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IN THIS ISSUE

Lessons on expert evidence in defending construction delay claims from *Walsh Construction v. TTC & Ors*, 2024 ONSC 2782

Expert evidence can be the difference between winning or losing millions. In *Walsh Construction Company of Canada v. Toronto Transit Commission*, 2024 ONSC 2782, TTC learned this the hard way. Justice Hood's mammoth 849-paragraph judgment was a full construction law syllabus dealing with issues of scope change, subcontractor flowthroughs, delay and more. This article explores the parts of that judgment concerning delay claims, in general, and the necessity for expert evidence on quantum when defending a delay claim, in particular.

Key Takeaways

- Delay claim defendants should obtain their own expert schedule analysis evidence. Mere critique of the plaintiff's expert's findings runs the risk of an all-or-nothing result.
- An expert's involvement in the contractor's prior claims on the same project is not incompatible with that expert's independence before the court. It does not, on its own, give rise to bias.
- Experts that display dogmatism or stubbornness risk damaging the court's perception of their credibility and independence.

The case

TTC hired Walsh to build the Steeles West Subway Station in September 2011. The contract price was $166 million with a scheduled substantial performance date of November 5, 2014, that is, 1,154 days from award of the contract.

To say the project was delayed is an understatement. Substantial performance was achieved 953 days late, on June 15, 2018. The revenue service date was also 1,047 days late, and contract completion was 1,372 days late.

TTC accepted that it caused 411 days of delay and certified an increase of $57 million to Walsh's contract price, however, it refused to accept responsibility for the balance of 636 days of delay.

As is typical, each party blamed the other for the balance of the delay. Walsh claimed the delay was all caused by TTC. They claimed $193 million under 23 heads of damages, $19 million of that consisting of direct delay damages. TTC counterclaimed for $22 million in liquidated damages against Walsh for missing certain contractual milestones. TTC's argument amounted to saying that delays are to be expected in a project of this size and complexity, and responsibility should be shared between it and Walsh.

The parties' stances on how the judge should address the gulf between them was also at odds. Walsh took the position that the court could find the number of days of TTC-caused delay was between the 411 days which TTC admitted and the 1,047 days Walsh claimed. TTC went for all or nothing. They argued that the court could not find another number of days, it was 1,047 or 411, nothing in between.

With both sides pointing fingers, the question of who was truly at fault for the delays came down to each party's expert testimonies.

Walsh's evidence

Walsh relied primarily on the evidence of their delay analyst, Richard Ott. Mr. Ott had a history of being retained by Walsh, including during the project, when he prepared a time impact analysis used by Walsh in its claims for delay. Notably, there was no question on whether Mr. Ott's fee was contingent upon success. Mr. Ott testified that he investigated over 780 TTC-related change conditions to see how each affected Walsh's work and the critical path using the software, Primavera. He assumed Walsh was responsible for all delay unless the analysis showed that TTC was responsible. He reviewed data from the project documentation including RFIs, RFQs, CDs, NOICs, Walsh's schedules, TTC's schedules, correspondence, daily reports, and meeting minutes. He also testified that he looked for concurrencies. The result of his analysis was that Walsh was entitled to a total of 1,047 days of compensable time extension.

Walsh also retained a second expert who rebutted TTC's criticism of Mr. Ott's methodology.

TTC's evidence

After initially seeking an order for the court to refuse Walsh's expert's qualifications and then backing down from that approach, TTC settled on challenging Mr. Ott's independence. They argued that he was part of Walsh's team since he had a history of being retained by Walsh.

Importantly, TTC did not retain an expert to perform its own delay analysis. Instead, TTC's expert limited his opinion to critiquing Mr. Ott's methodology, alleging that Mr. Ott's delay analysis was faulty because Walsh's project schedules were erroneous, Mr. Ott departed from the recommended practice, and there were logic errors in his analysis.

Justice Hood's decision on delay

Justice Hood accepted Mr. Ott's opinion that Walsh was entitled to 1,047 compensable days of delay; all the delay was TTC's fault and all of it was compensable. The court awarded Walsh $58 million in damages (the shortfall being largely the result of the court's rejection of flow throughs from subcontractors) and dismissed TTC's counterclaim.

