Termination Rights for Late Payment under JCT Contracts: *Providence Building Services Limited v. Hexagon Housing Association Limited* [2026] UKSC 1

On January 15, 2026, the UK Supreme Court released its judgment in *Providence Building Services Limited v Hexagon Housing Association Limited*, resolving an important question of contractual interpretation concerning clauses 8.9.3 and 8.9.4 in the commonly used JCT Design and Build Contract (2016 edition) ("**JCT Contract**"). This decision will be of significant interest to employers and contractors across the UK construction industry, especially as the 2024 edition of the JCT Contract contains the exact same wording for these clauses.

The sole issue for the Supreme Court to determine was whether a contractor can terminate under clause 8.9.4 for a repeated specified default if a right to serve a termination notice under clause 8.9.3 had never previously accrued—that is, where the earlier default had been cured within the specified period.

For the reasons below, the Supreme Court unanimously decided no; there is no right to terminate under clause 8.9.4 for a repeated specified default, unless that party had previously held the right to terminate under clause 8.9.3 for a prior default.

The Contract and Relevant Provisions

In February 2019, Hexagon Housing Association Limited (the "**Employer**") and Providence Building Services Limited (the "**Contractor**"), entered into a contract for the construction of a number of buildings in London (the "**Contract**"). The Contract incorporated the 2016 edition of the standard-form JCT Contract as amended by the parties and contained the following relevant clauses:

- **Clause 8.9.1:** "If the Employer does not pay by the final date for payment the amount due to the Contractor in accordance with clause 4.9 and/or any VAT properly chargeable on that amount, the Contractor may give to the Employer a notice specifying the default or defaults (a "specified" default or defaults)."
- **Clause 8.9.3:** "If a specified default or a specified suspension event continues for 28 days from the receipt of notice under clause 8.9.1 or 8.9.2, the Contractor may on, or within 21 days from, the expiry of that 28 day period by a further notice to the Employer terminate the Contractor's employment under this Contract."
- **Clause 8.9.4:** "If the Contractor for any reason does not give the further notice referred to in clause 8.9.3, but (whether previously repeated or not): (1) the Employer repeats a specified default; or (2) a specified suspension event is repeated for any period, such that the regular progress of the Works is or is likely to be materially affected thereby, then, upon or within a reasonable time after such repetition, the Contractor may by notice to the Employer terminate the Contractor's employment under this Contract."

Default and Termination

During the project, the Employer made a number of late payments.

In December 2022, the Employer failed to make a payment on time and the Contractor served a notice of specified default under clause 8.9.1 of the Contract, but the Employer cured the default by paying the outstanding sum within the 28-day cure period.

In May 2023, the Employer again failed to pay on time. The Contractor immediately served a notice on May 18, 2023, purporting to terminate the contract under clause 8.9.4, arguing that this was a "repetition" of the earlier specified default entitling it to terminate without waiting for a further cure period.

On May 23, 2023, the Employer paid the full sum. The following day, the Employer disputed the lawfulness of the termination notice and asserted that the Contractor had repudiated the contract. On 31 May 2023, the Employer wrote again to the Contractor, accepting what it characterized as the Contractor's repudiatory breach.

The Employer referred the dispute to an Adjudicator who found largely in the Employer's favour. The Contractor then commenced court proceedings seeking a declaration as to the correct interpretation of clauses 8.9.3 and 8.9.4.

The Decisions Below

The High Court held in favour of the Employer, finding that that the party purporting to terminate under clause 8.9.4 must have previously had a right to terminate under clause 8.9.3.

The Court of Appeal allowed the Contractor's appeal, finding the opposite, that the Contractor did not necessarily have to have an accrued right to terminate under clause 8.9.3 to terminate under clause 8.9.4. The Court of Appeal reasoned that the words "for any reason" in clause 8.9.4 were "broad enough to catch a case where the reason why the further notice may not be given is that there is no accrued right to give it".

The Supreme Court's Ruling

The Supreme Court confirmed that the proper interpretation of a contract is to ascertain the meaning of words used by applying an objective and contextual approach. This is still in the case when interpreting standard form contracts widely used in the industry. The Court held that "the established approach, based on the objective intentions of the contracting parties in the relevant context, should still be applied to the interpretation of an industry-wide standard form contract."

