

Adjudication: Efficient, Informal, and Most of All, Fair

February 2, 2024

By and Dylan Dilks

The Divisional Court recently provided guidance to parties and adjudicators with respect to how an adjudication under the *Construction Act* [\[1\]](#) should be conducted.

Adjudications are generally subject to the procedures set out in Part II.1 of the *Construction Act*, which may include procedures provided for in the contract or subcontract between the parties. [\[2\]](#)

An adjudicator has a range of broadly defined powers [\[3\]](#) and may conduct the adjudication as he or she determines appropriate in the circumstances. [\[4\]](#)

In [Ledore Investments and Dixin Construction](#) [\[5\]](#), Ledore, a subcontractor, carrying on business as Ross Steel, submitted three invoices to Dixin, the general contractor. Dixin, in turn, did not pay those invoices, despite receiving payment from the owner. Dixin did not deliver a notice of non-payment with respect to any of the three invoices.

Ross Steel then commenced an adjudication to seek payment of the three invoices in lieu of the failure to provide any notice of non-payment.

The adjudicator delivered his determination, but that determination was ultimately based on issues not raised by the parties in their submissions. The adjudicator concluded that because Dixin did not deliver a “proper invoice” to the owner, the prompt payment provisions of the *Construction Act* did not apply, and denied Ross Steel's claim.

Ross Steel then sought a judicial review of the determination on the basis that the procedure of the adjudication was unfair because it was not given an opportunity to be heard on the key issue that determined the outcome. [\[6\]](#)

The Divisional Court agreed.

The Divisional Court held that it is fundamentally unfair for an adjudicator to reach a conclusion in a proceeding based on an issue that has not been pleaded by a party to the proceeding.

While adjudications under the *Construction Act* are “interim binding,” the determinations flowing therefrom are important to the parties involved. That adjudications are designed to be efficient – a fast and informal process [\[7\]](#) – does not preclude the adjudicator from requesting further written submissions on a key issue. In fact, the *Construction Act* expressly authorizes an adjudicator to conduct the adjudication as he or she determines appropriate in the circumstances.

In the end, the Divisional Court remitted the matter back to the adjudicator to hear submissions from the parties about the “proper invoice” issue.

Takeaway

Complaints about the adjudication process are on the rise. Fairness is fundamental to dispute resolution, even where the purpose of the process is meant to be fast, efficient, and informal. In most adjudications, parties are afforded the ability to propose an appropriate process, and this decision highlights the importance of proposing a fair adjudication process at the outset.

If you are a contractor or subcontractor requiring adjudication assistance, contact a member of the team at WeirFoulds.

The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.

[1] [Construction Act, RSO 1990, c. C. 30](#)

[2] [s. 13.6\(1\)](#)

[3] [s. 13.12\(1\)](#)

[4] [s. 13.12\(4\)](#)

[5] [Ledore Investments v. Dixin Construction, 2024 ONSC 598](#)

[6] It should be noted that the Construction Act does not allow for an appeal on the merits of a determination, but only allows the determination to be set aside under limited grounds related to questions of whether or not the process was fair.

[7] [Anatolia Tile & Stone Inc. v. Flow-Rite Inc., 2023 ONSC 1291](#) at para. 4

For more information or inquiries:

Toronto

Email:

WeirFoulds^{LLP}

www.weirfoulds.com

Toronto Office

4100 – 66 Wellington Street West
PO Box 35, TD Bank Tower
Toronto, ON M5K 1B7

Tel: 416.365.1110
Fax: 416.365.1876

Oakville Office

1320 Cornwall Rd., Suite 201
Oakville, ON L6J 7W5

Tel: 416.365.1110
Fax: 905.829.2035

