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Judicial Review of Adjudicator's Decisions under the Construction Act: Recent Guidance from the Divisional Court

Introduction:

The *Construction Act's* prompt payment provisions have brought significant changes to the construction dispute resolution process. Adjudication, an interim dispute resolution mechanism created alongside the prompt payment provisions, plays a vital role in ensuring that prompt payment has real “teeth”.

Adjudication is relatively informal compared to the traditional litigation process, and as a result, adjudication has been described as “rough justice”. There is no right to appeal an adjudicator’s determination, only a right to seek leave to bring an application for judicial review with respect to specific grounds enumerated at s. 13.18(5) of the *Construction Act*.

In *Anatolia Tile & Stone Inc. v. Flow-Rite Inc.* 2023 ONSC 1291, a decision released in March of this year, the Divisional Court provided guidance on the test for leave to apply for judicial review of an adjudicator’s determination. This short article discusses the guidance from the Divisional Court and its implications for future judicial reviews.

Summary of the Case:

In *Anatolia Tile*, the moving party sought leave to bring an application for judicial review of an adjudicator's determination which enforced the *Construction Act's* prompt payment provisions. The moving party failed to pay the determination in accordance with the timelines in the *Construction Act*. At the time the motion for leave was heard in writing, the determination remained outstanding. In its brief decision, the Divisional Court dismissed the motion and emphasized that leave would be granted rarely, especially considering the interim nature of adjudicator determinations and the *Construction Act's* goal of securing prompt payment while preserving the right to resolve substantive disputes through litigation or arbitration.

Standard of Review:

When reviewing an adjudicator's determination, the Divisional Court will apply a reasonableness standard. Procedural unfairness may be considered, but the court will consider the prompt and informal nature of adjudications and the limited impact on the final decision regarding the issues between the parties. Procedural irregularities may also be rectified during an application for judicial review, and the court's focus is primarily on whether the moving party had a fair opportunity to present their case.

The Test for Leave to Apply for Judicial Review:

The Divisional Court found that the test for leave applied to the factors enumerated in s. 13.18(5) of the *Construction Act* is analogous to the conjunctive test for leave to appeal an interlocutory order of a judge.

First, there must be either, (1) good reason to doubt that the impugned decision is reasonable; or (2) good reason to believe that the process followed by the adjudicator was unfair in a manner that probably affected the outcome below.

Second, it must be determined that either (1) the impact of the unreasonableness or the procedural unfairness probably cannot be remedied in other litigation or arbitration between the parties; or (2) the proposed application raises issues of principle important to the prompt payment and arbitration 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.

Non-Payment and Motion for Leave to Appeal:

The Divisional Court also stated that a failure to comply with prompt payment requirements may influence the decision on granting leave. If leave is granted, the moving party must make payment or obtain a stay. Non-compliance may lead to the dismissal of the application. However, the sequencing of the stay motion and leave motion may be determined by the case management judge based on the specific circumstances.

Conclusion:

The Divisional Court's guidance makes it clear that adjudication determination's will be granted deference and that there is a high bar for granting leave. In addition to complying with payment requirements or obtaining a stay, parties on the losing side of an adjudication should carefully assess the grounds for seeking judicial review and ensure they meet the stringent criteria established by the *Construction Act* and Divisional Court.



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