Canadian College of Construction Lawyers

LEGAL UPDATE

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CANADIAN COLLEGE OF CONSTRUCTION LAWYERS
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Editors' Note

To round out the year, we bring you Legal Update #169, our final issue of 2024. This issue includes commentary from across the country on interesting construction law cases and important upcoming legislative changes in Ontario and Alberta. As Canadian courts continue to release interesting decisions impacting the practice of construction law across the board, we look forward to bringing you content in the New Year. On behalf of your Committee Co-Chairs, Brendan Bowles and Catriona Otto-Johnston, and the entire Legal Update Committee, we wish you and your loved ones a safe and happy holiday season.

We begin this issue with commentary from Jacob McLelland and Amir Ghoreshi of Glaholt Bowles LLP on important incoming changes to Ontario's *Construction Act*, including changes to the rules surrounding release of holdback, refined criteria for "proper invoices", significant changes to the adjudication regime and several housekeeping amendments. This is followed by discussion of impending changes to Alberta's *Prompt Payment and Construction Lien Act* and *Public Works Act*, as highlighted by Catriona Otto-Johnston and student-at-law Marissa Dimmell of Rose LLP. The proposed changes to Alberta's lien legislation include an optional waiver of lien rights and obligations for consulting professionals and changes to the adjudication regime, as well as proposed introduction of prompt payment and adjudication regimes to the *Public Works Act*, albeit limiting the types of claims that can be adjudicated on public projects.

Next, we have thoughtful insight from Morgan Burris and her colleague Aljosa Zenicanin of Dentons LLP on the treatment of subcontractor pass-through claims in light of the Ontario trial decision in *Walsh Construction v. Toronto Transit Commission et al*. Morgan and Aljosa discuss the Court's finding that liquidating agreements between Walsh and its subcontractors that released Walsh of liability to the subcontractors were fatal to Walsh's claim for recovery from the owner for the subcontractor flow-through claims. Although the decision is under appeal, this aspect of the case is of particular interest to construction lawyers when considering whether and how to settle subcontractor claims, separate and apart from pursuing an action against an owner. It will be interesting to see how this aspect of the decision is treated on appeal.

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Brendan D. Bowles

Catriona Otto-Johnston

Editors' Note

Brendan Bowles and Markus Rotterdam of Glaholt Bowles LLP give an update on a topic reported on in Legal Update #167; namely, a challenge to the use of letters of credit as lien security in Ontario. Brendan and Markus discuss Associate Justice Robinson's decision in *TruGrp Inc. v. Karmina Holdings Inc*. Spoiler alert: the standard form of letter of credit has been upheld.

Morgan Burris appears again, this time to discuss the British Columbia Court of Appeal's decision in *Centurion Apartment Properties LP v. Sorensen Trilogy Engineering Ltd.* with respect to an engineer's duty of care in the case of a dangerous defect. The underlying litigation involves structural deficiencies in a building, which led to emergency evacuation and remediation efforts. Although it did not need to decide on the enforceability of limitation of liability clauses in engineering contracts as part of the appeal, the Court's discussion of the factors to be considered when determining this issue is of interest to construction litigators and solicitors alike.

We close this issue with commentary from Ontario on the ongoing development of adjudication as a more prevalent form of construction dispute resolution in that province. Since adjudication was introduced in 2019 there has been a steady increase in the number of adjudications filed each year, as borne out by ODACC's Annual Report for 2024.

As one might expect, as the number of adjudications has increased, so have the number of reported decisions on attempted judicial review of adjudicators' determinations. Bruce Reynolds and a team from Singleton Reynolds comment on *Jamrik v 2688126 Ontario Inc.*, a case where the Divisional Court granted a judicial review application to set aside an adjudicator's decision based on an incorrect understanding of the statute made pursuant to a flawed process. The Singleton Reynolds team analyzes *Jamrik* from the perspective of the ongoing development of the law in respect of the appropriate standard of review for courts to apply to tribunals such as challenges to administrative and arbitration decisions. The authors note that this is an evolving area of the law, and that adjudication is distinct in notable respects from these other processes. The authors note that this issue is likely to be developed in future judicial review challenges to adjudicators' determinations.

Paul Ivanoff, Lia Bruschetta and Emma Smith of Osler conclude this issue with a review of additional Ontario Divisional Court caselaw from 2024 on judicial review of adjudicator's determinations. They note that 2024 began with the first reported judicial review decision overturning an adjudicator's determination, *Ledore Investments v Dixin Construction*, and then comment on two further Divisional Court precedents from 2024, including one where

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the applicant achieved partial success in having an adjudicator's determination overturned on the basis that the adjudicator had no jurisdiction to hear a matter arising from an improvement procured before October 1, 2019. The case is also a good reminder that in Ontario it is possible to have more than one improvement under a contract, these terms are not coextensive under the *Construction Act*.

Key Changes coming to Ontario's Construction Act: What Bill 216 Means for Holdback, Adjudication, Administration, and More

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Primary Topic:
II. Statutory Regulation
Secondary Topic:
IX. Construction and Builders' Liens
Jurisdiction:
Ontario
Authors:
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Jacob McClelland

Amir Ghoreshi

In February 2015, nearly a decade ago, Bruce Reynolds and Sharon Vogel were appointed by the Ministry of the Attorney General and the Ministry of Economic Development, Employment and Infrastructure to conduct an expert review of Ontario's *Construction Lien Act*. Their review culminated in a comprehensive 435-page report, published in 2017, which included 100 recommendations for legislative reform. Many of these recommendations were adopted by the legislature and integrated into the updated *Construction Act*.

One of the key recommendations was for an independent review of the *Act* to be conducted within five years of the new legislation's enactment, with subsequent reviews every seven years thereafter.

The first of these independent reviews was completed by Duncan Glaholt, whose report, *2024 Independent Review: Updating the Construction Act*, was released on October 30, 2024. The report includes 44 new recommendations for further reforms. As Mr. Glaholt notes, through consultations with stakeholders, three major themes emerged: holdback, adjudication, and administration.

Coinciding with the release of Mr. Glaholt's report, Bill 216, *Building Ontario For You Act (Budget Measures), 2024*, went through its first reading on the same day. By November 6, 2024, Bill 216 had passed its second and third readings and received Royal Assent.

Schedule 4 of Bill 216 introduces amendments to the *Construction Act*, which, upon proclamation by the Lieutenant Governor, will come into force on a yet-to-be-determined date. A review of the Bill reveals that, once again, the legislature has largely embraced the recommendations from Mr. Glaholt's *2024 Independent Review*.

Key Changes in Schedule 4 of Bill 216

Mandatory Annual Holdback Release:

One of the most significant changes is the introduction of mandatory annual holdback release. Under section 26(4), an owner shall make payment to a contractor of all the accrued holdback in respect of services or materials supplied by the contractor during the year immediately preceding the anniversary, unless a lien has been preserved or perfected and not discharged, vacated, or satisfied.

Notices of annual release of holdback must be issued by owners in the prescribed form no later than 14 days after the anniversary date. Liens arising

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from the supply of services or materials covered by a notice of annual release of holdback will expire 60 days after the notice is published.[1]

The new holdback provisions also establish deadlines for payments at various stages of the contracting chain. Contractors must pass on accrued holdback to subcontractors within 14 days of receiving payment from the owner, unless a lien has been preserved or perfected. Similarly, subcontractors must pay sub-subcontractors within 14 days of receiving their holdback payment.

Holdback and Designers:

A new provision under section 14(4) addresses situations where an owner retains a holdback for the supply of a design, plan, drawing, or specification for a planned improvement that is never started. In such cases, the holdback provisions of section 14(1) will apply, unless the owner proves the value of their interest in the land has not been enhanced.

Proper Invoices and Prompt Payment:

Section 6.1 has been amended to refine the criteria for a proper invoice. Invoices must now include details such as the period, milestone, or payment entitlement, contract identifiers (e.g., contract number or purchase order number), and any additional information requested by the owner to facilitate the accounts payable process. If an invoice is missing any of these details, it will still be considered a proper invoice unless the owner notifies the contractor in writing within seven days, specifying what is required.

Adjudication Process:

Significant changes have been made to the adjudication regime, including the ability for adjudications to be conducted by private adjudicators, provided they are qualified by the Authorized Nominating Authority. The scope of adjudications is now governed by Regulations rather than being explicitly listed in the Act. Additionally, parties may refer disputes to adjudication on any matter agreed to in the contract or prescribed by Regulation.

Regarding the availability of adjudication, Bill 216 modifies the availability of adjudication from being tied solely to "completion", and provides that:

- An adjudication in respect of a contract may not be commenced if the notice of adjudication is given more than 90 days after the date on which the contract is completed, abandoned or terminated, unless the parties to the adjudication agree otherwise.

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[1] See, however, subsections 27(3), (4), & (5) regarding the expiry of liens that do not expire under s. 27(2).

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- An adjudication in respect of a subcontract may not be commenced if the notice of adjudication is given more than 90 days after the earliest of,
  - ◊ the date on which the contract is completed, abandoned or terminated, unless the parties to the adjudication agree otherwise;
  - ◊ the date on which the subcontract is certified to be completed under section 33; and
  - ◊ the date on which the subcontractor last supplies services or materials to the improvement.

