Toronto Law Journal

Upset and Angry? Not All Emotions are Compensable

Stephen N. Libin, Dutton Brock LLP

Are persistent feelings of frustration and anger, without more, a compensable mental injury? The Court of Appeal for Ontario recently grappled with this issue in *Bothwell v London Health Sciences Centre*.[1] While the Court's decision highlights the principles which must be considered when determining whether a plaintiff has suffered a compensable mental injury, it also demonstrates the challenges that can occur when a trial is bifurcated between liability and damages.

Background

In September 2011, Craig Bothwell – a paramedic by profession – was himself a patient at London Health Sciences Centre. While recovering from reverse ileostomy surgery, he overheard that one of the nurses had erroneously administered an anticoagulant rather than a blood volumizer. Thereafter, Mr. Bothwell experienced substantial internal bleeding and underwent further procedures to relieve abdominal cavity pressure. Understandably, Mr. Bothwell was "shocked, frustrated and angry". He sought compensation for a variety of physical and psychological injuries, which he claimed were caused by the medication error.

Trial Decision

The trial in this action was bifurcated. Typically, bifurcated trials separate liability (i.e., was there a breach of the standard of care) from damages (i.e., what injuries were caused by the defendant's negligence and how should those losses be quantified). But the defendants in *Bothwell* did not dispute that there had been a breach of the standard of care. Rather, they took the position that the error did not cause any injuries. As such, the first trial focussed on causation and asked whether the medication error caused the plaintiff to (i) hemorrhage and suffer physical injuries, and/or (ii) suffer a mental injury?[2]

As it relates to the psychological impact of the incident, Mr. Bothwell testified – and the trial judge accepted – that he was frustrated and angry and that those emotions continued through to the trial. He further explained that these negative feelings remerged when he attended the hospital in the course of his employment as a paramedic, although they did not interfere with his ability to do his job.

The trial judge went on to find that Mr. Bothwell's negative emotions were objectively and subjectively serious and that they rose beyond the level of ordinary annoyances. As such, the

[1] 2023 ONCA 323.
[2] *Ibid* para 9.

trial judge was satisfied that the psychological upset satisfied the standard set by the Supreme Court in *Mustapha v Culligan*[3] and *Saadati v Moorhead*.[4]

Mental Injury vs Psychological Upset

The defendants appealed and argued that the trial judge erred in the application of the test when determining whether the plaintiff suffered a compensable mental injury or merely psychological upset. The Court of Appeal found that the trial judge had provided an incomplete list of principles for determining whether a plaintiff has suffered a mental injury. Failing to take into all relevant factors into account was an error in law to which no deference was owed.

The Court of Appeal summarized the applicable principles, the first four of which were considered by the trial judge:

1. Recovery for mental injury in negligence requires that the claimant satisfy the ordinary duty of care analysis (duty, breach of the duty, and whether the claimant sustained damage caused by the breach);

2. Liability for mental injury must be confined to claims which satisfy the proximity analysis within the duty of care framework and the remoteness of the inquiry;

3. The disturbance of a mental injury must be shown to be serious and prolonged, and rise above ordinary annoyances, anxieties, and fears;

4. While expert evidence can assist in determining whether a mental injury has been shown, it remains open to the court, on other evidence adduced, to find that the claimant has proven, on the balance of probabilities, the occurrence of a mental injury;

5. The trier of fact must consider not only the claimant's psychological upset but also how seriously the claimant's cognitive functions and participation in daily activities were impaired, the length of such impairment, and the nature and effect of any treatment sought and taken in relation to the psychological upset.[5]

Turning to the evidence, the Court of Appeal held that the plaintiffs (Mr. Bothwell and his wife) had not established that Mr. Bothwell had sustained a psychological injury. The Court accepted the trial judge's factual findings, including that he was a credible witness. However, there was no evidence in the record to demonstrate that his feelings of anger and frustration caused a cognitive impairment or impacted his participation in daily life. Similarly, there was no evidence that he participated in any therapy or psychological treatment due to the incident. Furthermore, the plaintiffs did not lead any expert evidence from a participant or litigation expert. The only evidence on this issue came from the plaintiffs themselves and did not address the degree to which his feelings interfered with his life.

---

[3] 2008 SCC 27 [*Mustapha*].
[4] 2017 SCC 28.
[5] *Bothwell v London Health Sciences Centre*, 2023 ONCA 323, paras 27 - 32.

In the absence of evidence of impairment, the Court of Appeal found that Mr. Bothwell had not sustained a mental injury. As such, he was not entitled to any compensation despite the undisputed medication error.

