

The Finality of Interim Binding Construction Adjudication

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Prompt Payment and Adjudication

Changes to the *Construction Act* in 2018 brought about prompt payment provisions. The purpose of these provisions is to facilitate the downward flow of payment in the construction pyramid and to reduce the strain of delayed payments on parties involved in construction projects, particularly those further down the pyramid such as subcontractors or sub-subcontractors. At the same time, changes to the *Construction Act* introduced adjudication: an expedient, informal, and interim means of addressing construction disputes. Essentially, prompt payment ensures payments are to be made within strict timelines, and adjudication ensures certain categories of disputes are addressed expeditiously by a neutral third-party without prejudice to either party rights to revisit the dispute later. The intent of the changes to the *Act* are clear: to keep the money flowing “promptly”.

The prompt payment regime requires that “proper invoices”² submitted on construction projects be paid within strict deadlines, and that recipients of proper invoices deliver “notices of non-payment”, also within strict deadlines, should the recipient object to payment thereof. Adjudication is intended to work in tandem with the prompt payment provisions and ensure an expedient, but interim, determination of disputes while the building contract is still in existence. These include, but are not limited to, disputes relating to the payment or non-payment of proper invoices.

The availability of adjudication is found under s. 13.5 of the *Construction Act*, which provides that during the existence of a building contract (or subcontract), a party to the contract may refer a dispute with the other party to the contract to adjudication in respect of matters including, but not limited to, the valuation of services and materials, payment and notices of non-payment, and change orders.

Growing Use of Adjudication

Since coming into force on October 1, 2019, the use of adjudication has been on the rise, and its scope has grown to resolving disputes both big and small. The Ontario Dispute Adjudication for Construction Contracts (ODACC), the authorized nominating authority that oversees construction adjudication in Ontario, has reported that the number of Notices of Adjudication filed more than doubled from 2021 to 2022, increasing from 50 to 121. Similarly, the average amount claimed in each Notice of Adjudication increased by 59%, rising from approximately \$174,000 in 2021 to \$277,000 in 2022.³ The most common use of adjudication has been in the

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² A defined term under section 6.1 of the *Construction Act*, R.S.O. 1990, c. C.30.

³ ODACC 2021 and 2022 annual reports.

residential construction and transportation and infrastructure sectors, which combined, made up two-thirds of adjudications commenced each year.

| Sector | Notices of Adjudication filed | | Amount Claimed | | Average | |
|-----------------------------------|-------------------------------|------------|-----------------------|------------------------|---------------------|---------------------|
| | 2021 | 2022 | 2021 | 2022 | 2021 | 2022 |
| Residential | 19 | 52 | \$508,799.49 | \$4,312,623.27 | \$26,778.92 | \$82,935.06 |
| Commercial | 10 | 23 | \$996,466.43 | \$3,949,902.22 | \$99,646.64 | \$171,734.88 |
| Industrial | 3 | 6 | \$3,738,322.23 | \$10,126,035.00 | \$1,246,107.41 | \$1,687,672.50 |
| Public Buildings | 3 | 10 | \$97,895.35 | \$1,677,533.87 | \$32,631.78 | \$167,753.39 |
| Transportation and Infrastructure | 15 | 30 | \$3,368,175.48 | \$13,471,286.96 | \$224,545.03 | \$449,042.90 |
| TOTAL | 50 | 121 | \$8,709,658.98 | \$33,537,381.32 | \$174,193.18 | \$277,168.44 |

Court's Treatment of Determinations Made on Adjudication

The intent of the *Act* is clear that once there is a determination, payment must be made “promptly”. The Courts have recognized this intent, and that adjudications are aimed to facilitate the prompt payment regime by providing for an expedient interim determination of construction disputes.⁴ The Courts have therefore treated adjudications with great deference, and have set a high bar in having an adjudicator’s determination judicially reviewed or stayed. Despite their interim nature, determinations made on adjudication can still have a significant impact on the parties in both the short and long term.

a. High Threshold for Leave and Likelihood of Deference

As it stands, there is no right of appeal of an adjudicator’s determination made on adjudication, and the only way to set aside the determination is through judicial review by the Divisional Court. Pursuant to s. 13.18(1) of the *Construction Act*, leave of the Divisional Court is required before a party can apply for judicial review, and s. 13.18(5) sets out the grounds on which an adjudicator’s decision may set aside on judicial review. These grounds include, but are not limited to, situations where the adjudicator did not have jurisdiction to make the determination, the adjudicator failed to follow the proper procedures in making the determination, or where there are circumstances to suggest that the adjudicator’s determination was made as a result of bias or fraud.