Another key update is the ability to object to an adjudicator's jurisdiction during the adjudication process, and the ability of the adjudicator to make determinations regarding his or her own jurisdiction, mirroring the competence-competence principle in arbitration. Adjudicators can also correct errors or amend determinations to address oversights, on their own initiative or upon request.

Housekeeping Amendments:

Several administrative updates have been introduced.

For instance, the definition of "price" has been expanded to allow the Regulations to set a price for contracts or subcontracts in situations where the parties fail to agree on one, other than the market value of the services or materials supplied. Additionally, the definition of "written notice of a lien" now includes a copy of any claim for lien registered or given under section 34.

Mr. Glaholt's report also recommended that the Regulations explicitly permit the joinder of trust claims in lien actions, with the court having the discretion to sever claims or require separate trials or procedures as needed. In response, Bill 216 includes a new section 50(4), which states that "the procedures prescribed for the purposes of this Part may provide for the joinder of a lien claim with another claim in an action, in which case this Part applies to the other claim as it does to the lien claim." As a result, it is anticipated that the Regulations will allow for the joinder of lien and trust claims.

However, as of the date of this article, the Regulations have yet to be amended to implement the intended changes.

Additionally, a new section 1(5) is being introduced to clarify that when multiple improvements are to be made under a single contract, and those improvements are to lands that are not contiguous, then, if the contract so

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provides, each improvement will be considered as part of a separate contract.

Transition Provisions:

Upon proclamation, most amendments in Bill 216 will take effect immediately, applying to all improvements in the province, including those under contracts entered into prior to the amendments' effective date.

However, there are some exceptions. For instance, the first anniversary date for mandatory annual release of holdback under the new rules will be the second anniversary of the contract, following the enactment of the amendments.

Additionally, the new transition provisions (section 87.4) do not affect the existing transition provisions (section 87.3) related to the 2017 amendments. Specifically:

- the amendments in Bill 216 will not apply to an improvement if the contract was entered into or the procurement process commenced on or before June 30, 2018;[2] and
- the amendments in Bill 216 respecting Part I.1 (Prompt Payment) and Part II.1 (Adjudication) will not apply to an improvement unless the contract was entered into or the procurement process commenced on or after October 1, 2019.[3]

Conclusion

The recommendations from Mr. Glaholt and the amendments in Bill 216 demonstrate an ongoing effort to streamline and modernize the *Construction Act*. Notable updates, particularly those related to the availability of adjudication and mandatory release of holdback, are poised to have a significant impact on Ontario's construction industry. Owners, contractors, and subcontractors need to be mindful of their updated obligations, particularly around holdback retention and payment, lien expiry deadlines, and adjudication timelines.

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[2] By operation of subsection 87.3(1) the *Construction Lien Act* continues to apply to such improvements.

[3] By operation of subsection 87.3(4) the *Construction Act* applies but Parts I.1 and II.1 do not apply to such improvements.

Key Proposed Changes to Alberta's Lien and Public Works Legislation

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Alberta
Authors:
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Catriona Otto-Johnston

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Key Proposed Changes to Alberta's Lien and Public Works Legislation

On August 29, 2022, changes to Alberta's *Builders' Lien Act* came into effect, including a name change to the *Prompt Payment and Construction Lien Act,* SA 2000, c P-26.4 (the "PPCLA" or the "Act"). This marked the first significant update to Alberta's lien legislation in several decades and was driven in part by a desire to incorporate prompt payment and adjudication regimes, similar to those implemented in Ontario and other Canadian jurisdictions.

While prompt payment and adjudication in Alberta is little more than two years old, industry members have expressed concerns about the adjudication process and identified obstacles to the adoption of the prompt payment regime introduced under the Act. There has also been a level of interest in extending the prompt payment regime to government projects.

Touted by the Minister as reducing "red tape" to simplify complex processes for Albertans, on November 4, 2024, the Minister of Services introduced Bill 30, the *Service Alberta Statutes Amendment Act, 2024* ("Bill 30"). Bill 30 proposes, among other things, changes to the PPCLA and to the *Public Works Act,* RSA 2000, c P-46 (the "PWA"). As of the date of this publication, Bill 30 has passed its second reading. The Minister suggests that if passed after a third reading, the amendments introduced under Bill 30 will be in effect as early as Spring 2025.

In this article, we highlight the key proposed changes to the PPCLA and PWA.

Key Proposed Amendments to the PPCLA

Optional Waiver for Consulting Professionals

The proposed amendments to the PPCLA include an optional waiver of rights and obligations under Part 2 of the Act for regulated professional engineers and architects. Unlike the existing provisions of the PPCLA, which prohibit an agreement to waive application of the Act, the proposed amendments would allow engineers and architects to waive their lien rights, and by extension, any associated holdback requirements where their contract expressly contemplates such a waiver. Such waiver is qualified insofar as it would only apply to the extent that it does not conflict with and is not inconsistent with the regulations. This waiver does not apply to the prompt payment and adjudication regime of the Act.

Bolstering the Adjudication Regime

The uptake of the adjudication process in Alberta has been slow, with 23 notices being filed during the period of August 29, 2022 to March 31,

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2024.[1] ARCANA, the Nominating Authority in Alberta, has raised issues with implementation of the new adjudication regime under the Act, specifically in respect of jurisdictional issues in the interpretation of the PPCLA and the negative impact of court interventions in the adjudication process.[2] Additionally, emerging jurisprudence has highlighted the need for clarity in respect of the finality of an adjudicator's decision.[3] In response to these concerns, Bill 30 proposes amendments to the adjudication regime, aiming to give fuller effect to the legislature's intention of making adjudication the default forum for resolving construction disputes.

As a starting point, Bill 30 proposes to extend the window for a party to commence adjudication proceedings from the date the contract is complete (as the PPCLA currently contemplates) to 30 days after *the date of final payment*, unless the parties to the adjudication agree otherwise. The "date of final payment" is defined in the amendments to mean the earlier of (i) the date on which complete payment of the amount set out in the contract or subcontract is made, and (ii) the date on which complete payment of the amount set out in the contract is required in accordance with the statutory prompt payment deadlines. It is not tied to substantial performance.

A further attempt to bolster the adjudication process is evidenced by the proposed changes to the PPCLA's treatment of multiplicity of proceedings. For one, the proposed amendments remove the qualification that a party can only initiate adjudication if it has not already commenced a court action with respect to the same dispute. Similarly, under the current wording of the PPCLA, if an adjudication is initiated on the same day that a party commences a court action regarding the same dispute, the adjudication is automatically discontinued, and the court action proceeds. However, the proposed amendments allow both the adjudication and the court action to continue simultaneously unless a party applies for a ruling, or the court decides on its own to direct otherwise. An adjudication will only be automatically terminated if the court issues a decision on the merits of the dispute while the adjudication is still ongoing.

The proposed amendments under Bill 30 also aim to strengthen the adjudication regime by seeking to reinforce the finality of an adjudicator's decision. To this end, the proposed amendments narrow the circumstances in which an adjudicator's decision is not binding on the parties. For instance,

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[1] Arcana Annual Report 2023 pp. 9

[2] Arcana Annual Report 2023 pp. 8.

[3] See e.g. *Welcome Homes Construction Inc v Atlas Granite Inc.,* 2024 ABKB 301 where the Alberta Court of King's Bench parses the difference in wording between the Alberta adjudication provisions and the equivalent wording under Ontario's *Construction Act,* RSO 1990, c C.30. The Court held that adjudicator determinations are "final and binding, unless…", whereas determinations in Ontario are deemed to be "interim and binding, until…" due to the differing language used in their respective legislation.

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under the existing language of the PPCLA, a party need only enter into a written agreement to appoint an arbitrator for an adjudicator's decision to no longer bind them. The proposed amended language narrows the category to instances where an arbitrator has been appointed by the parties under the *Arbitration Act* and has made an award in respect of the matter. A similar narrowing of the exceptions to the registration and enforcement of an adjudicator's order has also been proposed.

The proposed amendments support the notion that adjudication be the default method for resolving disputes. However, ambiguity remains regarding the binding nature of an adjudicator's decision, as the proposed language does not explicitly resolve the lingering question of whether such a decision is final.

Key Proposed Amendments to the PWA

Industry stakeholders have expressed interest in integrating a prompt payment and adjudication framework on government projects, highlighting the need for timely payments on such projects and the desire to align the handling of government projects in Alberta with other Canadian jurisdictions that have adopted prompt payment and adjudication principles for public projects. In response to these concerns, and among other changes to the PWA (including housekeeping updates to the tender process), Bill 30 proposes the incorporation of a prompt payment and adjudication regime for government projects akin to that already in place for private sector projects through the PPCLA.

Prompt Payment in the PWA Context

The proposed amendments include proper invoice requirements identical to those in the PPCLA. Bill 30 proposes similarly mandated monthly billings through proper invoices, which must be issued at least every 31 days, and proposes to preserve the 28-day payment deadline for undisputed amounts between the Crown and a contractor. An important difference between prompt payment under the PPCLA and the proposed amendments to the PWA lies in the payment obligations down the contractual chain. Unlike the PPCLA, where the payment timeline between contractors and subcontractors is tied to payment of undisputed amounts under a proper invoice by the owner, the proposed amendments to the PWA flow down the proper invoice requirements to every tier of subcontractor and tie the payment deadlines down the contractual chain to the receipt of a proper invoice from the subcontractor or sub-subcontractor (as applicable).