First – TTC's allegations of bias. Justice Hood accepted that an expert's bias could go to the weight of their testimony. But he did not consider the fact that Mr. Ott had been previously retained by Walsh to be determinative of bias. It was not unusual for an expert to analyze work during construction and continue with the analysis if litigation ensued.

Second – the substantive issues of liability for the delay and the quantum of the delay.

Justice Hood summarized the relevant construction law principles, as follows:

1. Delay is categorized as (1) excusable or non-excusable, and (2) compensable or non-compensable. Non-excusable delay is delay for which the Contractor is not entitled to any time extension or compensation because it is a delay within its control. Excusable delay is generally viewed as delay that is beyond the Contractor's control and for which it may be entitled to compensation.

2. Concurrent delay for which the Contractor is responsible would make excusable delay non-compensable.

3. It's important to consider whether the delay is on the project's "critical path": the series of connected tasks that define the minimum overall duration for completion of a project, also known as the "longest path".

4. For the Contractor to be compensated for delay, it must prove on a balance of probabilities that the delay was the sole responsibility of the Owner, was on the critical path, and without concurrent delay. (This was TTC's argument, apparently undisputed by Walsh or the court.)

The court held that the delays were TTC's responsibility because they arose out of design issues, and design was TTC's responsibility. Contrary to what was said by TTC at the time of awarding the contract, the design was not complete. This resulted in a very large number of Requests for Information ("RFIs") and Change Directives as well as excessive delays by TTC in responding to the RFIs. Justice Hood was of the view that the large number of RFIs were a telltale sign that the delays originated from TTC, not Walsh. Justice Hood also decided that TTC's position, that it was only responsible for 411 days of delay, was based on some faulty analysis, as had been acknowledged in cross-examination.

Having accepted that the delay was the TTC's fault, Justice Hood turned next to consider the number of compensable days of delay. According to Justice Hood, the Court was in "no position to determine the amount of compensable delay on its own; it does not have the expertise to do so." [86] In a massive project like this there were a multitude of moving parts. Delay events might be closely intertwined, overlapping, concurrent or not concurrent, excusable or non-excusable, and on or off the critical path. The court needed the assistance of delay experts to quantify the number of days of delay for which a party might be entitled to compensation.

The decision hinged on whether the court should accept Mr. Ott's evidence or not. Justice Hood stated plainly that, "I am left with only one expert opinion as to the amount of compensable delay, with two conflicting expert opinions as to whether the methodology used by the first expert was appropriate." [123] Justice Hood lamented that the differing experts from both sides were eminently qualified and delay analysis methodology is "completely foreign" to him, yet he was tasked with "having to conclude whose opinion to accept on matters that these three experts have spent their life studying." [130]

In deciding which expert's evidence to prefer, he compared each expert's attitude and approach to answering during cross-examination. He contrasted the patience and straightforwardness of Walsh's expert, Mr. Ott, with TTC's expert's dogmatism

and resistance to being challenged. He concluded that TTC's expert was more prone to advocacy, and so he preferred Mr. Ott.

Lastly, Justice Hood reiterated that Mr. Ott was the only expert who actually performed a delay impact analysis and provided an actual opinion on the compensable time extension. "If TTC had presented its own delay impact analysis, then I would have been placed in a position of having to choose between the two or arriving at a different number altogether," he noted, "[but] I was given a binary choice between 1,047 days and 411 days." [132] Faced with that binary choice, and having accepted Mr. Ott's evidence despite TTC's expert's criticisms, he found that the total number of days of compensable delay was 1,047 days. In his view, he had no basis to find another number of days on the evidence.

Commentary

First, when it comes to assessing bias, courts are cognizant that the pool of experts is often small. If the fact that a litigation expert was retained to consult during the project were to lead to automatic disqualification of that expert, litigants would encounter difficulties in finding independent and separate experts for claims and for litigation. Indeed, there may be practical advantages to having an expert who provided analysis during the currency of the project, also provide evidence before the court. As long as the expert can maintain their independence, their familiarity with the project can be an asset to the court and may be more economical to the parties than retaining a forensic expert who must learn the project and familiarize themself with documents and data from scratch. As Justice Hood opined, the nature of the retainer, in particular if compensation was tied to the success of the claim, is a stronger indicator than the mere fact of a previous retainer.