The Future of Frustration

It is unknown whether the Court of Appeal for Ontario will have the last word on the issue.[6] In any event, the Court's decision should not be taken as a statement that anger and frustration can never be compensable injuries. Anger and frustration can be components in recognized psychiatric illnesses. For example, anger is a major criterion in five diagnoses within DSM-5: Intermittent Explosive Disorder, Oppositional Defiant Disorder, Disruptive Mood Dysregulation Disorder, Borderline Personality Disorder and Bipolar Disorder.[7] It can also be considered in the diagnosis of post-traumatic stress disorder (PTSD), in which a person suffers marked change in arousal and reactivity due to a traumatic event as shown by angry outbursts.

Persistent feelings of anger following a deeply disturbing or traumatic event are insufficient to establish an injury. As a medical diagnosis is not required, plaintiff counsel must focus on the degree to which that anger and frustration interferes with the plaintiff's activities of daily living. Defendants will undoubtedly respond by arguing that these feelings of anger are merely the "ordinary annoyances, anxieties and fears that come with living in civil society".[8]

Parties Must Carefully Craft Bifurcated Trials

This case also demonstrates the importance of framing the issues before the court on a bifurcated trial. In *Saadati*, the defendant admitted liability for a motor vehicle collision but took the position that the plaintiff had not suffered any compensable injuries. The issues left for trial were (i) what injuries, if any, were caused by the defendants' negligence; and (ii) what damages should be awarded to compensate for those injuries. In effect, it was the second part of a bifurcated trial with the focus on *causation and damages*. With only one trial, Mr. Saadati's family members and friends were able to testify about how the accident had changed his personality and deteriorated close relations.

By contrast, causation was a part of the *liability* phase of the trial in *Bothwell*. There could be no dispute that Mr. Bothwell had suffered significant physical injuries after the medication error; whether that breach of the standard of care caused these serious physical injuries was the question to be determined. If the trial judge had found in favour of the plaintiffs on the issue of physical injury causation, a second trial would be required to determine the specifics of Mr. Bothwell's physical injuries and the quantum of damages. Because the issue of physical

[6] The time within which the plaintiffs may seek leave to appeal to the Supreme Court of Canada has not yet expired as of the time of publication.
[7] E. Fernandez and S. Johnson, "Anger in psychological disorders: Prevalence, presentation, etiology and prognostic implications" (2016) 46 Clin Psychol Rev 124.
[8] *Mustapha*, *supra* note 3, para 9.

injury causation had to be determined first, it is on that basis that the first trial could be considered a "liability trial".

The division between liability and damages in the context of Mr. Bothwell's alleged mental injury was different. The plaintiffs did not need a factual finding that the medication error caused the internal bleeding to establish a compensable claim for mental injury. Rather, this injury was allegedly caused by the medication error itself. As such, the first trial in *Bothwell* on the mental injuries more closely aligns with *Saadati* than his own claim in respect of physical injuries – the defendant admitted a breach of the standard of care but denied that the plaintiff suffered an injury. One questions whether the plaintiffs in this action intended to lead expert evidence about the degree to which Mr. Bothwell's anger and frustration interfered with his participation in daily life in the second phase of the trial. Perhaps the plaintiffs would have led different evidence from Mrs. Bothwell or presented testimony from a cast of family and colleagues, as was done in *Saadati*.

Ultimately, it would have been preferable for the court to have determined only the question of general causation for Mr. Bothwell's physical injuries during the liability phase of the trial. A finding in favour of the plaintiffs would have yielded a "damages trial" in which the court could have determined the specifics of both Mr. Bothwell's physical and mental injuries.

Conclusion

The Court of Appeal's decision in *Bothwell* serves as a reminder that hurt feelings and anger are insufficient to warrant compensation. Plaintiffs must lead evidence about the degree to which such emotions impair their daily life before these injuries can be compensable. Parties should also be particularly careful when framing issues of causation in a bifurcated trial. In some instances, causation will be most appropriately addressed in the liability phase but in others it should be left to the damages trial.

Toronto Law Journal

The Finality of Interim Binding Construction Adjudication

Neal Altman and Amir Ghoreshi, Glaholt Bowles LLP[1]

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

[1] The authors would like to thank Kathy Jiang for her valuable contributions to the preparation of this article.
[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.

	Notices of Adjudication filed		Amount Claimed		Average	
Sector	**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.