The proposed changes implement the payment deadlines from the PPCLA: a contractor must pay its subcontractors within 35 days and a subcontractor

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must pay its sub-subcontractors within 42 days. However, unlike in the PPCLA, the proposed amendments to the PWA require payment to be made "regardless of whether or not the Crown has made any payment to the contractor for the labour, equipment, material, or services described in the proper invoice provided to the contractor." They do not incorporate a requirement for the Crown to issue a Notice of Dispute for any disputed amounts in a proper invoice. Instead, the onus remains on the unpaid contractor or subcontractor to file a Notice of Claim. With that said, the proposed amendments remove the existing time periods within which a Notice of Claim must be filed, ostensibly to allow an unpaid contractor or subcontractor to file a Notice of Claim as soon as the relevant payment deadline passes.

Adjudication in the PWA Context

Bill 30 proposes to incorporate into the PWA by reference the adjudication regime set out in the PPCLA, subject to some modifications. For instance, the proposed amendments contemplate a lengthy number of exceptions to the application of the adjudication regime, including for disputes that seek relief other than payment and any disputes for which the claimant seeks an order or declaration in respect of, *inter alia,* the validity of the termination of a contract, delay or modification of a construction schedule, or the achievement of a milestone date under the relevant contract. The proposed adjudication regime under the PWA also caps the amount claimed in any adjudication to $200,000.

No Waiver

Whereas the PWA does not presently prohibit agreements by parties to contract out of the remedies provided under the legislation, the proposed amendments contain the same waiver as is found in the current wording of the PPCLA. Presumably, this is to reinforce the mandatory nature of the proposed prompt payment and adjudication regimes, as applicable, on government projects.

The proposed incorporation of prompt payment and adjudication into the PWA is indeed a step in the right direction and may serve to assuage concerns about timely payment and effective dispute resolution on government projects. However, the proposed amendments, as they exist currently, fall short of fully addressing stakeholder concerns insofar as they fail to encompass P3 projects. While indeed such projects engage different considerations based on their complexity and the fact that they often include maintenance work, the absence of a uniform application of prompt payment and adjudication to all construction projects in Alberta, including P3 projects, renders the Minister's attempts to "close the loop" on prompt payment and adjudication somewhat perfunctory.

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Conclusion

Although the proposed amendments in Bill 30 are responsive to some industry concerns, they are unlikely to fully address issues regarding timely payment and the efficient resolution of construction disputes under both the PPCLA and the PWA. While some of these issues may be resolved through further judicial treatment, it is likely that additional legislative changes will be required to give fuller effect to the legislature's intention.

A Comment on Walsh v TTC: Factors to Consider Regarding the Viability of Subcontractor Pass-Through Claims

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Topic:
IV. Subcontracts
Jurisdiction:
Ontario
Authors:
Morgan Burris, Partner, & Aljosa Zenicanin, Senior Associate, Dentons Canada LLP

CanLii Reference:

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ONTARIO

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A Comment on *Walsh v TTC*: Factors to Consider Regarding the Viability of Subcontractor Pass-Through Claims

The recent Ontario Superior Court of Justice decision in *Walsh Construction v. Toronto Transit Commission*, 2024 ONSC 2782, provides guidance on how subcontractor flow-through claims may be advanced by a general contractor against an owner.

In this case, Walsh, a general contractor, attempted to flow-through certain subcontractor delay claims to TTC, the owner of the project, after Walsh had settled the claims with the subcontractors pursuant to certain release and assignment agreements, which are commonly known in the U.S. as liquidating agreements. The Court ultimately held that Walsh could not obtain recovery from the owner for the damages suffered by its subcontractors after Walsh had been released of any possible liability for the same losses. Walsh has appealed the decision to the Ontario Court of Appeal.

Background

The dispute pertains to a contract between TTC and Walsh for the construction of subway stations running from Toronto to Vaughan. While the case covers many different issues, including contractual delay, design issues, liquidated damages, and scope changes, this case commentary focuses on the court's treatment of Walsh's flow-through subcontractor claims.

Decision

1. Lack of Privity of Contract

Before addressing Walsh's ability to flow-through subcontractor claims, the Court first confirmed there was no privity of contract between TTC and the subcontractors. TTC never entered into an agreement with any subcontractors. It hired Walsh as its general contractor and Walsh then subcontracted for the various services and work required to complete the project. Justice Hood noted that it was clear between the parties that there was no privity of contract and therefore the subcontractors could not bring a claim for breach of contract damages against TTC:

> *The subcontractors clearly acknowledge this in their contracts with Walsh. As a result, the subcontractors have no direct cause of action against TTC, only against Walsh.*

The Court found that flow-through claims are a procedural device used to get around this lack of privity of contract between the subcontractors and the owner. However, for a flow-through claim to be successful, the general contractor must at a minimum be *potentially* liable to its subcontractors for the damages being claimed. In this instance, the Court found that Walsh had no liability for the subcontractor flow-through claims, potential or otherwise, as it received a full release pursuant to the liquidating agreements.

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2. Release of Walsh's Liability Fatal to Claim

The Court found that Walsh had entered into two types of liquidating agreements: (i) assignment liquidating agreements; and (ii) non-assignment liquidating agreements. Under the assignment liquidating agreements, Walsh paid an amount representing all of the contract payments due and payable to the subcontractor and the subcontractor assigned its claim to Walsh. For the non-assignment liquidating agreement, Walsh paid an amount representing the contract payments due and payable to the subcontractor but if Walsh recovered anything from TTC, it would have to pay the subcontractor a portion of the amount recovered dependent on whether it was a global recovery or specific to the subcontractor's damage claim. Critically, pursuant to both types of agreements, Walsh was released of all liability to the subcontractor for further claims under the subcontract.[1]

The Court held that under Canadian law, a contractor is only entitled to recover damages from an owner that they have actually incurred or expect to incur as a result of the owner's breach of contract.[2] Since Walsh had been fully released of all liability to the subcontractors pursuant to the liquidating agreements, there was no basis on which to find TTC liable to Walsh for any of the subcontractor flow-through claims.

In dismissing the subcontractor flow-through claims, Justice Hood expressed concern regarding the fairness of contractors using liquidating agreements to circumvent the lack of privity between an owner and a subcontractor:

> *Caselaw in the United States seems to accept liquidating agreements as being a valid way to maintain liability and to flow through both the subcontractor claim and the contractor's liability to the subcontractor to the owner. While perhaps useful in minimizing litigation, in my view the attempt to place liability upon the owner for the subcontractor's damages, where the owner has not contracted with the subcontractor and where the contractor has effectively removed itself from the picture, is not right. This makes these claims untenable.*[3]

Further to this point, the Court observed that the use of liquidating agreements "removes any motivation or requirement" for contractors to scrutinize or minimize subcontractor claims, despite being in the best position to do so. It did not take positively to this attempt to pass on a claim that Walsh had not vetted and of which Walsh had been released of liability. By way of

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[1] Walsh, paras. 331, 333 and 334.
[2] Walsh, para. 343.
[3] Walsh, para. 350.

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A Comment on *Walsh v TTC*: Factors to Consider Regarding the Viability of Subcontractor Pass-Through Claims

illustration, it was noted that Walsh had failed to take advantage of potential contractual defences available in its subcontracts, such as express terms that disentitled its subcontractors to additional costs for delay, and a waiver by the subcontractors of any claims to compensation for which Walsh could not in good faith certify.[4]

The Court's comments on Walsh's failure to scrutinize the subcontractor claims before asserting them against the owner as flow-through claims suggests that general contractors may be expected to demonstrate a minimum level of due diligence in assessing or vetting subcontractor claims before seeking recovery for them against an owner.

Going Forward

The finding of the Court in *Walsh* raises important questions regarding the implications of liquidating agreements that formally release the general contractor from any liability for their subcontractors' flow-through claims, relative to the use of "pay if paid" clauses in subcontracts, which limit a contractor's liability for a subcontractor's delay damages to whatever amounts can be recovered against the owner.

Prior Ontario case law authority has suggested that "pay if paid clauses" could be interpreted as making the general contractor liable for their subcontractor's delay damages, subject to the condition precedent that the contractor recover damages from the owner in respect of the delay.[5] In *Ledcor Construction Ltd. v. Carleton University,*[6] the Court found that if the subcontract gave rise to a positive obligation on the general contractor to advance the subcontractor's delay claim against owner, the failure to do so would make the contractor liable to the subcontractor. The Court held that this potential liability against the contractor could be sufficient to provide a legal basis for the flow-through claim to be asserted against the owner. This approach was considered to be "more in keeping with the harmonious operation of the construction pyramid".