Second, experts must be independent witnesses, not advocates for their clients' case. Particularly for delay claims, where the requisite technical expertise is so far outside the expertise of the Court, an expert's credibility becomes paramount. That credibility is not just a function of the expert's written report, its readability, and coherence, but also the expert's attitude and demeanor during cross-examination, just like any other witness. In other words, an expert's credibility is not premised exclusively on their background, experience, and academic and professional credentials, but how they present themselves as honest individuals. Thus, an expert's willingness to objectively consider other views and to adjust their own views in the face of contrary evidence is a signal to the court of honesty and integrity that the court will weigh heavily.

Third, Justice Hood's decision is a cautionary tale to delay claim respondents everywhere. In the face of complex disputes and even more complicated delay analyses, a judge's fact-finding role may be reduced to choosing between the opinions of competing experts. Thus, a defence strategy that seeks to play "spoiler" only carries significant risk. Yet, critical path delay analysis for complex projects is typically a very expensive undertaking. Is forcing a respondent to undertake a full-blown delay analysis fair? In a system that places the burden of proof squarely on the claimant, is it fair to require the respondent to prove an alternative quantification? Arguably, that is akin to requiring the respondent to prove the claimant's case, or at the very least, fix the respondent's mistakes.

While it has always been the respondent's prerogative to simply cast doubt in its own defence, such an approach may be too simple for complex delay claims. Rarely is delay to large projects black or white. But once the Court is satisfied there is some compensable delay, in other words, that liability has been established, it has an obligation to "do its best" to quantify the damages, i.e. the number of days of delay.

In *Perini Pacific Ltd. v. Greater Vancouver Sewerage and Drainage District*, [1967] SCR 189, the Supreme Court established, long ago, that a judge must make a reasonable effort to quantify damages, even when a precise calculation is hard, holding that damages should not be denied simply because they are difficult to measure. Instead, the judge should use the best available evidence to make an informed estimate. In Justice Hood's defence, Mr. Ott's calculation was not just the best available evidence, it was the only available evidence.

Given the dearth in Canadian jurisprudence on construction delay claims, *Walsh v. TTC* is a welcome contribution. Moving forward, Justice Hood's decision provides important guidance for plaintiffs and defendants both.

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Relief from Forfeiture - *Wessuc Inc. v. Todd Brothers Contracting et. al*, 2024 ONSC 4368

Overview

In *Wessuc Inc. v. Todd Brothers Contracting et. al*, 2024 ONSC 4368 the Ontario Superior Court confirmed the factors that a court must consider when deciding whether to grant relief from forfeiture.[1] Although the case was ultimately decided based on the principles of contract interpretation and the evidence of the parties, the decision gives much to consider for bonding and surety companies by way of defending against claimants seeking relief from forfeiture.

Background

The plaintiff, Wessuc Inc. ("**Wessuc**"), was a subcontractor of the defendant, Todd Brothers Contracting Ltd. ("**Todd Brothers**"). Wessuc is a waste management company, specializing in industrial and agricultural wastewater infrastructure and processes.[2] Todd Brothers is a contractor, specializing in general heavy civil construction. Three members of the Todd family are also named as defendants in this case. The final defendant is The Guarantee Company of North America ("**GCNA**"; now Intact Financial Corporation). GCNA was Todd Brothers's surety for the project by way of labour and material payment bond. The claim against GCNA will be the focus of this case commentary.

Wessuc was retained by Todd Brothers to remove sludge from a water treatment lagoon at the Sunderland Water Pollution Control Plant in the Township of Brock. Todd Brothers was the successful bidder on a tender by the Regional Municipality of Durham ("**Durham**") for the Sunderland Sewage Lagoon Expansion project.[3] The tender required the removal of the sludge and its disposal to an approved off-site location (the "**Project**"). Durham estimated the total volume of waste to be less than 6,100 m.[4]

Todd Brothers entered into its sub-contract with Wessuc relying on the representation by Wessuc that it is an expert in removing, handling, and disposing of sewage. Wessuc was awarded the Project based on its bid, which included a unit price for material extracted and material hauled to the approved landfill site. Under the contract, Todd Brothers and Durham estimated the sub-contract price to be near $1.0M. Wessuc quoted this price based on the methodology prescribed in the tender: the wastewater needed to be dewatered to a specified slump and then hauled to an approved landfill in trucks.