Taking this approach, the Court took special notice of the wording in clause 8.9.4, which states, "If the Contractor for any reason does not give the further notice referred to in clause 8.9.3…" The Court wrote that these opening words indicated that clause 8.9.4 was "parasitic" on clause 8.9.3, rather than independent of it. Further, the phrase "for any reason" refers to any number of various reasons why a Contractor might choose not to exercise an already-accrued right to terminate; it does not refer to the absence of any such right.

The Court found that any other interpretation of 8.4.9 would render the opening words of that clause superfluous.

The Court also went on to say, as a practical matter, that the Employer's interpretation produced a rational outcome: only where an earlier breach went uncured for 28 days may the Contractor terminate immediately for a repeated late payment.

The Contractor's interpretation, by contrast, would permit termination even where two payments were each only one day late - an outcome the Court described as potentially providing "a sledgehammer to crack a nut".

Commercial Implications for Contractors

This decision has some interesting implications for contractors.

The Contractor had argued that its interpretation was necessary to protect against Employers who persistently pay late. Technically, under the Supreme Court's interpretation, an Employer could strategically make every payment up to 27 days late - just within the cure period - and thereby prevent the Contractor from ever acquiring a right to terminate.

The Supreme Court did acknowledge this concern but held that arguments based on commercial common sense did not assist either party. Lord Burrows, writing for the Supreme Court, stated that even if the Contractor's other remedies (such as the right to suspend works, statutory interest, and adjudication) were inadequate, "the interpretation of the disputed termination clause should not be distorted so as to favour the Contractor". Any perceived deficiency in the contract is a matter for the JCT to address in future editions.

Key Takeaways

In short, under clause 8.9.4, a contractor cannot terminate immediately for a repeated late payment unless the earlier late payment went uncured for the full 28-day period. Where an Employer cures a late payment within time, the Contractor must wait to see whether any subsequent late payment is also cured before a termination right arises.

Contractors facing persistent late payers will need to rely on alternative remedies such as suspension of work, statutory interest, and adjudication remedies. These remedies may not adequately address cash flow difficulties and may be something that the JCT should consider when re-wording its termination clauses in later editions to specifically protect against repeated late payment.

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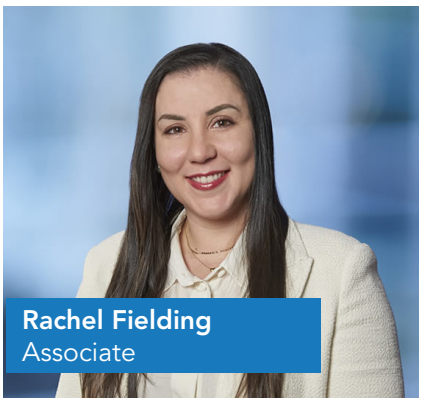

Updates to Green Construction in Canada: Legislative Developments

Canada's construction sector operates within a fast-evolving policy backdrop aimed at decarbonizing buildings, reducing operational energy use, and aligning new development with broader climate commitments. At the same time, other construction objectives, such as affordability of new housing stock and the speed of development, are increasingly prioritized by all levels of government. In different contexts, these objectives either harmonize or conflict, and in some instances have prompted the reconsideration or rollback of certain green construction requirements. This article considers recent developments in green construction at the federal and select provincial and municipal levels.

Federal Updates

The Federal Government's green construction strategy is built on two complementary tracks: (a) the National Building Code of Canada ("**NBC**") and National Energy Code of Canada for Buildings ("**NECB**") and (b) federal policy instruments that use financial incentives to impact procurement and financing, as articulated in the Canada Green Buildings Strategy ("**CGBS**"). CGBS has the stated goal of promoting greener, more energy efficient and affordable homes and buildings. The NBC is the core model building code, which addresses nearly all aspects of many buildings' construction. The NECB is a stand-alone, specialized model code that focusses on energy regulation for buildings that are not governed by the NBC, but is referenced in the NBC where applicable. For instance, provisions in Section 9.36 of Division B of the NBC address the environment objective

for housing and small buildings, whereas the NECB captures all new buildings, additions, and certain alterations, including large and multizone buildings.