However, the question of whether a subcontractor flow-through claim could be dismissed on the basis of a "pay if paid" clause was not definitively decided in *Ledcor.* The Court merely rejected the owner's attempt to have the flow-through claim dismissed summarily on this basis. Importantly, there was also no indication in the *Ledcor* case that the parties had entered into a liquidating agreement, or any other kind of agreement that released the contractor of liability. As a result, it remains to be seen whether the Ontario

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[4] *Walsh,* para. 346.
[5] *Ledcor Construction Ltd. v. Carleton University*, 2009 CarswellOnt 1213 at para. 17; *Ledcor Construction Ltd. v. Attorney-General of Canada,* 2013 ONSC 2407 at para. 22.
[6] *Ledcor Construction Ltd. v. Carleton University*, 2009 CarswellOnt 1213.

A Comment on Walsh v TTC: Factors to Consider Regarding the Viability of Subcontractor Pass-Through Claims

LU #169 [2024]

Topic:
IV. Subcontracts
Jurisdiction:
Ontario
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CanLii Reference:

2024 ONSC 2782

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A Comment on *Walsh v TTC*: Factors to Consider Regarding the Viability of Subcontractor Pass-Through Claims

Court of Appeal will use the appeal of the *Walsh* decision to endorse or reject the treatment of flow-through claims proposed but not decided in the *Ledcor* line of decisions, or whether the cases will be distinguished on the basis of Walsh's liquidating agreements.

Presently, the one definitive take-away from the *Walsh* decision is that, pending the outcome of the appeal, general contractors and subcontractors should exercise caution when considering entering into liquidating-type agreements in respect of subcontractor claims for damages for which recovery against the owner may be sought.

Follow-Up: Challenge to Letters of Credit as Lien Security in Ontario Resolved — TruGrp Inc. v. Karmina Holdings Inc.

Follow-Up: Challenge to Letters of Credit as Lien Security in Ontario Resolved — TruGrp Inc. v. Karmina Holdings Inc.

LU #169 [2024]

Topic:
IX. Construction and Builders' Liens Jurisdiction: Ontario
Authors:
Brendan Bowles and Markus Rotterdam, Glaholt Bowles LLP

CanLii Reference:

2024 ONSC 2165

ONTARIO

Brendan D. Bowles

Markus Rotterdam

In Legal Update #167, we commented on the decision of Associate Justice Robinson in *TruGrp Inc. v. Karmina Holdings* Inc. 2024 ONSC 2165, which concerned the sufficiency of the letter of credit commonly used for vacating liens in Ontario.

Back in April 2024, Associate Justice Robinson heard a motion to set aside an order vacating a lien upon posting of security in the form of a letter of credit. The lien claimant, TruGrp, had argued that there was a potential gap whereby the letter of credit is not renewed by the issuing bank, BMO, but the Accountant will not accept the bank draft as contemplated by the letter of credit without a court order. TruGrp was concerned that it would be left with no enforceable security held in court for its lien. Since Karmina was allegedly seeking to sell the liened premises, TruGrp was concerned that it could be left without any security for its lien, contrary to the intent of the *Construction Act.* Further, TruGrp argued that since nothing in the letter of credit requires notice to any party other than the Accountant, a lien claimant could also be entirely unaware of a potential deficiency with the security for its lien.

Associate Justice Robinson considered but did not finally resolve the issue of the sufficiency of the letter of credit. Instead, he directed that the motion be served on the Accountant of the Superior Court of Justice and the bank who provided the letter of credit, and that they be given an opportunity to be heard.

As we previously commented, this unresolved challenge left some possible doubt as to the use of letters of credit as security for vacated liens. The form is not statutorily mandated, but appears as an appendix to *Conduct of Lien, Trust and Adjudication Proceedings*.

Both the Accountant and the bank have now weighed in on the matter. The Accountant submitted its position as follows:

> The letter of credit with standard form provisions permitting the issuing bank to decline renewal of the letter upon providing the Accountant with at least thirty days' notice as well as a bank draft for the amount of letter of credit, less any payments already made under it, is sufficient authority for the Accountant to accept and deposit the bank draft provided that a court Order has permitted the payment into Court of the letter of credit with these provisions.

The Bank of Montreal agreed with that position.

The Accountant clarified that a further court order would only be necessary in circumstances where parties other than the issuing bank seek to substi-

Follow-Up: Challenge to Letters of Credit as Lien Security in Ontario Resolved — TruGrp Inc. v. Karmina Holdings Inc.

LU #169 [2024]

Topic:
IX. Construction and Builders' Liens Jurisdiction: Ontario

Authors:
Brendan Bowles and Markus Rotterdam, Glaholt Bowles LLP

CanLii Reference:

2024 ONSC 2165

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Follow-Up: Challenge to Letters of Credit as Lien Security in Ontario Resolved — TruGrp Inc. v. Karmina Holdings Inc.

tute the letter of credit with a bank draft, a scenario not contemplated by the approved letter of credit.

In other words, the Accountant confirmed that it will accept and deposit a bank draft submitted by the issuing bank in accordance with the terms of the letter of credit, provided that the letter of credit with such terms has been posted pursuant to a court order approving that form, and BMO agreed.

As we argued in Legal Update #167, this makes sense. The original order inherently permits the substitution of the letter of credit with a bank draft, even if not explicitly stated. The Court Order provides that the letter of credit is only cancelled if the bank actually provides a replacement bank draft for the Accountant to accept. The Court Order, by its terms, at least implicitly requires the Accountant to not only accept the letter of credit but accept it subject to its terms, including tendering of the replacement draft.

Further, a bank draft, a familiar instrument to both banks and accountants, is essentially equivalent to cash. Unlike a normal "cheque" which merely directs one's banker to remit the face value of the instrument, provided that there is adequate credit held to the customer's account with the financial institution, a bank draft asserts to the holder that the issuing or certifying institution financially backs the instrument.

Therefore, it was the authors' view that the Accountant should not require further explicit court authorization to accept the bank draft as replacement security for the court-approved letter of credit.

It is now clear that the Accountant and the bank share this view. Considering this development, TruGrp confirmed that its concerns were satisfied. Subject to costs which are yet to be determined, the motion is resolved. Of general interest, the issue of the sufficiency of the commonly accepted form of letter of credit as security to vacate a lien in Ontario has been affirmed.

In light of this resolution to TruGrp's motion, statutory adoption of the form of letter of credit as lien security by designating it as a form to the *Construction Act* regulations, as suggested in our prior case comment, may be unnecessary. However, having a statutory form of letter of credit, just as we have a statutory form of lien bond, would at least remove any lingering doubts created by the arguments canvassed by Associate Justice Robinson.

BC Court of Appeal Confirms Factors to establish an Engineer's Duty of Care & the Enforceability of Limitation of Liability Clauses

LU #169 [2024]

Primary Topic:
III. Building Contract
Secondary Topic:
XI. Engineers
Jurisdiction:
British Columbia
Author:
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CanLii Reference:

2024 BCCA 25

BRITISH COLUMBIA

Morgan Burris

BC Court of Appeal Confirms Factors to establish an Engineer's Duty of Care & the Enforceability of Limitation of Liability Clauses

In *Centurion Apartment Properties LP v. Sorensen Trilogy Engineering Ltd.,* 2024 BCCA 25, the BC Court of Appeal overturned a summary trial decision which limited the liability of the engineers allegedly responsible for the negligent design of a building with dangerous defects to the amount of their fees. At the summary trial, the court dismissed the plaintiff building owners' claims against the engineers in negligence, and limited the engineers' liability to the builder in contract to the amount of their fees.

Background

This case concerns a building that was constructed by a developer/owner pursuant to a CCDC-14 Design-Build Stipulated Price Contract. After construction was completed, the developer sold the building to a real estate investment trust operating through a limited partnership. The structure of the purchase was typical in the commercial real estate industry. The B.C. Land Title Office will not register a limited partnership as an owner of land in British Columbia, which makes it practically necessary for limited partnerships to hold their property through a trustee or agent. In this case, the buyer elected to purchase the shares of the existing legal nominee that held title to the land, rather than transfer the title to another agent for the same purpose. Both the design-build contract and the purchase agreement addressed the risk of deficiencies in the construction of the building, allocating this risk to the design-builder and vendor, respectively. Following completion of the sale, dangerous structural deficiencies in the building were disclosed to the new owner, which required the building to be immediately evacuated and remediated.

The primary issue on appeal was whether the contractual arrangements between the plaintiffs and the building developer and vendor negated their ability to sue the engineers responsible for the dangerous structural deficiencies. In other words, by seeking a contractual remedy against the parties they were dealing with, had the plaintiffs limited their ability to pursue any other remedies that may be available to them in tort? The Court of Appeal also addressed the standing of a beneficial owner to sue for damages to trust property, and the ability of the defendant engineers to enforce their contractual limitation of liability clause against the design-builder on a summary trial.

Decision

At the summary trial, the engineers argued that the plaintiffs' claims in negligence against them should be dismissed because they were not in a suffi-

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ciently proximate relationship with the plaintiffs to owe them a duty of care in tort. The chambers judge agreed. Relying on *1688782 Ontario Inc. v. Maple Leaf Foods Inc.*, 2020 SCC 35, he held that the plaintiff building owners and the engineers were linked by a contractual matrix in which the parties had agreed amongst themselves how to allocate the risk of deficiencies in the building, and as a result, any proximity between the parties that might have otherwise given rise to a duty of care owed by the engineers was negated.