Sometime prior to commencing the work, Wessuc sought a modification to the methodology: Wessuc wanted to extract the wastewater without dewatering and spray the wastewater over farmlands with consent of the farm owners. Wessuc assured Todd Brothers that it had agreements with enough farmers to accept all or almost all of the wastewater. The new methodology allowed the work to be completed faster because there would be no need to dewater the wastewater. Upon these assurances, both Todd Brothers and Durham agreed to allow the change in methodology. Wessuc agreed that any waste material that they could not spray would be trucked off to an approved landfill site. Wessuc also delivered a quote for the new

1. 2024 ONSC 4368.

2. https://wessuc.com/.

3. https://www.toddbrothers.ca/.

4. https://www.toddbrothers.ca/project/sunderland-sewage-lagoon-expansion.

methodology which stated one price of approximately $1.0M.

On September 6, 2018, Wessuc delivered an invoice for $458,000. At this time, Wessuc had not completed its scope of work and Wessuc had exhausted all available farmland on which they could spray wastewater. Wessuc was now required to incur the cost of dewatering and transporting sludge to a landfill. From September 6 to 26, Wessuc performed little to no work. Wessuc did not bring their own dewatering equipment on site and caused damage to Todd Brothers's machine. Wessuc did not attend on site for the first haulage of sludge to the landfill. During this period, Todd Brothers delivered notices to Wessuc stating that Todd Brothers will complete the work in place of Wessuc if Wessuc does not finish the work. On September 26, due to Wessuc not performing the work and demobilizing, Todd Brothers assumed Wessuc abandoned the Project and terminated the subcontract. Wessuc commenced this action to recover $1.7M for breach of contract, breach of trust, and unjust enrichment, plus costs and interest.

Decision

The court considered five issues:

1. Was there a contract between the parties? What were the terms?

2. Did Wessuc abandon the Contract or did Todd Brothers terminate the contract?

3. What are the Damages from abandonment or termination?

4. Does *quantum meruit* apply?

5. Did Wessuc comply with the terms of the Labour and Material bond?

The court found in favour of Todd Brothers on all five issues.

1. Was there a contract between the parties? What were the terms?

Wessuc argued that there was only one contract between the parties: they would perform the work on a unit price basis. Todd Brothers argued that, after the methodology had been changed by Wessuc from dewatering and trucking to spraying wastewater into farms, the parties had entered a new stipulated price (lump sum) contract.

The court agreed with Todd Brothers because the change in methodology decreased the time required to complete the work and changed the product being disposed of from sludge to wastewater. Because wastewater is more watered down in its sewage content as compared to sludge, which has its water content removed, a greater volume of wastewater would need to be removed to achieve the same level of sewage content removal. Under this condition, if the parties agreed to keep the contract at a unit price, it would be more expensive for Durham to have the lagoon cleaned. The court found that the evidence did not support such an interpretation because it would be illogical for Durham to have agreed to this. The court found that the change in methodology resulted in a new contract which was stipulated price.

2. Did Wessuc abandon the Contract or did Todd Brothers terminate the Contract?

Due to Wessuc's inaction on the jobsite from September 6 to 26 and frequent notices from Todd Brothers to perform the work, the court found that Wessuc had abandoned the Project. Todd Brothers was permitted to terminate the contract and perform the work itself.

3. What are the damages from abandonment or termination?

The court relied on the decision in *Fairview Home Improvements Inc. v Antonopoulos*,[5] in which Associate Justice Wiebe found that "… in the absence of an express provision to the contrary, a contractor on a fixed price contract is not entitled to payment until "substantial completion" of the work." The court then compared the state of the work performed by Wessuc to the level of performance required for "substantial performance" under the *Construction Act*.[6] In the court's opinion, the level of completion required to achieve substantial performance for Wessuc was to have $25,000 worth of work left to be performed (based on a contract price of nearly $1.0M). The court found that the value of the work remaining was far greater than $25,000.

Although not stated in the decision, it can be inferred that because the threshold performance level for substantial performance was not achieved, the level of performance required for substantial completion (which is much higher) could not have been completed. Therefore, Wessuc was not entitled to receive payment for the full contract price.

On the counterclaim, Todd Brothers claimed for the cost they had incurred for trucking after Wessuc had abandoned the contract and for the damage to its equipment. The court awarded Todd Brothers $53,000.