Since their introduction, the NBC and NECB have moved towards heightened standards for energy efficiency and other green construction elements. The latest version of both documents, published in late 2025, continues that trend.[1] For example, the 2025 NBC introduces both performance and prescriptive requirements, within a framework of gradually increasing reduction levels, to establish limits for operational greenhouse gas emissions resulting from the supply and consumption of energy used by the building, as determined at the time of design. The 2025 NECB introduces performance requirements to establish limits for operational greenhouse gas emissions from the supply and consumption of energy used by the building. The Federal Government has offered other indications that strengthening green construction remains a priority, providing a target that by 2026, additional climate change resiliency considerations will be incorporated into the National Building Code.

On the financing front, CGBS provided or currently offers several programs that promote green construction practices, including the Canada Greener Homes Grants program, the Canada Greener Homes Loan, and the Canada Greener Homes Affordability Program, launched in Budget 2024. These programs are designed to address the dual objectives of green construction practices and affordability by offsetting the cost incurred by homeowners. For instance, these programs supported the installation of heat pumps in homes heated by oil through grants and loans that led to over 280,000 new heat pumps being installed since 2020. Other homeowners used the program to fund retrofits improving windows and doors, home insulation, and air sealing—thus decreasing energy loss in those homes.

In Fall 2025, the Federal Government announced the creation of Build Canada Homes, an agency with an initial capitalization of $13B and the mandate to accelerate housing development across the country. As part of that mandate, Build Canada Homes intends to invest in modular and factory-built housing, generally considered a greener method of construction.

Provincial and Municipal Updates

Ontario

One of the more significant changes in recent years has been Ontario's adoption of the NBC and NECB through amendments to the Building Code Act, 1992, S.O. 1992, c. 23 along with the document "Ontario Amendments to the National Building Code of Canada 2020". Ontario-specific modifications have been made to the NBC, including heightened mandatory energy efficiency levels, mandatory CO2 emission reductions, and stronger water conservation requirements for plumbing systems. The NECB, as amended in 2020, also requires heightened thermal performance of the building envelope.

On the other hand, some of the more aggressive measures to promote green construction are being reexamined, including the long-standing requirement by the City of Toronto for certain buildings to be built with "green roofs", meaning a building roof partially or fully covered with vegetation. In October 2025, Ontario released a public consultation which asked the public to weigh in on municipally enforced "enhanced development standards" that included requirements for bioswales, permeable pavement, and other vegetative elements, or direction around matters such as native tree planting, soil volume, and bicycle parking. Subsequently, by way of Order in Council 1374/2025, the province repealed the section of the *City of Toronto Act, 2006*, SO 2006, c. 11, Sch A, which authorized the City of Toronto to have a by-law requiring and governing the construction of green roofs, ending the requirement after approximately 15 years. The province's interest in this matter indicates at least a perceived tension between the goals of green construction and increasing the pace and affordability of construction.

Western Canada

In Spring 2024, Alberta adopted the then latest version of the NBC, with modifications for the provincial context and the NECB. Section 9.36 of the modified NBC provides that Tier 1 is the minimum energy efficiency standard for housing and small buildings. The Tier system for energy codes was introduced at the federal level in 2022 and designed as a measure to move construction towards net zero. There are five tiers, with 1 being the lowest and 5 being the highest, fully net zero. Alberta has reserved the right to determine the timeline on which it will adopt higher tiers and as of today has not increased the mandatory tier level. Functionally, industry experts suggest that the adoption of the Tier 1 standards in the modified NBC is not expected to significantly alter construction practices. For example, BILD Alberta notes that the increase to construction costs is likely to be less than half a percentage point as Tier 1 is substantively similar to the

1. Note that no Canadian provinces or territories have, as of the date of publication, adopted the 2025 version of the NBC.

previous code in Alberta. Notably, in many cases Alberta's adoption of the NBC and NECB allows municipalities to adopt stricter local energy efficiency requirements.

In Alberta's largest cities, Calgary and Edmonton, no green construction bylaws akin to pre-2025 Toronto exist and neither city has adopted stricter local energy efficiency requirements, though Calgary does have a sustainable building policy that guides city-owned facility construction.