In overturning this finding, the Court of Appeal focused on the chambers judge's error in failing to find that the relationship between the plaintiff owners and the defendant engineers was analogous to the relationship of proximity recognized in *Winnipeg Condominium Corp. No. 36 v. Bird Construction Co.* [1995] 1 S.C.R. 85. In this regard, the decision is less remarkable for what it says than for what the Court of Appeal determined it need not say.

On appeal, it was argued that the lower court's decision was contrary to the long-standing principles of concurrent liability in tort and contract established in *BG Checo International Ltd. v. British Columbia Hydro and Power Authority*, [1993] 1 S.C.R. 12. However, rather than address this issue directly, the Court of Appeal held that the particular factors that justified the finding of a duty of care in *Winnipeg Condominium* also arise in this case notwithstanding the plaintiffs' contractual arrangements. Arguably, this represents proper judicial restraint, rather than an open door to future attacks on *BG Checo*. However, it also suggests that as a matter of prudence, it may be best practice to include clauses in your contracts that expressly preserve any rights and remedies available at law that your client intends to retain in addition to those set out in the contract.

The Court of Appeal upheld the lower court's finding that the plaintiff limited partnership, who owns the beneficial interest in the building through a bare trust and agency agreement with its legal nominee, does not have standing to sue in negligence. The Court of Appeal held that there were no circumstances that justified departing from the standard rule that a beneficiary does not have standing to sue a third party for losses related to property held in trust. Given the widespread use of limited partnerships as real estate investment vehicles, and the practical need for them to hold land through trust and agency agreements, this finding was disappointing, but softened by the Court of Appeal's confirmation that it does not matter if the trustee has not actually suffered any loss, since it can claim the loss either directly as its own loss, or as trustee on behalf of the beneficiary.

BC Court of Appeal Confirms Factors to establish an Engineer's Duty of Care & the Enforceability of Limitation of Liability Clauses

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Finally, on the limitation of liability issue, the Court of Appeal overturned the lower court's order that the engineers' liability was contractually limited to its fees on the basis that the question was not suitable for summary determination. The Court of Appeal's decision to hear this issue despite the respondent's argument that the issue had been made moot due to the bankruptcy of the design builder, signals the importance of the Court of Appeal's findings regarding the enforceability of the contractual limitation clauses. The Court of Appeal agreed with the appellants that a full hearing and weighing of the evidence will be required to determine (a) whether the conduct of the engineers at the time they entered into the contract was relevant to whether it would be unconscionable to permit them to limit their liability to the amount of their fees; and (b) whether enforcing the clause would be contrary to public policy, particularly given the important public safety concerns at issue.

It remains to be seen whether it will be necessary in this case for the contractual limitation of liability issue to be argued. However, the Court of Appeal's decision provides helpful confirmation of the factors that will be considered when determining the enforceability of limitation of liability clauses.

Jamrik v. 2688126 Ontario Inc.: What is Adjudication?

LU #169 [2024]

Primary Topic:
XV. Adjudication
Jurisdiction:
Ontario
Authors:
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CanLii Reference:
2024 ONSC 2854

ONTARIO

R. Bruce Reynolds

Sharon Vogel

Jamrik v. 2688126 Ontario Inc.: What is Adjudication?

In *Jamrik v. 2688126 Ontario Inc. ("**Jamrik**")*[1]*, t*he Divisional Court considered whether an adjudicator properly concluded he had jurisdiction to make an order for prompt payment in circumstances where it was argued by Stephen Jamrik ("**Jamrik**" or the "**Applicant**") that the contract was completed such that no notice of adjudication could be delivered. The adjudicator had found that the contract was not "completed" and therefore he had jurisdiction. Section 2(3) of the *Construction Act* defines completion, and the adjudicator applied the formula found in that section based on amounts owing and unpaid, rather than based on the cost to complete the remaining work relative to the overall contract price (in other words, the portion of work yet to be physically completed).

More interestingly, the Court's analysis raises several questions as to the fundamental nature of adjudication and how it should be understood. Below, we examine the implications of this ruling and how it may influence future adjudications in the construction sector, including how it fits within the growing body of Ontario case law on adjudication. In addition, we consider how *Jamrik* impacts the way adjudication is understood as compared to other forms of dispute resolution.

Background

Jamrik engaged 2688126 Ontario Inc., operating as Turnkey Construction ("**Turnkey**" or the "**Respondent**"), to act as contractor for a residential construction project. Disputes arose regarding payment for the work performed. Specifically, Turnkey claimed that Jamrik had withheld a significant portion of the contract price even though the work was performed. Turnkey therefore commenced an adjudication under the *Construction Act* (the "***Act***"), seeking an order for payment of the allegedly outstanding amounts.[2]

The adjudicator decided in Turnkey's favour, ordering Jamrik to pay $564,812.87. The adjudicator found that he had jurisdiction to make this order on the basis that the contract had not been "completed" within the meaning of the *Act* because more than 1% of the contract price remained unpaid. The adjudicator concluded that since the *unpaid* amount exceeded the 1% threshold stipulated in Section 2(3) of the *Act*, the contract could not be considered complete, thus allowing the adjudication to proceed.[3]

Jamrik applied for judicial review, arguing that the adjudicator lacked jurisdiction to make the order, as the contract had already been "completed" under the *Act*. According to Jamrik, the adjudicator's interpretation of

[1] 2024 ONSC 2854 ["*Jamrik*"].
[2] *Ibid* at paras 1.
[3] *Ibid* at para 2.

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"completion" was flawed because it conflated the physical completion of the contracted work with unresolved payment disputes, which was contrary to established legal principles.

A crucial point in Jamrik's argument was that the adjudicator had made this determination without seeking submissions from either party on the specific issue of contract completion. The adjudicator independently decided that the outstanding payment amount was sufficient to deem the contract incomplete, without giving the parties an opportunity to make submissions regarding the proper interpretation of section 2(3) of the *Act*. This, Jamrik argued, led to an improper assumption of jurisdiction by the adjudicator and ultimately resulted in an invalid order for payment.[4]

Conversely, Turnkey maintained that the unpaid amount indicated that the contract was not complete, and that the adjudicator's interpretation aligned with the intent of the *Act*'s prompt payment provisions. These provisions are designed to ensure that contractors receive timely payment for work performed, and Turnkey argued that the adjudicator's decision was consistent with this legislative intent.

Inasmuch as an adjudicator has no jurisdiction once the contract has been completed, the central issue before the Court was therefore whether the contract had been "completed" under section 2(3) of the *Act*, which defines completion based on the remaining value of uncompleted work rather than on the existence of payment disputes. As the Divisional Court put it, "The principled basis for interim payment determinations through adjudication disappears once a contract is completed."[5] Jamrik's challenge centered on the argument that the adjudicator's failure to apply the correct legal principle resulted in an erroneous assumption of jurisdiction.

The Divisional Court's Decision

The Divisional Court granted Jamrik's application, taking issue with the adjudicator's decision on several grounds.

First, the Court agreed that the adjudicator had conflated the concept of physical completion of work with the existence of unresolved payment disputes. Section 2(3) of the *Act* clearly distinguishes between the two, with the completion of a contract being tied to the actual performance of the contractual obligations (i.e. physical completion of work), rather than to the payment disputes that may arise after the work is performed.[6]

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[4] *Ibid* at para 6.
[5] *Ibid* at para 23.
[6] *Ibid* at para 3.

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The Court also observed that the adjudicator did not consider well-established jurisprudence that consistently interpreted contract completion as referring to the actual work required under the contract, rather than the state of accounts between the parties. In previous cases, such as *Wood Lumber Co. (Ontario) Ltd. v. Eng*,[7] Ontario courts confirmed that the physical completion of work marks the point at which a contract is deemed completed, setting the ultimate timeline for the preservation of construction liens. The adjudicator's departure from this standard was an error, leading to an incorrect assumption of jurisdiction.

The Court further noted that the adjudicator's decision was brief and did not include a thorough analysis of whether any contract work remained uncompleted, or the actual value of such work. This omission was critical, as it precluded the Court from reviewing whether the contract had indeed been completed or if any outstanding work warranted the continuation of the adjudication process.[8]

Moreover, the Court rejected the notion that the adjudicator was free to disregard established case law when interpreting statutory provisions such as those found in the *Construction Act*. On this point, the Court (1) highlighted the importance of consistency in legal interpretations, particularly in areas as complex and financially significant as construction, and (2) emphasized that the adjudicator had decided jurisdiction on an unargued point.

Given these findings, the Court found that the adjudicator's decision could not stand. The entire matter was remitted for a fresh adjudication before a different adjudicator, so that the issues would be considered under the correct legal framework and with proper factual findings.[9]

Commentary

Jamrik highlights several key points for consideration with respect to how adjudication fits in the broader context of other forms of dispute resolution, as well as the applicable standard of review for adjudication determinations.

First, the Court made the interesting observation that adjudicators are *bound* to follow decisions from the Divisional Court and the Court of Appeal, but that Superior Court decisions – including those from associate justices (formerly known as masters) – are only *persuasive authorities* that adjudicators "would be well advised to consider". Although not explicitly stated, it

[7] 1999 CanLII 15030 (ON SCDC).