5. 2015 ONSC 7668 [***Fairview***] at para 22.

6. RSO 1990, c. C.30 [***CLA***], s.2(1).

4. Does quantum meruit apply?

The court found that Todd Brothers was not unjustly enriched. Todd Brothers paid Wessuc for the work it had performed up to September 6, 2018, after which they stopped working.

5. Did Wessuc comply with the terms of the L&M bond?

While this issue was *obiter*, the court's determination that Wessuc did not notify GCNA within the required notice period provides some valuable insight into the consequences of non-compliance with the terms of a bond.

The court's opinion on this issue was *obiter* because it already concluded that there was no claim, and thus there was no claim on the bond. However, the court found that even if Wessuc had a claim to bring against the insurer, Wessuc had not notified GCNA within the required notice period.

Per the bond, Wessuc needed to deliver a notice of claim to GCNA at most 120 days after the subcontractor was to be paid in full or on the last day of work performed. Wessuc argued that, factually, it had provided notice within the required time. In the alternative, Wessuc argued that the court should grant it relief from forfeiture because the breach of the contractual provision was minor and GCNA suffered no prejudice. GCNA argued that not providing a notice of claim on time barred Wessuc from making any claim. Further, they argued that if relief from forfeiture is available, the court should not grant relief because of the prejudice they face from the breach.

The court found that irrespective of when Wessuc claimed the payment was due, Wessuc failed to deliver a notice of claim within 120 days. Further, the information that GCNA would have required to make an investigation on the claim was delivered to GCNA almost two years after the notice was delivered. The amount claimed under the bond had also changed from the time of notice to the time of commencing this action. The court found that this made the notice substantially inaccurate. Despite the delayed notice and inaccurate and delayed claim documentation, the court found no prejudice against GCNA from Wessuc's breach. However, due to Wessuc's unreasonable conduct, the court would not have granted relief from forfeiture.

Analysis

The Ontario Court of Appeal in *Monk v. Farmers' Mutual Insurance Company* ("***Monk***") cited the Supreme Court of Canada decision in *Falk Bros. Industries Ltd. v. Elance Steel Fabricating Co*. to establish that the purpose of relief from forfeiture in insurance matters is:

> to prevent hardship to policy beneficiaries where there has been a failure to comply with a condition for receipt of insurance proceeds and where leniency in respect of strict compliance with the condition will not result in prejudice to the insurer.[7]

Further, *Monk* confirmed three factors that a court must consider when exercising its discretion in granting relief from forfeiture: (1) reasonableness of the insured's conduct, (2) gravity of the insured's breach, and (3) the disparity between the value of the property forfeited and

7. 2019 ONCA 616 [***Monk***] at para 77; [1989] 2 SCR 778, 62 DLR (4th) 236 [***Elance Steel***].

the damage caused by the breach.[8] These three factors are known as the "*Saskatchewan River*" or "*Liscumb*" test. Interestingly, this test does not include prejudice against the insurer as a factor when relief from forfeiture is available.[9] In paragraph 79 of *Monk*, the court states that although relief from forfeiture is not available where a breach of the insurance policy consists of non-compliance with a condition precedent to coverage, a court should find a breach constitutes non-compliance in rare cases when the breach is substantial and prejudices the insurer. Thus, under *Monk*, prejudice is to be considered in deciding whether relief from forfeiture is available. If it is, then the Liscumb Test is to be applied.

Wessuc relied on the British Columbia Court of Appeal (BCCA) decision in *British Columbia Ltd. v. Alta Surety Co*[10]. The court in *Alta Surety* also cited *Elance Steel* in its decision and stated that among several other factors, "by far the most important factor" to consider when granting relief from forfeiture is whether the surety has suffered prejudice by the insured's breach[11].

In the present decision, the court followed *Monk* rather than *Alta Surety* by using the *Liscumb* Test. The court found that there was no significant prejudice against the insurer. Accordingly, the court stated that relief from forfeiture was available to the insured, subject to the *Liscumb* Test. In applying the *Liscumb* Test, the court stated that it would not have granted relief from forfeiture under the given facts because of Wessuc's grossly unreasonable conduct. Therefore, the court weighed the unreasonableness factor higher than the absence of prejudice against the insurer.

