

ADJUDICATION UNDER THE *CONSTRUCTION ACT*: COURT CONFIRMS TEST TO APPLY FOR JUDICIAL REVIEW A “HIGH BAR”

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The Ontario Superior Court of Justice recently confirmed the high-bar that parties must meet to obtain leave to judicially review an adjudicator’s decision (see *Anatolia Tile & Stone Inc. v Flow-Rite Inc.*, [2023 ONSC 1291](#) (“*Anatolia*”)).

Refresher – Adjudication under the Construction Act

The new *Construction Act* provides a quick and informal process for parties to adjudicate their disputes on an interim basis. An adjudicator’s decision is not final; the parties can still litigate or arbitrate the same dispute afterward.^[1] The adjudication process is designed to provide the parties with a binding interim decision.

Parties cannot appeal an adjudicator’s decision. Instead, the *Construction Act* only allows parties to apply to the Divisional Court for leave to judicially review the adjudicator’s decision. This application must be made within 30 days of the decision.^[2] The grounds for a successful judicial review of an adjudicator’s decision are very narrow and are prescribed in [s. 13\(18\) of the Construction Act](#).

The Test for Leave to Apply for Judicial Review

Until now, it was not clear what test a party would have to meet to get leave from the Divisional Court to judicially review an adjudicator’s decision. The *Construction Act* does not provide any such test. The Court in *Anatolia* helpfully filled this gap in the legislation.

The Court confirmed that the test for leave to apply for judicial review of an adjudicator’s decision is analogous to the test for leave to appeal an interlocutory order of a judge. The moving party must establish the following (emphasis added):^[3]

Either:

(1) there is good reason to doubt that the impugned decision is reasonable; or

(2) 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) the impact of the unreasonableness or the procedural unfairness probably cannot be remedied in other litigation or arbitration between the parties; or

(4) the proposed application raises issues of principle important to the prompt payment and arbitration^[4] 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.

In this case, the Court denied the moving party's application for leave on the basis that the moving party had not met the high bar for granting leave. The Court did not provide specific reasons, and is not required to do so.^[5]

However, the Court provided the following key guidance for future cases:

1. Leave to apply for judicial review of such an interim decision will be granted rarely.^[6]
2. Where leave to apply for judicial review is granted, the Court will review the adjudicator's decision to determine whether it was reasonable. The Court will only intervene where the decision is unreasonable.^[7]
3. Adjudicators have the jurisdiction to decide whether a claim is properly brought under the *Construction Act*. This includes, among other things, whether services or materials are lienable, whether a claim for lien is out of time, and whether a contract is invalid or ceased to exist.^[8]
4. The Court may review procedural unfairness in the adjudication, but that will be reviewed through the lens that adjudications are meant to be quick, informal and only binding on an interim basis. The focus will be on whether the moving party had a fair opportunity to be heard in the adjudication process.^[9]

Court Provides Guidance on Motions to Stay Adjudicator's Order

An adjudicator's decision that one party must pay the other is binding on an interim basis. Parties can file the adjudicator's decision with the Court and enforce it like a Court order.^[10]

The Court has previously confirmed that when a party applies for judicial review, it must pay, or seek a stay of the adjudicator's decision. The Court may otherwise dismiss the application for the party's failure to comply with the prompt payment regime.^[11]

In *Anatolia*, the party opted not to pay, and instead seek a stay of the adjudicator's decision. The Court opted to decide the leave issue before hearing the stay motion.

However, the Court provided helpful guidance on how stay motions will be treated when made in conjunction with applications for judicial review:

1. the case management judge has the discretion to order that stay motions be argued before, after or concurrent with a motion for leave to apply for judicial review; [\[12\]](#)
2. the case management judge has the discretion to direct payment into court as a condition precedent to permitting a stay motion and/or leave motion to be brought;
3. a stay will not be granted as a matter of course when leave to apply for judicial review is granted; and
4. where a stay is granted, securing the disputed payment will be a common term of the stay order.

If you have any questions or comments on this decision or the adjudication and prompt payment regime more generally, please feel free to reach out to [Jason J. Annibale](#), [Jeremy Rankin](#) or [Preet Saini](#) directly.

[1][ps2id id='1' target=''] *Anatolia*, para 6.

[2][ps2id id='2' target=''] *Construction Act*, s.13.18(1) and (2).

[3][ps2id id='3' target=''] *Anatolia*, para 6.

[4][ps2id id='4' target=''] [*sic*] the Court may have intended to reference “adjudication” and not “arbitration”.

[5][ps2id id='5' target=''] *Construction Act*, s. 13.18(3).

[6][ps2id id='6' target=''] *Anatolia*, para 3.

[7][ps2id id='7' target=''] *Anatolia*, para 7.

[8][ps2id id='8' target=''] *Anatolia*, para 7.

[9][ps2id id='9' target=''] *Anatolia*, para 4.

[10][ps2id id='10' target=''] *Construction Act*, s. 13(20).

[11][ps2id id='11' target=''] *SOTA Dental Studio Inc. v Andrid Group Ltd.*, [2022 ONSC 2254](#) at para. 12.

[12][ps2id id='12' target=''] *Anatolia*, para 11.

by [Jason J. Annibale](#), [Jeremy Rankin](#) and [Preet Saini](#)

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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