⁴ *Anatolia Tile & Stone Inc. v. Flow-Rite Inc.*, 2023 ONSC 1291, at para 3; *Pasqualino v. MGW-Homes Design Inc.*, 2022 ONSC 5632, at paras 30-32; *SOTA Dental Studio Inc. v. Andrid Group Ltd.*, 2022 ONSC 2254, at paras 9-10; *Okkin Construction Inc. v. Apostolopoulos*, 2022 ONSC 6367, at paras 49-50.

However, the established jurisprudence to date suggests that judicial review of an adjudicator's decision will be difficult to pursue, and obtaining leave to bring the application for judicial review is no formality.

In *Pasqualino v. MGW-Homes Design Inc. ("Pasqualino")*⁵, the Moving Party, Mr. Pasqualino, sought leave to appeal the decision of an adjudicator on the basis that the contract which was the subject of the adjudication had "ceased to exist" due to it being abandoned or terminated prior to the commencement of the adjudication, and on the basis that the adjudicator did not have jurisdiction to make the determination that was made.

In refusing leave to seek judicial review, the Divisional Court held that the subject contract had not "ceased to exist". Ceasing to exist is a high threshold, and the abandonment or termination of a contract does not equate to the cessation of its existence, as parties often acquire rights during the performance of a contract that survive the termination or abandonment of same. Holding otherwise would allow a party to easily bypass the adjudication regime by abandoning or terminating a contract before allowing the other party to commence an adjudication, and would undermine the entire purpose of the prompt payment and adjudication provisions under the *Construction Act*, which is to promote the efficient flow of funds through the contractual pyramid on a construction project through expedient and interim determinations of contractual disputes. It would be entirely contrary to the prompt payment and adjudication provisions if a party could force another into expensive and lengthy litigation as opposed to adjudication, simply by abandoning or terminating the contract.

With respect to the jurisdictional issue, the Divisional Court held that a party is precluded from seeking judicial review on the basis of a jurisdictional challenge if it did not first raise the jurisdictional issue before the adjudicator. Because Mr. Pasqualino never raised issue with the adjudicator's jurisdiction during the adjudication, the Divisional Court refused to grant leave to seek judicial review on this basis.

Ultimately, in refusing leave to seek judicial review, the Divisional Court determined that Mr. Pasqualino failed to demonstrate that he had a reasonably or fairly arguable case for overturning the adjudicator's determination.

In *Anatolia Tile & Stone Inc. v. Flow-Rite Inc. ("Anatolia")*⁶, the Divisional Court elaborated on the test for obtaining leave to seek judicial review of an adjudicator's determination. Again refusing to grant leave to seek judicial review, the Court held that there is a high bar to obtain leave, and that the test for leave was analogous to the test for seeking leave to appeal an interlocutory order of a judge. That is, in order to obtain leave to seek judicial review of an adjudicator's determination, the moving party must establish:

Either:

⁵ *Pasqualino v. MGW-Homes Design Inc.*, 2022 ONSC 5632.

⁶ *Anatolia Tile & Stone Inc. v. Flow-Rite Inc.*, 2023 ONSC 1291.

- 1) That there is good reason to doubt that the impugned decision is reasonable;
- or
- 2) That there is good reason to believe that the process followed by the adjudicator was unfair in a manner that probably affected the outcome below;

And either:

- 3) That the impact of the unreasonableness or the procedural unfairness probably cannot be remedied in other litigation or arbitration between the parties;
- or
- 4) That the proposed application raises issues of principle importance to the prompt payment and adjudication provisions of the *Construction Act* that transcend the interest of the parties in the immediate case, such that the issues ought to be settled by the Divisional Court.

Given the interim nature of adjudication, it will be exceedingly difficult for a party to establish that the unreasonableness or procedural unfairness of an adjudicator's determination would not be able to be remedied in subsequent litigation or arbitration. Thus, a party seeking leave for judicial review will likely need to establish that the issues to be raised on judicial review transcend the interests of the parties to the adjudication. Even if this is established, the party seeking leave would still need to satisfy the Court that there is good reason to doubt the reasonableness or procedural fairness of the adjudicator's determination, which would suggest that even if leave is granted, the standard of review on an application for judicial review is a standard of reasonableness and that the Divisional Court would likely defer to the determination of the adjudicator.

b. No Delay in Satisfying a Determination Made on Adjudication

As discussed, both obtaining leave and satisfying the Court that a determination made by an adjudicator should be set aside are difficult and have high thresholds. However, even if leave is granted and an application for judicial review is brought, the determination must still be complied with without delay, as absent a stay of the adjudicator's determination, a failure to comply with the determination will likely cause the Divisional Court to refuse to grant leave or dismiss the application for judicial review.