This result would potentially have been different under *Alta Surety* because in that case, prejudice was stated to be the most important factor. If the court found no prejudice against the insurer, it would have most likely have granted relief from forfeiture to the insured.

Monk is an Ontario Court of Appeal decision making it a binding authority on the Ontario Superior Court, whereas *Alta Surety*, being a decision from the BCCA, is only a persuasive authority. However, *Elance Steel* is a Supreme Court of Canada decision and it is binding on all courts. The *obiter* discussion in the present decision does not directly conflict with *Elance Steel* because the court did not completely ignore prejudice against the insurer; the court used prejudice as a preliminary checkpoint in considering whether relief from forfeiture is available.

Monk adds an additional burden on beneficiaries when attempting to claim relief. This decision could have the effect of closing the doors on future insurance beneficiaries making claims for relief from forfeiture. Even if beneficiaries can demonstrate that the insurer is not prejudiced by a breach of provision, an insurer could successfully rely on *Monk* to dismiss a bond claim on the basis of technical non-compliance with the terms of the bond. *Elance Steel, Alta Surety,* and *Monk* all mention that prejudice against the insurer is at the core of the purpose of relief from forfeiture. If prejudice is the most crucial factor to consider, the factors outweighing a finding of no prejudice must be very strong. In the present case, the court found that Wessuc came to the court with "unclean hands". This is an indication that to find success in using the *Monk* and the *Liscumb* Test to outweigh a finding of no prejudice against the insurer will be highly fact specific. Conduct of the insured must be as highly disagreeable as Wessuc's to make an insurer successful in dismissing a bond claim when relief from forfeiture is available. New case law from different provinces will offer greater insight into whether other provinces adopt the approach of deciding to grant relief from forfeiture based only on prejudice against the insurer or to use the *Monk* framework.

Takeaways

Prejudice against insurers remains the primary consideration for courts when granting relief from forfeiture to a beneficiary. However, this case has demonstrated a factual matrix where the court decided to deny relief from forfeiture, despite there being no prejudice to the insurer, in reliance on the three *Liscumb* Test, as confirmed in *Monk*:

1. reasonableness of the insured's conduct;

2. gravity of the insured's breach; and

3. the disparity between the value of the property forfeited and the damage caused by the breach.

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8. *Monk*, *supra* note 7 at para 79.

9. *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*; [1994] CarswellAlta 769, 115 DLR (4th) 478; *Liscumb v. Provenzano et al.*, 51 OR (2d) 129, 1985 CanLII 2051 [***Liscumb***].

10. 61 BCCA 208 [***Alta Surety***], at para 13.

11. *Ibid* at para 14.

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Defining 'Immediate' in the Context of the Duty to Disclose Partial Settlement Agreements in a Multi-Party Litigation

In Ontario, courts have consistently required parties in multi-party litigation to promptly disclose any partial settlement agreements to both the court and the non-settling parties. Failure to do so can result in severe consequences, such as a stay of proceedings against the non-settling defendants.[1]

Interestingly, not all partial settlements trigger the requirement to disclose.[2] Immediate disclosure is only required when the settlement significantly changes the "litigation landscape.[3]" In practice, the "litigation landscape" may be changed where the terms of the settlement transform an adversarial relationship into a cooperative one,[4] as in the case of *Mary Carter*[5] agreements and *Pierringer* agreements.[6]

Although Ontario courts have traditionally required immediate disclosure, the 2024 Ontario Court of Appeal decision in *Kingdom*. has opened the door to a potentially more flexible definition of "immediate".

The court in *Kingdom* reasoned that 'immediate' should be interpreted based on the intent to conceal the settlement rather than a strict timeframe.[7] This means that the focus should be on the impact of the settlement on the litigation and the settling parties' intentions, rather than just the time elapsed between the settlement and its disclosure.

Pre-*Kingdom* Interpretation

As stated in *Aecon Buildings v. Stephenson Engineering Limited,*[8] the duty to disclose is "clear and unequivocal" and any failure is considered an abuse of process, warranting serious consequences.[9]

In *Laudon v. Roberts,*[10] the term "immediate" was defined as meaning "as soon as [the settlement agreement] is concluded."[11] Similarly, in *Tallman Truck Centre Ltd v. KSP Holdings Inc,*[12] "immediate" was clarified to mean that it should not be "eventually" or "when it is convenient".