[8] *Jamrik*, *supra* note 1 at paras 10-14.

[9] *Ibid* at para 24.

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LU #169 [2024]

Primary Topic: XV. Adjudication
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Jamrik v. 2688126 Ontario Inc.: What is Adjudication?

appears that the rationale for such an observation may have been the implicit proposition that adjudication is somehow co-equal with a court of first instance.

However, such a proposition is challenging insofar as it arguably implies that adjudicators are *not* bound by Superior Court case law, unlike arbitrators, which would seem to undermine the Court's reference in *Jamrik* to the adjudicator's deviation from the applicable case law (much of which was from the Superior Court).

In other words, if the adjudicator was not bound to apply Superior Court case law, then it arguably could not have formed a basis for finding that he erred on the jurisdictional issue (although on the other hand, if a future Court were performing judicial review of a similar situation, it would presumably have to treat *Jamrik* as persuasive authority as well).[10] Furthermore, if adjudicated determinations are co-equal with Superior Court decisions, then it also raises the question of whether a determination is or can be binding on subsequent adjudications (a proposition which is itself challenging given that determinations are not published, although other court decisions have indicated they should be[11]).

On balance, the authors are therefore of the respectful view that *if* precedent is to be considered binding on adjudicators, then Superior Court decisions ought to be considered controlling authority for adjudications. Having said this, it is difficult to support the full applicability of the principles of precedent considering (1) the interim binding nature of adjudication, (2) the fact that adjudicators need not be lawyers, and (3) the proposition that an adjudicator has the "right to be wrong" on substantive points of law. On the latter point, adjudication is similar to arbitration, insofar as an error of law will not be a basis for challenging an arbitral award where (1) there is no right of appeal and (2) the error does not go to jurisdiction. In that regard, a non-jurisdictional error of law in an adjudication cannot form the basis of an application for judicial review, as the parties will instead have recourse to litigation or arbitration.

In any event, this issue highlights a further, significant question of where adjudication conceptually fits in relation to other forms of dispute resolution such as arbitration, expert determination, and administrative tribunals, along with how this impacts the standard of review applicable to adjudicated determinations.

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[10] However, this point would have been moot insofar as the plain language of the *Construction Act*, along with Divisional Court case law, confirmed he was incorrect.

[11] See *Caledon (Town) v. 2220742 Ont. Ltd. o/a Bronte Construction*, 2024 ONSC 4555 at para 13, fn 1.

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Adjudication was of course drafted to take advantage of non-legal experts' experience and knowledge and apply it to adversarial proceedings in a "rough justice" setting where adjudicators have the "right to be wrong" and are given certain quasi-inquisitorial powers that are not commonly found in arbitration. Furthermore, Ontario courts have already confirmed that adjudication participants are not entitled to the full range of procedural protections that would apply to an arbitration.[12] In that regard, adjudication is dissimilar to arbitration.

On the other hand, however, and as we have written about elsewhere[13], case law has established some procedural guardrails on the adjudication process, and *Jamrik* confirms that adjudications must follow applicable law, notwithstanding its finding that Superior Court decisions are only persuasive authority (as opposed, for example, to proceeding on an *amiable compositeur* or *ex aequo et bono* basis). Similarly, it is clear that adjudicators have the jurisdiction to consider their own jurisdiction[14], just as arbitrators do under the competence-competence principle.

Ultimately, the question of how to think of adjudication may be somewhat academic insofar as adjudication is its own category of dispute resolution, being neither arbitration[15], nor expert determination, nor litigation, nor an administrative tribunal decision; on the other hand, however, the answer may be valuable in considering how to continue developing the growing body of case law on adjudication. Arguably, thinking of it in arbitration terms may import a more robust application of procedural fairness principles, while understanding it as closer to expert determination may result in a more relaxed approach consistent with the underlying "rough justice" nature of adjudication.

For example, and beyond the issues raised above, it appears to remain an open question as to *when* a jurisdictional challenge must be raised in an adjudication – that is, if it needs to be raised at the first available opportunity (as generally required under most institutional arbitration rules), or if it can be raised at a later time as part of the overall briefing of the merits of the dispute (e.g. could a respondent raise the issue as part of their responding submissions at a hearing). Similarly, it is unclear whether an adjudicator would be required to deal with a jurisdictional challenge on a preliminary basis, or whether they could decide the issue simultaneously with the merits of the dispute.

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[12] *Ledore Investments v. Dixin Construction*, 2024 ONSC 598 at para 27.

[13] See, for example, our discussions on statutory adjudication in *MGW Homes Design Inc. v. Pasqualino* and *Arad Incorporated v Rejali et al*.

[14] *Pasqualino v. MGW-Homes Design Inc.*, 2022 ONSC 5632 at paras 21-22.

[15] In that regard, it is notable that the Court referred to the adjudicator as the "Arbitrator" in a handful of instances: see paras 3 and 13.

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The answer to this question is not clear, and the way in which adjudication is understood may influence how readers will consider the answer. Ultimately, the construction industry will need to await further guidance from the courts.

On that point, however, viewing *Jamrik* through an administrative law lens (including with respect to standard of review) further complicates matters, insofar as it is not clear how the standard of review for various issues (including jurisdictional questions) should be determined.

Fundamentally, a party's ability to attack an adjudicated determination is, by design, seriously circumscribed (e.g. no ability to appeal, and narrow grounds of judicial review).[16] In that regard, it is similar to international arbitration, but dissimilar to domestic arbitration. Notably, the case law on appeals from an arbitrator's jurisdictional decision is split on whether the standard of review is correctness or reasonableness[17], while the case law on set-aside applications arising from jurisdictional decisions has confirmed that a correctness standard applies.[18] Applications under s. 17(8) of Ontario's *Arbitration Act, 1991* are similarly reviewed on a standard of correctness.[19]

However, because there are no appeals from adjudication, adjudication cannot be analogized to a domestic arbitral award or an inferior court decision (along with the rules of standard of review that would apply in each case). It could arguably be analogized to an arbitral award in the sense that a dissatisfied party can apply for a court to review a determination – and indeed, the grounds for judicial review of a determination in the Act are inspired by the grounds for set-aside articulated in the *UNCITRAL Model Law*[20] – but adjudication remains distinct from arbitration for the reasons noted above, as well as the fact that the *Construction Act* specifically refers to **judicial review** of a determination (a term more commonly used in the administrative law context).

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[16] *Construction Act*, RSO 1990, c C.30 at s. 13.18(5).
[17] See, for example, *Parc-IX Limited v. The Manufacturer's Life Insurance Company*, 2021 ONSC 1252 at para 37.
[18] In the context of international arbitration, see *The Russian Federation v. Luxtona Limited*, 2018 ONSC 2419 at para 23, citing *Mexico v. Cargill, Incorporated*, 2011 ONCA 622 at para. 48. In the context of domestic arbitration, see *Smyth v. Perth and Smiths Falls District Hospital*, 2008 ONCA 794 at paras 13-17; however, the Court in *Smyth* relied entirely on case law regarding the standard of review on *appeals* to decide the standard that would apply to set-aside applications, despite the fact that these are two distinct forms of review.
[19] *PCL Constructors v. Johnson Controls*, 2022 ONSC 1642 at paras 18-24.
[20] See R. Bruce Reynolds, *Construction Law Letter* (36:3), "The Enforceability of the Adjudicator's Determination and the Potential for Judicial Intervention: Quite a Hill to Climb", at p. 9.

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Ontario

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Jamrik v. 2688126 Ontario Inc.: What is Adjudication?

It is therefore necessary to square the intentionally narrow scope of judicial review for adjudication with the Court's conclusion that legal aspects of jurisdictional questions are to be reviewed on a correctness standard (while factual aspects attract deference). In that regard, the Court appears to have treated the adjudicator's determination as akin to a lower court decision, and judicial review of the determination as akin to an appeal, at least insofar as it concluded that a question of law was subject to a correctness standard while a question of fact was subject to a reasonableness standard (in the arbitral context, presumably the entire jurisdictional issue would have been reviewed on a correctness standard).

In addition, the *Jamrik* Court cited a decision that was released **after** *Jamrik* (being *Caledon (Town) v. 2220742 Ont. Ltd. o/a Bronte Construction*, 2024 ONSC 4555, which we have discussed elsewhere), which itself cited *Anatolia Tile & Stone Inc. v. Flow-Rite Inc.,* 2023 ONSC 1291. However, the Court in *Anatolia* only went to far as to state as follows:

> **It is in the jurisdiction of an adjudicator to decide whether a claim is properly brought under the Construction Act.** Thus, for example, an argument that services or materials provided by a claimant are not lienable (because, for example, they do not constitute an "improvement" to "premises"), that a claim for lien is out of time, or that the contract in issue "is invalid" or has "ceased to exist", are within the jurisdiction of an adjudicator to decide, and **an adjudicator's decision on these issues is reviewed in this court on a standard of reasonableness**. An adjudicator does not "lose jurisdiction" if they "err" on these points: **only where an adjudicator's decision is "unreasonable" would this court intervene.**[21] [emphasis added]

Accordingly, it appears that the Court in *Anatolia* only went so far as to discuss circumstances where an adjudicator is called upon to consider questions of mixed fact and law as they related to jurisdiction. It therefore does not appear that *Anatolia Tile* actually stands for the proposition upon which the Court indirectly relied in *Jamrik*.

