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Procedural Fairness and Adjudication Under Ontario's Construction Act

Key Takeaway

An adjudicator that fails to allow parties to make submissions regarding a key and decisive issue will likely result in that determination being quashed for violating the fundamental principle of procedural fairness.

The Background and Decision

Pursuant to Section 6.5 of Ontario's *Construction Act*, subject to a notice of non-payment, a contractor who submits a proper invoice to an owner which contains services and materials of a subcontractor, shall pay the subcontractor within 7 days of the contractor receiving payment from the owner.

In *Ledore Investments v. Dixon Construction*,¹ the applicant, Ledore Investments (c.o.b. as "**Ross Steel**", the subcontractor) commenced an adjudication for payment against Dixon Construction (the general contractor) for, among other things, Dixon Construction failing to provide a notice of non-payment to Ross Steel in accordance with the *Construction Act*.

The adjudicator dismissed Ross Steel's adjudication because the invoice submitted by Dixon Construction to Lambton College (the owner) was not a proper invoice in accordance with the *Construction Act* and therefore did not engage the prompt payment regime. However, neither party previously raised concerns regarding the validity of Dixon Construction's invoice, nor did they have an opportunity to make submissions regarding this new and critical issue that the adjudicator raised, which formed the basis of the determination.

Ross Steel brought an application for judicial review of the adjudicator's determination under Section 13.18(5) of the *Construction Act* and alleged that the determination prejudiced the applicant's right to a fair adjudication because they did not have an opportunity to make submissions on this key and determinative issue.

The Divisional Court found that the determination should be set aside and remitted back to the same adjudicator so the parties can have an opportunity to make their submissions.

Therefore the Divisional Court has made it clear, that notwithstanding the adjudicator's broad range of powers which include the adjudicator's right to conduct the adjudication in the manner they deem appropriate, or to ascertain the relevant facts and law, a court may still intervene if serious breaches of procedural fairness occur.

In this matter, the Divisional Court found that the adjudicator should have requested that the parties make further submissions on the issue of a proper invoice being required, particularly since the owner made payment without a proper invoice, rather than deciding the issue in the absence of submissions from the parties.

¹ [2024 ONSC 598](#).

This case not only provides further guidance as to how an adjudicator should conduct their adjudication, but also raises some interesting questions. For example:

- The court notes that while adjudication is interim binding, the amount in issue (in this case, \$349,263.57) was not insignificant and warranted having the parties making further submissions. Had the amount been less significant, would the court have decided differently regarding the adjudicator's conduct?
- The court awarded costs for the judicial review application but made no mention regarding the costs the parties incurred with regards to the adjudication. Will Ontario Dispute Adjudication for Construction Contracts (ODACC) credit the fees paid by parties for the first adjudication or do they both have to bear the costs already incurred, in addition to potential further costs associated with these new submissions?
- Was the judicial review a pyrrhic victory? The process took nearly 18 months and resulted in Ross Steel essentially being kicked back to square one. Additionally, would Ross Steel even elect to make further submissions regarding the 'properness' of the invoice, as it was remitted back to the same adjudicator, who made their position clear that the invoice was not a proper invoice?
- There is a gap in the *Construction Act* regarding protection to subcontractors with regards to the prompt payment regime. What is the appropriate recourse for subcontractors if the contractor fails to send a proper invoice to the owner? What if the contractor intentionally chooses not to include the subcontractor's services or materials in their proper invoice to the owner? In both scenarios, the subcontractor does not receive protection from the prompt payment regime, and thereby limits their grounds for adjudication. Canada's federal prompt payment regime (*Federal Prompt Payment for Construction Work Act*) attempts to fill in some of these gaps but that is of no help to Ross Steel.

It is also likely that this decision may be the first time a court has allowed an application for judicial review of an adjudicator's determination and perhaps has paved a way for what a successful application looks like.



[Simren Sihota](#), Associate
T. 647-794-1564
ssihota@margiestrub.com



[John Margie](#), Partner
T. 416-473-7963
jmargie@margiestrub.com