Toronto Law Journal

Alternate Dispute Resolution for Land Use and Construction Disputes

Ron Kanter, Mediator/Adjudicator/Arbitrator

Many readers are familiar with the increasing use of alternate dispute resolution ("ADR") to resolve business, family and employment disputes. This article will look at the emerging use of ADR to resolve disputes concerning land use planning and construction contracts. Land use disputes in Ontario have traditionally been resolved through lengthy hearings by a tribunal - now the Ontario Land Tribunal ("OLT"), previously known as the Ontario Municipal Board or Local Planning Appeal Tribunal. Construction conflicts were generally heard by courts, a process which was often time-consuming, expensive, and disrupted project completion. Following is a brief overview of four alternate ways now available to resolve such disputes in Ontario.

Planning Appeals

The OLT hears appeals from municipal decisions concerning official plans, zoning by-laws and plans of subdivision in the City of Toronto as well as the rest of Ontario. It also hears appeals of consents to sever and minor variances, other than in Toronto. The OLT may use mediation or other dispute resolution processes as an alternative to hearings to resolve such disputes.[1] It may direct that mediation occur, if the Chair determines that any issue raised in a proceeding is suitable for mediation, and two or more parties to the proceeding agree to participate. A mediation may be conducted by a mediator from a list approved by the Chair and Attorney-General, an OLT member or a private mediator. A Tribunal Member who conducts a mediation in which one or more of the issues have not been resolved may not preside at any hearing event of those unresolved issues. The process is confidential, and positions of the parties may not be disclosed if the mediation is not successful.[2] The OLT has published a Practice Direction emphasizing the flexible nature of mediation, including allowing applicants to pay some or all of the costs of residents participating in a mediation of a matter before the Tribunal.[3]

Appeals of Consents and Minor Variances in Toronto

The Toronto Local Appeal Body ("TLAB") is a municipal administrative tribunal which hears appeals from decisions of the Toronto Committee of Adjustment concerning consents and minor variances within the City.[4] TLAB has discretion to conduct mediation as an alternative to a hearing if it is satisfied there is good reason to believe one or more issue may be resolved through mediation. Mediation is conducted by a TLAB member, who typically does not preside over a hearing if the mediation is not successful. Information and documents provided during

[1] *Ontario Land Tribunal Act, 2021*, S.O. 2021, c. 4, Sched 6, s. 16; *Planning Act*, R.S.O. 1990, c. P. 13, ss. 17 (26.1), 17 (37.2), 34 (11.0.0.10), 51 (49.1) and 65
[2] *OLT Rules of Practice and Procedure*, Rule 18
[3] https://olt.gov.on.ca/wp-content/uploads/2023/02/mediation-practice.html
[4] *City of Toronto Act, 2006*, S.O. 2006, c. 11, Sched A, s. 115

the mediation are confidential; however, if the mediation results in settlement, the settlement terms may be disclosed for approval by TLAB.[5]

Construction Contracts

Any party to a construction contract can now refer a dispute concerning the value of goods or services, and payment for such goods or services, to adjudication.[6] The Ministry of the Attorney General has designated the Ontario Dispute Adjudication of Construction Contracts ("ODACC") as the Authority to oversee the adjudication process. An adjudicator must be certified by ODACC, but may be chosen by the parties, or appointed by ODACC at the request of the parties.[7] The adjudicator, in consultation with the Claimant and Respondent, then determines the process (which may be predesigned by ODACC or customized for the parties) and fee.[8] The adjudicator must issue a determination through ODACC within 30 days of receiving the documents that the Claimant intends to rely on for the adjudication, subject to an extension on consent of both parties.[9] Costs are generally paid equally by the parties, but the adjudicator may require all costs to be paid by a party acting frivolously or vexatiously.[10] The determination is subject to judicial review. However, the Divisional Court has generally upheld ODACC determinations.[11]

New Home Warranties

Every homebuilder in Ontario must warrants that a new home, including a residential condominium unit, is constructed in a workmanlike manner and is free from structural defects.[12] The Minister of Business and Public Service Delivery has designation Tarion as the Corporation responsible for administering the warranty between builders and homeowners.[13]

a) New Home Purchasers

Homeowners may request mediation if they have requested that Tarion "conciliate" their claim of breach of warranty, but are dissatisfied with Tarion's decision concerning their claim.[14] Mediation is not currently available for deposit protection, financial loss or delayed occupancy/delayed closing claims. Mediation is provided by a neutral person appointed by agreement of the homeowner and Tarion. Tarion pays $3,000 toward the cost of each full day of mediation, with the homeowner responsible for any additional mediation fees.[15] If the