The court in *Laudon* emphasized that immediacy is crucial for justice and fairness, as a partial settlement can immediately affect (1) the strategy and procedural actions of non-settling defendants and (2) the court's oversight of the litigation process.[13] Examples of failures to disclose immediately include:

- Disclosure of the agreement "several" months after its execution, only after the plaintiff independently discovered it;[14]
- Disclosure about eight months post-execution, with the plaintiff's belief that the settlement was irrelevant;[15]
- Disclosure three weeks after execution, following a court order;[16]
- Disclosure "piecemeal" over about five months, with the full terms finally revealed only after extensive discussions.[17]

1. *Kingdom* Construction Limited v. Perma Pipe Inc., 2024 ONCA 593 [***Kingdom***] at para 1.
2. *Kingdom*, *supra* note 1 at para 31.
3. *Kingdom*, *supra* note 1 at para 1.
4. *Handley Estate v. DTE Industries Ltd.*, 2018 ONCA 324 [***Handley***] at para 1.
5. *Laudon v. Roberts*, 2009 ONCA 383 at para 36.
6. *Handley*, *supra* note 4 at para 39.
7. *Kingdom*, *supra* note 1 at para 33.
8. 2010 ONCA 898 [***Aecon***].
9. *Aecon*, *supra* note 8 at para 16.
10. 2009 ONCA 383 [***Laudon***].
11. *Laudon*, *supra* note 10 at para 39.
12. 2022 ONCA 66 [***Tallman***].
13. *Laudon*, *supra* note 10 at para 39.
14. *Aecon*, *supra* note 8 at para 14.
15. *Skymark Finance Corporation v. His Majesty the King in Right of Ontario et al.*, 2023 ONCA 234 at para 34.
16. *Tallman*, *supra* note 12 at paras 1, 10.
17. *Handley*, *supra* note 4 at para 3, 14-21.

Post-*Kingdom* Interpretation

The decision in *Kingdom* has introduced a more nuanced approach to the concept of 'immediate' disclosure. Although there are similarities to the 'piecemeal' disclosure in *Handley*, the disclosure in *Kingdom* was deemed compliant based on its specific circumstances.

In *Kingdom*, the sequence of events was as follows:[18]

1. On March 1, 2021, *Kingdom's* counsel informed the non-settling defendants that a settlement agreement was "expected"

2. On March 4, 2021, the Minutes of Settlement were executed

3. On March 11, 2021, in response to an inquiry from a non-settling defendant, Kingdom's counsel confirmed the settlement and mentioned that the settling defendant's counsel would be updating the other parties.

4. On March 29, 2021, a letter from one of the settling defendants detailed:
   a. The conclusion of the settlement between specific parties.
   b. The discontinuance of the plaintiff's action against the settling defendants.
   c. The transfer of the plaintiff's action against the non-settling defendants to the insurance company through subrogation.

5. Finally, on March 30, 2021, in response to a direct request, the full terms of the Minutes of Settlement were disclosed.

The court in *Kingdom* concluded that 'immediate' should be interpreted "purposively." A stay should be considered only if there is an effort to conceal the settlement.[19] If the litigation remains "dormant" between settlement and disclosure, and there is no substantial impact on (1) the non-settling parties' strategy and procedural steps or (2) the court's management of the case, a stay would not serve justice and fairness.[20]

In essence, *Kingdom* shifts the focus from a strict time-based analysis to a more context-specific evaluation. This approach considers the actual impact of the settlement on the litigation and the intent behind the disclosure process, rather than imposing a rigid timeframe. Each case will require a detailed examination of its unique facts, rather than a blunt application of time limits.[21]

18. *Kingdom*, *supra* note 1 at paras 21-28.

19. *Kingdom*, *supra* note 1 at para 33.

20. *Kingdom*, *supra* note 1 at para 33.

21. *Kingdom*, *supra* note 1 at para 33.

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To Stay, or Not to Stay an Adjudicator's Determination in the Face of Fraud Allegations

In a recent endorsement in *Accurate Railroad Construction Ltd. v. Sierra Infrastructure Inc.*, 2024 ONSC 3722, the Divisional Court addressed a key procedural issue under the *Construction Act* regarding a stay of an adjudicator's determination pending judicial review.

