

ADJUDICATION UNDER THE *CONSTRUCTION ACT*: FAST BUT FAIR

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Adjudicators are afforded significant discretion under the *Construction Act*^[1] to conduct adjudications in a manner in which they determine appropriate provided that they do so fairly and in accordance with the provisions of the *Construction Act*. The Ontario Superior Court of Justice recently confirmed a limit on this discretion in [Ledore Investments v. Dixin Construction, 2024 ONSC 598](#) ("**Ledore**").

In *Ledore*, the adjudicator made his determination based on an issue not raised or argued by either of the parties in their written submissions. The Court set aside this decision as being procedurally unfair.

Adjudication and Judicial Review

Adjudication is intended to be a speedy and targeted^[2] process that provides for an interim decision. The full suite of procedural rights available in ordinary litigation are not available to the parties.

Parties cannot appeal an adjudicator's decision. The *Construction Act* only allows parties to apply to the Divisional Court for leave to judicially review the adjudicator's decision. The grounds for a successful judicial review of an adjudicator's decision are narrow.^[3]

One of the permissible reasons to set aside an adjudicator's decision is that the procedures followed in the adjudication did not accord with the procedures to which the adjudication was subject under Part II.1 of the *Construction Act*, and the failure to accord prejudiced the applicant's right to a fair adjudication.^[4] Prior to *Ledore*, no Ontario court had considered appropriate circumstances to set aside an adjudicator's decision due to a failure to observe procedure.

Facts

Ross Steel Fabricators & Contractors ("**Ross Steel**") commenced an adjudication process to seek payment from Dixin Construction ("**Dixin**") for alleged unpaid invoices on a project at Lambton College (the "**College**"). Dixin acted as the general contractor on the project.

Ross Steel argued that Dixin had failed to give notices of non-payment in respect of any of the unpaid invoices

within the timeframe required by the *Construction Act*.^[5] Dixin claimed set-off against Ross Steel for costs arising from delay in other areas of the project that it attributed to Ross Steel's poor performance of its subcontract.^[6] Dixin had been paid in full by the College for work performed by Ross Steel.^[7]

The format of adjudication permitted Ross Steel a 10-page submission with its written argument, and a 15-page submission to Dixin. Ross Steel was granted a further 5 pages in reply. No oral submissions were permitted.^[8]

The Adjudicator's Decision

The adjudicator considered the parties' arguments but then made his determination on an issue neither party had raised in written submissions.^[9] He determined that Dixin was not required to pay Ross Steel for the unpaid invoices because Dixin had not delivered a "proper invoice" to the College as required by the *Construction Act*.^[10] The adjudicator concluded as a result that the statutory prompt payment provisions did not apply to this dispute.^[11] If the prompt payment provisions had been engaged, the adjudicator indicated that he would have found that the unpaid invoice must be paid. The adjudicator also stated that he would not have allowed Dixin's set-off claim given its failure to deliver a notice of non-payment within the statutory time period.^[12] The adjudicator further indicated that the adjudication could have been structured in a manner to deal with Dixin's failure to issue a proper invoice had the issue been known to Ross Steel prior to issuing a notice of adjudication.^[13]

The Judicial Review

The Court first considered whether judicial review was available in the circumstances. Ross Steel had been granted leave for judicial review pursuant to sections 13.18(5)3 and 13.18(5)5 of the *Construction Act*:

13.18(5) The determination of an adjudicator may only be set aside on an application for judicial review if the applicant establishes one or more of the following grounds:

...

3. The determination was of a matter... entirely unrelated to the subject of the adjudication.

...

5. The procedures followed in the adjudication did not accord with the procedures to which the adjudication was subject under [Part II.1], and the failure to accord prejudiced the applicant's right to a fair adjudication.

...

The Court found that judicial review was available under section 13.18(5)5 considering that the adjudicator had

breached procedural fairness.^[14] The Court did not need to consider 13.18(5)3.

The Court found that, while principles of procedural fairness were not provided for directly in Part II.1 of the *Construction Act* itself, Section 7 of Regulation 306/18 made under the *Construction Act* requires that adjudicators follow a code of conduct established by the Authority that addresses “[p]rinciples of civility, procedural fairness, competence and integrity in the conduct of an adjudication”.^[15]

The Court then considered whether there was a breach of procedural fairness in the circumstances. Dixon argued that adjudication is a fast and informal process to secure an interim result, and that the parties are entitled to limited procedural protections in this context.^[16] The Court agreed that Ross Steel was not entitled to the full range of procedural protections that would apply in arbitration or court.^[17] However, the Court then held as follows:^[18]

But the right to be heard on the determinative issue is a central component of even more limited procedural protections. It is a legal truism in our system of justice that it is fundamentally unfair, and quite possibly unreliable, for a judicial officer or adjudicator to reach a conclusion in his or her reasons for judgment in a proceeding based on an issue that has not been pleaded or relied upon by a party to the proceeding.

Parties must have an opportunity to know the case they have to meet or address the issue that has been decisive.^[19] In this case, the procedural entitlements were not so low to eliminate the fundamental right to be heard on the *determinative* issue.^[20] The adjudicator’s decision is interim but still important given the immediate entitlement to payment and enforcement remedies.^[21] The statutory scheme also does not preclude the adjudicator from requesting further written submissions from the parties.^[22]

The Court remitted the matter back to the adjudicator for a new determination with the benefit of the Court’s reasons noting the construction expertise of the adjudicator.^[23] The Court noted that it is often appropriate to remit the matter back to the administrative decision maker on a successful judicial review and this case did not fit within limited situations in which the court would reach a decision itself on the merits.^[24]

Take-Aways

1. Parties have the right to be heard on a determinative issue during adjudications under the *Construction Act*.
2. Courts may not engage in substantive analysis of the adjudicator’s decision and may instead remit the dispute back to the adjudicator for a new determination where a party is successful on judicial review.
3. The principles of procedural fairness apply to adjudications under the *Construction Act*, even though parties are not entitled to full procedural rights afforded in arbitration or litigation.

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

[1] *Construction Act*, RSO 1990, c C.30, s. 13.12(4)(5) [*Construction Act*].

[2] *Ledore* at para 5.

[3] *Construction Act*, s. 13.18(5).

[4] *Construction Act*, s. 13.18(5)5.

[5] *Ledore* at para 16.

[6] *Ledore* at paras 10, 17.

[7] *Ledore* at para 8.

[8] *Ledore* at para 14.

[9] *Ledore* at para 18.

[10] *Ledore* at para 18.

[11] *Ledore* at paras 18-19.

[12] *Ledore* at paras 19-20.

[13] *Ledore* at para 20.

[14] *Ledore* at para 23.

[15] *Ledore* at para 25; *Adjudications Under Part II.1 of the Act*, O Reg 306/18, s 7(2)3.

[16] *Ledore* at para 26.

[17] *Ledore* at para 27.

[18] *Ledore* at paras 28-29.

[19] *Ledore* at para 29.

[20] *Ledore* at para 33.

[21] *Ledore* at para 34.

[22] *Ledore* at para 35.

[23] *Ledore* at para 42.

[24] *Ledore* at para 43.

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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