---

[5] *TLAB Rules of Practice and Procedure*, Rule 20
[6] *Construction Act*, R.S.O. 1990, c. C. 30, Part II.1 Construction Dispute Interim Adjudication, S. 13.5
[7] *Ibid*, s. 13.9
[8] See ODACC Website, "Adjudication Process"
[9] *Construction Act*, *supra* note 4, s. 13.13
[10] *Ibid,* ss. 13.16 & 13.17
[11] See *Pasqualino v. MGW-Homes Design Inc.*, 2022 ONSC 5632 and *SOTA Dental Studio Inc. v. Andrid Group Ltd.*, 2022 ONSC 2254
[12] *Ontario New Home Warranties Plan Act,* R.S.O. 1990, c. O.31, s. 13 [*ONHWP*]
[13] RRO 1990, Reg 892
[14] *ONHWP, supra* note 12, ss. 14(16), 17(1) and O. Reg 242/21
[15] https://tarion.com/homeowners/alternative-methods-resolving-claims See "Cost of mediation"

purchaser does not want to proceed by mediation, or if the mediation does not result in a settlement agreement, the homeowner has the option of appealing to the Licence Appeal Tribunal ("LAT)[16] or commencing an action in court. Builders are not automatically parties, but may be added, as parties to a mediation or an appeal to LAT.

b) Homebuilders

Every agreement between a homebuilder and a purchaser is deemed to contain a compulsory arbitration clause.[17] A homebuilder may challenge a Tarion decision finding a breach of warranty and/or assessing the builder the cost of remedying the breach.[18] An arbitration between Tarion and the builder is conducted by an independent arbitrator chosen jointly by the parties from a list of arbitrators appointed to a Builder Arbitration Forum (BAF) roster. Arbitration costs are typically paid by the losing party, or split if success is divided. An arbitration award may be set aside for procedural errors set out in S. 46 of the *Arbitration Act*, and is subject to appeal to the Divisional Court[19]

Conclusion

Using ADR is relatively new for land use and construction disputes. It was first introduced for planning disputes in 1994[20], and is now used frequently by the OLT. Cases that proceed to mediation at the OLT have had a high rate of success, with over 85% of cases successfully mediated.[21] The OLT recently retained a consultant to administer a request for proposals seeking 7-10 external entities to provide mediation services.[22] Mediation is used less frequently by TLAB, perhaps due to less potential savings resulting from by-passing shorter hearings. However, it is available in appropriate cases, at no cost to the parties. Adjudication for construction disputes was introduced in Ontario in October 2019. ODACC has reported a significant increase in the number and types of cases using adjudication.[23] Mediation for new homeowners was introduced in July 2021 by Tarion, well after arbitration for builders. Tarion is engaged in additional consumer education, including explaining mediation on a new website, which will likely increase the use of mediation by new homeowners.[24] In my view, ADR will play an increasing role in resolving land use and construction disputes in Ontario.[25]

---

[16] *ONHWP, supra* note 12, s. 14 (14). LAT hears appeals from numerous laws, including motor vehicle insurance, as well as home warranty claims.

[17] *Ibid,* s. 17 (4)

[18] More information about the arbitration process for builders is set out in Registrar Bulletin 08

[19] *ONHWP, supra* note 12, s. 17 (4)

[20] *Planning Act, supra* note 1, s. 65

[21] *OLT Annual Reports 2021 and 2022*, p. 6-7

[22] The RFP closed in March 2023 and the winning entities are expected to be named in June 2023

[23] *ODACC Annual Report 2022*

[24] https://tarion.com/homeowners/alternative-methods-resolving-claims

[25] The author is a Member of TLAB, certified adjudicator for ODACC and on the BAF Roster. However, the views, thoughts, and opinions expressed in this article belong solely to the author, and not to any of the organizations mentioned in the text.

Toronto Law Journal

All in the Family: Not When it Comes to Franchise Law

David Kornhauser (MBA, LLB), Corporate Counsel, Macdonald Sager, LLP

As franchise practitioners are aware, franchise legislation across Canada (**"Canadian Franchise Legislation"**) provides for an exemption from a franchisor's obligation to provide a disclosure document in respect of the sale of an additional franchise to an existing franchisee.[1]

In the recent case of *Taprobane Group Holdings Ltd. v. Brownies Foods Ltd.*,[2] the British Columbia Supreme Court denied Brownies Foods Ltd.'s (the **"Franchisor"**) an exemption from the obligation to deliver a disclosure document by strictly interpreting which persons constituted the franchisee. The denial meant that Taprobane Group Holdings Ltd.'s (the **"TGH"**) right to rescind was upheld.