Another interesting alternative is the possibility that, viewed through an administrative law lens, statutory adjudication may be analogous to an administrative tribunal, at least insofar as both share the use of judicial review as a form of limited court intervention and do not allow appeals (notably the Divisional Court is the exclusive forum for judicial review in both cases).

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[21] *Anatolia Tile & Stone Inc.* v. *Flow-Rite Inc.*, 2023 ONSC 1291 at para 7.

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To the extent that statutory adjudication is at all analogous to an administrative tribunal under Canadian law (which proposition is highly debatable, insofar as adjudication is arguably *sui generis*), the governing case law would suggest a deferential standard of review. Specifically, and as readers will recall, the Supreme Court in Canada (*Minister of Citizenship and Immigration) v. Vavilov,* 2019 SCC 65 confirmed that with respect to administrative tribunals, there is a presumption that the standard of review will be reasonableness. That presumption can be rebutted in two circumstances:

- where the legislature makes it clear in the applicable legislation that a different standard applies (which is not the case in the *Construction Act*); and
- where the rule of law requires that the standard of correctness be applied. This will be the case for certain categories of legal questions, such as (1) constitutional questions, (2) general questions of law of central importance to the legal system as a whole, and (3) questions related to the jurisdictional boundaries between two or more administrative bodies. At first blush, none of these questions would seem to apply to adjudication.

Thus, it appears that the reasonableness standard would arguably apply to jurisdictional questions in adjudication. To the extent that an adjudicator reaches an incorrect conclusion on a point of law – which conclusion is, of course, only **interim** binding – it remains open to the parties to revisit the issue in arbitration or litigation (or whatever other forum is called for by their construction contract).

However, adjudication is also decidedly *not* an administrative tribunal in other respects – including that the parties can choose their adjudicator and can tailor the applicable procedure in consultation with the adjudicator – such that it is unclear how relevant the administrative standard of review is to adjudication.

Accordingly, the authors are also of the respectful view that this issue – as well as further judicial consideration of the fundamental nature of statutory adjudication – would benefit from further, more comprehensive appellate consideration at a first-principles level. On the one hand, requiring that jurisdictional issues be decided correctly would establish clear boundaries for adjudicators and encourage consistency with the *Act*, thus delivering greater predictability. On the other hand, though importing a more legalistic approach would arguably require adjudicators to have a greater degree of legal expertise, potentially discouraging parties from using non-lawyers as adjudicators (and thus depriving parties of their practical expertise). On balance, the authors favour the reasonable standard regarding jurisdictional challenges in adjudication.

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Finally, without further guidance, it would seem there is a risk that dissatisfied adjudication participants may be incentivized to package their complaints about a determination as legal questions as to jurisdiction, arguably creating a quasi-appeal route where none was intended. Needless to say, this would introduce significant delays into a process that was intended to be swift.

In view of all the foregoing, *Jamrik* highlights the ongoing importance of enhanced adjudicator education, and the need for continued development of the case law on adjudication.

Case Law Roundup—Judicial Review of Adjudication Determinations in the Ontario Divisional Court

LU #169 [2024]

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Case Law Roundup—Judicial Review of Adjudication Determinations in the Ontario Divisional Court

In the past year, there have been several decisions of the Ontario Divisional Court which address applications for judicial review of an adjudicator's determination. The first of these, released in January 2024 by the Ontario Divisional Court (*Ledore Investments v. Dixin Construction*),[2] set the stage and provided guidance on the circumstances in which judicial review of adjudication determinations may be successful.

Specifically, in *Ledore,* the Ontario Divisional Court found that procedural fairness is a valid ground for judicial review and confirmed that this includes the right of any party to an adjudication to be heard on the determinative issues in that adjudication. In the months that followed, there have been several more cases released by the Ontario Divisional Court that have provided further guidance in this growing area of jurisprudence.

(A) Caledon (Town) v. 2220742 Ont. Ltd. o/a Bronte Construction

How will the transition provisions under the Act relating to the application of adjudication be applied when a "contract" or "subcontract" is in respect of more than one improvement?

In *Caledon (Town) v. 2220742 Ont. Ltd. o/a Bronte Construction*,[3] the Ontario Divisional Court addressed an application for judicial review which focused on an adjudicator's jurisdiction. Section 13.18(5)3 of the *Construction Act* (the "**Act**") expressly sets out that the determination of an adjudication may be set aside on an application for judicial review if the applicant establishes that the determination was of a matter that *may not be the subject* of an adjudication under the Act.

In this case, Caledon sought judicial review of an adjudication determination granting Bronte's claim on the basis that the adjudicator lacked jurisdiction to address the claim because the transitional provisions under the Act excluded the improvement at issue from adjudication. The Divisional Court allowed the application in part, and the adjudicator's determination was varied to exclude Bronte's claims in respect of one of two improvements.

[1] The authors would like to acknowledge and thank Neil Maatta, an articling student at Osler, Hoskin & Harcourt LLP, for his assistance with this article.

[2] *Ledore Investments v. Dixin Construction,* 2024 ONSC 598 [*Ledore*]. See also Osler, Hoskin & Harcourt Construction and Infrastructure Law in Canada Blog post dated April 16, 2024 titled "Judicial review of adjudicator's determination granted by Ontario Divisional Court" authored by P. Ivanoff, L. Bruschetta and S. Livshits.

[3] *Caledon (Town) v. 2220742 Ont. Ltd. o/a Bronte Construction*, 2024 ONSC 4555 [*Caledon*].

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Background

Caledon entered into a contract with WSP for design, contract administration and site inspection services relating to the clean-up of wastewater pond (#7), and a second, similar contract with Matrix for another wastewater pond (#14). Subsequently, Caledon entered into a contract with Bronte for construction works for the clean-up of both wastewater ponds (#7 and #14).[4] Bronte performed work under its contract with Caledon until that contract was terminated by Caledon. The parties disagreed on what Bronte was owed up to the date of termination, and Bronte delivered a notice of adjudication to Caledon seeking $145,000.

Caledon responded to the notice of adjudication by challenging the jurisdiction of the adjudicator based on transitional provisions in the Act, and in the alternative, disputing the claim on the merits.[5] In a preliminary jurisdictional ruling (i.e., the jurisdiction decision), the adjudicator found he had jurisdiction over the claims, and in a final determination (i.e., the merits decision), the adjudicator awarded Bronte $93,445.92.[6]

Section 87.3 of the Act - The Transitional Provisions

Section 87.3 of the *Act* dictates which version of construction legislation applies to a dispute: the new Act or its predecessor, the *Construction Lien Act*. These are known as the transitional provisions. The adjudication provisions of the Act, which grant adjudicators jurisdiction, only apply where "a procurement process for the improvement" (emphasis added) that is the subject of the contract was commenced after October 1, 2019.[7]

The Divisional Court's Decision

The Divisional Court confirmed (as had been previously addressed by Associate Justices Robinson and Wiebe in earlier decisions)[8] that under the transitional provisions of the Act, jurisdiction to conduct an adjudication is determined on an improvement-by-improvement basis, so that all claims arising from an improvement are subject to the same version of the Act.[9]

When a "contract" or "subcontract" is in respect to more than one improvement (as was the case here), however, the Divisional Court noted there

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[4] *Caledon*, at para. 11.

[5] *Construction Act*, R.S.O. 1990, c. C.30.

[6] *Caledon*, at paras 12 – 13.

[7] *Ibid*., at paras 8 – 9.

[8] See *Crosslinx Transit Solutions Constructors* v. *Form & Build Supply (Toronto) Inc.*, 2021 ONSC 3396, and *DNR Restoration Inc.* v. *Trac Developments Inc.*, 2023 ONSC 1849.

[9] *Caledon*, at para. 51.

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were several practical interpretive options that could prevail. Ultimately, to achieve the goals of the Act, the Divisional Court held that the "contract" or "subcontract" may be subject to different versions of the Act, with respect to different improvements.[10] The Divisional Court noted that this may create some complications in addressing claims relating to "contracts" or "subcontracts" in respect of more than one improvement; however, the Divisional Court noted that these complications may be rather inconsequential (as was reflected in the adjudicator's merits decision in this case).

Applying the above to the facts at hand, the Divisional Court noted that the contract between Bronte and Caledon was entered into after October 1, 2019, but the central question was whether a procurement process for the contract's subject matter (i.e., the work relating to wastewater ponds #7 and #14, respectively) was commenced before that date.[11] The Court found that under the Act, the concept of "improvement" is tied to the land. Improvement and contract are not co-extensive, as different persons can undertake different work under different contracts, for the same improvement.[12] Contracts are not in respect to distinct improvements because the works described in the contracts are distinct – the question is whether the works are in respect to the same improvement to the same lands.

Accordingly, the Divisional Court found that in respect to pond #7, WSP contracted for the design, contract administration and site inspection of the clean out of wastewater pond #7, and Bronte contracted to do the clean out work. This was a "repair to the land" within the meaning of the definition of "improvement" under the Act. The procurement process for the WSP contract relating to wastewater pond #7 was commenced before October 1, 2019, and was not subject to the adjudication provisions of the Act by operation of the transition provisions, and therefore, the Bronte contract in respect of the works done on wastewater pond #7 was similarly excluded from the adjudication provisions of the Act.