In *SOTA Dental Studio Inc. v. Andrid Group Ltd.* ("*SOTA*")⁷, the owner, SOTA, obtained leave and brought an application for judicial review of an adjudicator's determination made against it, though it had yet to satisfy the adjudicator's determination.

⁷ *SOTA Dental Studio Inc. v. Andrid Group Ltd.*, 2022 ONSC 2254.

In *SOTA*, the Court found that absent a stay, the determination of an adjudicator must be complied with and that an application for judicial review does not operate to stay the adjudicator's determination as doing so would defeat the purpose of prompt payment. Failure to comply with a determination may result in leave for judicial review being refused or an application for judicial review being dismissed even if leave is granted. The Court then dismissed the application on that basis.

The Divisional Court's emphasis on prompt satisfaction of determinations made on adjudication, and its deference to said determinations, is also clear from its decision in *Okkin Construction Inc. v. Apostolopoulos* ("*Okkin*")⁸. In *Okkin*, Mr. Apostolopoulos, who had liens registered on his property and a determination made by an adjudicator against him, brought a motion arguing that the adjudicator's determination ought to be stayed or varied as paying the determination and vacating the liens would result in him "paying twice".

The Divisional Court found that it had no jurisdiction to interfere with the determination. It considered the impact of holdback provisions on an owner's obligation to satisfy an adjudication order pending determination of outstanding lien claims. An application for judicial review of an adjudicator's order may only be brought with leave and will only be granted in the limited circumstances specified in s. 13.18(5) of the *Act*, none of which appeared to apply here. At the time that the motion was brought, the determination had not been filed with the Court.

Absent a stay, which was not sought here, an adjudicator's determination had to be paid even if it meant that a party might have to pay twice in the short term. This allows the contractor to ensure that funds flow. The homeowner's concerns of paying twice ignores the trust provisions of the *Act*, which set out that all amounts received by a contractor on account of the contract price of an improvement constitute a trust fund for the benefit of the persons who have supplied services or materials to the improvement who are owed amounts by the contractor. Directing the proceeds of the determination to continue to be held in trust would defeat the purpose of the prompt payment provisions of the *Act* and create a path for delay.

This case further emphasizes the intention of the prompt payment and adjudication regimes in allowing funds to flow down the contractual pyramid. The Court has limited abilities to interfere with an Adjudicator's determination, particularly if the party seeking to vary the order had not previously sought leave to bring an application for judicial review of the order. The Court may also refuse to grant leave or may dismiss the application for judicial review if an adjudicator's determination is not complied with. The intention of the *Act*, as emphasized by the Court, is clear, an adjudicator's determination must be complied with to facilitate prompt payment.

Best Practices

⁸ *Okkin Construction Inc. v. Apostolopoulos*, 2022 ONSC 6367.

Adjudication is a quick process. Once the process has been commenced, an interim determination can be made within a matter of weeks, and when a determination is made, it is likely to be binding given the high threshold for obtaining a stay of the adjudicator's determination pending judicial review. The jurisprudence to date suggests that the Divisional Court will review determinations made on adjudication with deference and with a reluctance to intervene. Even though disputes subject to adjudication can be re-litigated at a later date, it is increasingly clear that determinations must be complied with in the interim, as parties have little recourse available to vary or overturn an adjudicator's determination.

It is therefore crucial for adjudication participants to understand the process, timelines, and administrative steps as the parties are likely to only have one "bite at the apple". Adjudication participants need to be able to organize key documents quickly, including contracts, invoices, notices and letters, and relevant correspondence.

While ODACC has pre-determined processes for adjudication, participants should also understand that these processes are not mandatory, and that the parties to an adjudication can tailor the process to create a bespoke procedure appropriate for the nature of the dispute which suits the parties' objectives. This can include setting appropriate page limits for submissions and supplementary documents, opting for oral submissions in addition to written material if needed, and selecting an adjudicator with expertise in the subject matter and issues in dispute. As can be gleaned from the jurisprudence, it is imperative that adjudication participants do things properly the first time to best ensure that the adjudicator's determination is made on as informed a basis as possible.