Other Western municipalities, however, have taken more stringent approaches to enforcing green construction. In 2022, the City of Vancouver approved the Greenhouse Gas and Energy Limits Bylaw, which aimed to reduce emissions from the largest building sources (heating and hot water), thereby regulating greenhouse gas emissions from larger buildings. Reporting under that bylaw has been required since June 1, 2024, for owners of commercial buildings over 100,000 square feet, and since June 1, 2025, for all commercial buildings over 50,000 square feet and multi-family buildings over 100,000 square feet. As of June 1, 2026, owners of multifamily buildings will be subject to the same reporting requirements. The bylaw also sets limits on the intensity of greenhouse gas emissions and heat loss for certain classes of buildings, which are also set to take effect in 2026.

The City of Vancouver has also updated the Vancouver Building By-law, instating higher energy performance and sustainable energy source requirements for single family and small multi-family residential buildings..

Green construction is therefore incentivized through both rules governing the actual construction process, and the fact that building performance is subject to reporting requirements. Owners should consider the outcomes of their current construction plans to ensure that their future buildings will comply with the greenhouse gas emissions and heat loss caps, understanding that such information is subject to annual disclosure. Together with the availability of Federal programs offering grant funds for green construction retrofits and new construction, the regulatory environment in Vancouver significantly prioritizes green construction.

Conclusion

While green construction continues to develop in Canada, more stringent efforts have faced significant setbacks. At the municipal level, measures that require green construction in city-owned buildings appear to still have significant uptake, however, attempts to impose green construction requirements on private development have been curtailed by higher levels of government.

At the same time, participants in the construction industry are still incentivized to adopt and practice green construction methods. Significant investment of public funds into infrastructure, as well as residential and commercial development, comes with requirements for such construction to be performed in line with green construction practices. From a market perspective, buildings certified by organizations such as LEED or BOMA BEST tend to have lower operating costs, incentivizing owners to seek out green construction methods at the construction phase. The bottom line is that notwithstanding certain setbacks, green building methods continue to gain traction in the construction industry, particularly when such measures do not conflict with other policy objectives surrounding affordability and faster timelines to completion.

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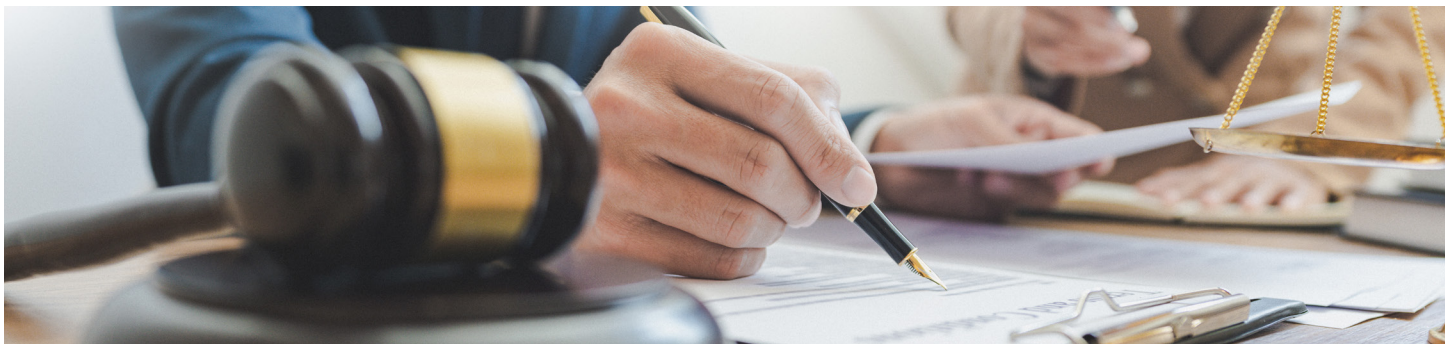

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Notable Case Law

***VanMar Constructors ON 1028 Inc. v. Travelers Insurance Company of Canada*, 2025 ONSC 6959 (S.C.J.)**

Given the clear and unambiguous language of the performance bond, the court held that the bond action by a contractor was commenced after expiry of the bond limitation period and dismissed the action on a summary judgment basis.

***Urban Electrical Contractors v. Urban Integrated Group Inc.*, 2025 ONSC 5164 (A.J.)**

When moving to release security from court or reduce it, it is important to note that section 44(9)2 stipulates that the security posted is subject to the claims of all persons with a lien as if the amount was realized from sale of the premises. In this case, that meant the owner was not able to get security completely cancelled where the general contractor lien claimant did not consent.

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