On the other hand, with respect to pond #14, the Divisional Court concluded that the procurement process for the Matrix contract commenced on March 24, 2020. The portion of the Bronte contract relating to wastewater pond #14 was in respect to the same improvement that was the subject matter of the Matrix contract (not the WSP contract, as found by the adjudicator), and therefore the adjudication provisions of the Act did not preclude adjudication of any claims in respect of wastewater pond #14, including claims arising under the Bronte contract.[13]

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[10] *Ibid*., at paras 27 – 29.
[11] *Ibid*., at para. 30.
[12] *Ibid*., at para. 33.
[13] *Ibid*., at para. 36.

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As noted above, the Divisional Court's analysis required a factual finding (not addressed by the adjudicator) that the wastewater ponds at issue were on different lands. This analysis had not been addressed before the adjudicator; therefore, the Court gave the parties the opportunity to provide written submissions to this effect, and ultimately concluded that they were.[14]

The Divisional Court also addressed other arguments raised by Caledon to challenge the adjudicator's determination, including the assertion that the adjudicator's determination breached procedural fairness on the basis that it was substantively unreasonable because it did not accord with the evidence and the adjudicator failed to explain his conclusion. Ultimately, the Divisional Court found that this was *not* a procedural fairness argument. It was an argument that the adjudicator's decision was substantively unreasonable, and therefore the Divisional Court had no basis under section 13.18(5)5 of the Act to intervene. Importantly, the Divisional Court commented that "this Court will not recharacterize non-procedural arguments as procedural arguments to expand the scope of judicial review prescribed in section 13.18(5)".[15]

Takeaways

This decision illustrates the significance of dates of procurement processes under *Act* as it relates to the application of adjudication under the transition provisions under the Act and underscores the importance of correctly interpreting how that could apply when a "contract" or "subcontract" is in respect of more than one "improvement". The Divisional Court also provided further guidance on the limits of procedural fairness in the context of an application for judicial review of an adjudicator's determination under section 13.18(5) of the Act. The Divisional Court has firmly held that it will not recharacterize non-procedural arguments as procedural ones to expand the scope of judicial review under the Act.

(B) Blackstone Paving and Construction Ltd. v. Barrie (City of)

What is the test that the Divisional Court will apply to applications for judicial review based on procedural fairness?

In *Blackstone Paving and Construction Ltd. v. Barrie (City of)*,[16] the Divisional Court addressed an application for review of two adjudication determinations based on procedural unfairness. In so doing, the Divisional Court

[14] *Ibid.,* at paras. 38-42.

[15] *Ibid.,* at paras. 62 – 63.

[16] *Blackstone Paving and Construction Ltd. v. Barrie (City of),* 2024 ONSC 4556

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squarely addressed the statutory test that will be applied, as well as the standard of review.

In this case, Blackstone applied for judicial review of two adjudication determinations on the basis that the City of Barrie had failed to comply with section 6.4(2) of the Act (relating to the issuance of Notices of Non-Payment ("NONP")). Ultimately, the Divisional Court dismissed the application, finding the threshold question for procedural fairness (i.e., whether the procedures followed in the adjudication accorded with the procedures to which the adjudication was subject under the Act) had not been met under the statutory test for judicial review.

Background

The application arose in the context of an ongoing payment dispute between Blackstone and the City of Barrie. Blackstone argued that the City had improperly raised issues and arguments in its written submissions to the adjudicators that ought to have been identified in its NONP.

Specifically, Blackstone argued that the City was required to identify all of its reasons for non-payment in its NONP pursuant to section 6.4(2) of the Act, and that its non-compliance with this provision of the Act was procedurally unfair, because when Blackstone sought to address what it argued were new issues raised by the City in its responding materials, both adjudicators refused to permit Blackstone the opportunity to deliver reply submissions – and in Blackstone's submission, this meant it never had the opportunity to respond to these purportedly new issues.[17]

Section 6.4(2) of the Act – Notices of Non-Payment

Section 6.4(2) of the Act addresses the requirements for an Owner who wishes to dispute a proper invoice. An Owner may only refuse to pay all or any portion of an amount payable under a proper invoice within the timelines under the Act if, no later than 14 days after it receives the proper invoice from the Contractor, the Owner gives the Contractor a NONP in the prescribed form and manner under the Act. As noted by the Divisional Court, section 6.4(2) of the Act expressly requires that a NONP "[detail] all of the reasons for non-payment".

The Divisional Court's Decision

The Divisional Court was not persuaded by Blackstone's arguments in this case. First, the Divisional Court took the opportunity to re-state the conjunc-

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[17] *Ibid*., at paras 5 – 6.

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tive statutory test for procedural unfairness under section 13.18(5)5 of the Act:[18]

a. The first question is whether the procedures followed in the adjudication accord with the procedures to which the adjudication was subject under the applicable Part of the Act;
b. If the answer to this question is No, then the second question is whether the failure to follow the prescribed procedures prejudiced the applicant's right to a fair adjudication.

The Divisional Court then went on to confirm that the standard of review for questions of procedural fairness is "fairness" or "correctness". Findings of fact are reviewed on a standard of reasonableness, and while this principle applies to factual findings related to procedural fairness issues, the requirements of procedural fairness, considering the facts, as found, is to be assessed on a "correctness" or "fairness" standard, applying the test set out in section 13.18(5)5 of the Act.

Having set out the framework to be applied, the Divisional Court went on to find no basis on which to interfere with the adjudicator's determinations in this instance. First, the Divisional Court found no error with the adjudicator's determination that any alleged "typographical errors" in the City's NONP (which Blackstone had argued vitiated the NONP) did not amount to non-compliance with section 6.4(2) of the Act. Further, even if they had, Blackstone had established no prejudice arising from this non-compliance, and the Divisional Court therefore gave no effect to this argument.[19]

Second, the Divisional Court found no error with the adjudicator's reasoning relating to the alleged failure to identify all reasons for non-payment in the NONP at issue. Blackstone had argued that the City's NONP did not include "all of the reasons for non-payment" and specifically did not "detail" the City's claims for set-off and liquidated damages. These "undetailed" claims were the principal basis upon which the adjudications were decided against Blackstone. The City disagreed – arguing that it simply provided "elaborations" of the reasons given in its NONP.

While neither adjudicator expressly resolved this issue, it was apparent to the Divisional Court that both had implicitly accepted that the City did no more than "elaborate" on reasons already given in its NONP. The Divisional Court was similarly satisfied that this implicit finding was available on the record before each of the adjudicators in this case. The Divisional Court did not fault the adjudicators for dealing with this issue in the manner that they did. As a result, the Divisional Court deferred to the adjudicator's findings that there was no breach of section 6.4(2) of the Act, and it therefore fol-

[18] *Ibid*., at para. 3.
[19] *Ibid*., at para. 8.

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lowed that Blackstone had not met the first branch of the conjunctive statutory test for procedural unfairness under section 13.18(5)5 of the Act.[20]

Third, the Divisional Court found no error with the adjudicators' decision to not permit reply submissions in the adjudications. All parties had agreed on a process for the exchange of materials, and no provision was made in that process for reply submissions. Each adjudicator had considered Blackstone's request for reply submissions, and both had indicated that they did not require them to dispose of the adjudications. In so doing, the adjudicators noted that many of the concerns behind the request for reply submissions were in respect to issues that were not properly before them. The Divisional Court held that the adjudicators' decisions in this regard were not inconsistent with the processes prescribed by the Act, or the process agreed to by the parties themselves. Again, it followed that Blackstone had not met the first branch of the conjunctive statutory test for procedural unfairness under section 13.18(5)5 of the Act.[21]

Takeaways

This decision emphasizes that establishing procedural unfairness in an application for judicial review of an adjudicator's determination is a high threshold to meet. It also demonstrates that parties to an adjudication do not have an absolute right to reply submissions under the Act. If parties wish to strengthen the ability to argue they should be permitted to deliver reply submissions, they may wish to make express the requirement that they be permitted to do so in any procedures and/or processes addressed in their contracts relating to the conduct of an adjudication.

Conclusion

These decisions highlight the challenges that parties may face as they continue to navigate the right to seek judicial review of adjudication determinations. The decisions suggest that the Divisional Court is not seeking to broaden the right to judicial review. Parties must establish valid grounds and meet the statutory requirements before they will gain access to the Courts and an opportunity to revisit any adjudication determination.

With that said, the decisions also serve as a reminder to adjudicators of the limits of their jurisdiction and the requirement to ensure they adhere to principles of procedural fairness. Adjudicators are not permitted to ignore caselaw, or the parties' right to be heard on material issues before them. They should carefully consider jurisdictional issues, correctly interpret and apply legislation, and follow established caselaw and precedent. It remains to be seen how the Divisional Court will continue to address future applications for judicial review, but in the meantime, parties would be wise to incorporate these lessons as they move forward.

[20] *Ibid*., at paras. 9—12.

[21] *Ibid*., at paras. 13—15.

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