FACTS

The facts of the case are relatively straightforward. The Franchisor had executed two franchise agreements:

1) Franchise Agreement dated April 2019, with Taprobane Foods Limited (**"TFL"**) for the operation of a Brownies Chicken and Seafood restaurant in Maple Ridge, BC. Devin Amerasinghe and his wife, Iromie Amerasinghe were the directors, and shareholders of TFL.

2) Franchise Agreement dated May 30, 2022, with TGH for the operation of a Brownies Chicken and Seafood restaurant in Mission, BC. Devin Amerasinghe and his wife, Iromie Amerasinghe, as well as their son, Adrian Amerasinghe, were the directors, and shareholders of TGH.

The Franchisor failed to provide a disclosure document to either TFL or TGH, or their respective directors or shareholders. The Mission Franchisee delivered a notice or rescission on or about October 28, 2022, on the basis that the Franchisor had failed to provide a disclosure document as required by section 5 of the *Franchises Act* (BC).

THE PARTIES' POSITIONS

The Franchisor asserted that it was exempt from the obligation to deliver a disclosure document pursuant to the exemption found in ss. 5(8)(c) of the *Franchises Act* (BC) since:

[1] Arthur Wishart Act (Franchise Disclosure), 2000, R.S.O. 2000, c 3; ss. 5(1)(c) Franchises Act, R.S.A. 2000; ss. 5(7)(c), ss. 5(7)(c), Franchises Act, R.S.P.E.I. 1988, c F-14.1; ss. 5(11)(c), The Franchises Act, C.C.S.M. 2012, c F156; ss. 5(8)(c), Franchises Act, R.S.N.B. 2014, c 111; and ss. 5(8)(c) Franchises Act, R.S.B.C. 2015, c 35 (Can. B.C.).
[2] 2023 BCSC 227.

1) the principals of TGH were the same as that of TFL;

2) it did not know that Adrian, being the son of TFL's principals (Mr. and Mrs. Amerasinghe), was also a director and shareholder of TGH;

3) it believed that TGH was a holding corporation for TFL; and

4) the *Franchises Act* (BC) is designed to protect prospective franchisees who have limited knowledge of the franchisor, disclosure was not required since Mr. and Mrs. Amerasinghe were entirely familiar with the Franchisor, having operated a Brownies Chicken and Seafood restaurant for almost two (2) years.

In response, TGH argued that it was a separate legal entity with different directors and shareholders.

THE LAW

The court took into account the following legal principles:

A) A franchisee means a person to whom a franchise is granted; this is set forth in ss. 1(1) of the *Franchises Act* (BC);

B) A franchisor is required to provide a franchisee with a disclosure document; this is set forth in s. 5 of the *Franchises Act* (BC);

C) A franchisee has a right to rescind a franchise agreement within two years if a franchisor fails to provide a disclosure document; this is set forth in s. 6 of the *Franchises Act* (BC);

D) Subsection 5(8)(c) of the *Franchises Act* (BC) provides an exemption for the grant of an additional franchise to an existing franchisee if:

   (i) the additional franchise is substantially the same as the existing franchise that the franchisee is operating, and

   (ii) there has been no material change since the existing franchise agreement, or latest renewal or extension of the existing franchise agreement, was entered into; and

E) The burden of proving an exemption or exclusion from the requirement or provision under the Act is on the party claiming the exemption; this is set forth in s. 14 of the *Franchises Act* (BC).

THE DECISION

The Court granted TGH's application to rescind, narrowly interpreting the definition of "franchisee". The court concluded that TGH was not a person to whom a franchise had been previously granted, and thus was not an "existing franchisee". As evidence of the foregoing the court stated that TGH had no prior legal relations or connection to the Franchisor and that even though there was some overlap in the share ownership and directorships with TFL, the two corporations were separate and distinct entities.

PRACTICE TAKEAWAYS

It is unclear whether the court held that the exemption in ss. 5(8)(c) of the *Franchise Act* (BC) was not available because TGH was a separate legal entity which had "no prior legal relations or connection to the Franchisor", which would be the case in most every circumstance in which an existing franchisee uses a newco to enter into a franchise agreement, or whether it was because Adrian was a director and shareholder of TGH but not of TFL. There was no indication in the decision as to what percentage ownership Adrian had in in TGH.

To rely on the additional grant exemption found in Canadian Franchise Legislation, franchisors and their lawyers should make sure that both the franchisee corporation which signs the second franchise agreement, and the principals who will operate the second franchise, are the same as the first franchisee. Of course, franchisors, and their lawyers, must also ensure that there has been no material change since the date of the first franchise agreement.