Under the *Act*, judicial review of adjudication determinations is generally limited to narrow grounds, with fraud being one of them. The *Act* aims for the swift resolution of disputes to maintain the flow of funds within construction projects. Therefore, determinations must be paid even while judicial review applications are pending, and failing to comply can itself be grounds for refusing leave for review.

Background

The issue centered on the Applicant's motion for leave to bring an application for judicial review of an adjudicator's determination, requiring repayment of over $288,000 to the Respondent, and seeking a stay of the adjudicator's determination pending judicial review.

The Applicant, Accurate Railroad Construction Ltd., alleged that the decision was tainted by fraud, with claims of misrepresentation in documents presented by the Respondent, Sierra Infrastructure Inc., during adjudication.

Accurate then requested a case conference to seek a stay of the adjudicator's determination, pending its motion for leave to bring an application for judicial review and a stay of the adjudicator's determination pending judicial review. At the case conference, Accurate argued that Sierra misled the adjudicator by submitting a summary chart which contained erroneous data so "precisely mixed and matched", that on its face, it appeared these errors were not accidental but deliberate, constituting fraud.

In response, Sierra argued that there was a wide gap between an error in a summary chart and an intentional act of deceit or fraud.

Court's Considerations

Justice Myers, in his endorsement, emphasized the court's preference for expedited proceedings, avoiding prolonged delays and cumbersome litigation, particularly for an interim determination when the statutory purpose is "prompt payment".

Accurate, however, proposed a schedule involving cross-examinations and a hearing no earlier than three months after this case conference. Alternatively, Accurate was prepared to split its contemplated motion, and have the portion seeking a stay pending judicial review heard first. The court found both proposals problematic, lengthy, having the potential to lead into time consuming refusals and "meta-motions", and inconsistent with the concept of an expedited schedule.

In other words, the court was hesitant to grant Accurate a stay in the face of drawn-out legal proceedings.

At the same time, despite Sierra's arguments, the court was hesitant to allow Sierra to benefit from a mistake in its summary chart, even if it did not amount to fraud.

While Accurate pushed for an interim stay of the determination, Sierra did not oppose the stay on the condition that Accurate secure the amount in court. Relying on the previous guidance of the Divisional Court in *Anatolia Tile & Stone Inc. v. Flow-Rite Inc.*, Justice Myers accepted this solution, ordering that the sum of $288,493.07 be paid into court as security. In doing so, the court was able to achieve a compromise between the *Act*'s objective of ensuring prompt payments, while allowing for judicial oversight if fraud is alleged.

Takeaways

1. **Limited Grounds for Judicial Review:** The *Act* permits review of adjudication determinations only on narrow grounds, including fraud.
2. **Prompt Payment, Not Just Prompt Adjudication:** The *Act* emphasizes prompt payment, not just prompt adjudication. Non-payment of an adjudicator's determination, without a stay or securing the amounts when a stay is granted, can undermine the legislative goal of the prompt payment regime. In situations where a stay of a determination is sought, courts will likely require that the disputed amount be secured in court while judicial review proceedings are ongoing, even in the face of fraud allegations, as seen in this case.
3. **Expedited Processes Preferred:** Courts prefer to expedite leave applications, minimizing the need for stay motions and delays in the adjudication process. Applicants seeking judicial review must present clear and expedited schedules when seeking interim relief.

This decision reinforces the balance between ensuring the integrity of the adjudication process and judicial oversight when necessary, while safeguarding the prompt payment regime critical to the construction industry.

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Jamrik v. 2688126 Ontario Inc., 2024 ONSC 2854 (Div. Ct.)

Overview & Background

On July 15, 2024, the Divisional Court clarified the scope of an adjudicator's jurisdiction and the conditions for judicial review of adjudicators' decisions in *Jamrik v. 2688126 Ontario Inc.*, 2024 ONSC 2854. Writing for a panel of the Court, Justice Corbett's decision addressed procedural fairness, an adjudicator's authority to make findings of fact and law, and how adjudicators should manage procedural fairness and unargued submissions.

In doing so, the Court overturned an adjudicator's order requiring the applicant to pay $564,812.87 pursuant to the "prompt payment" provisions of the *Construction Act*. The applicant successfully argued that the adjudicator lacked jurisdiction because the contract was "completed" according to section 2(3) of the *Act*.

Was the contract "completed" for the purpose of determining an adjudicator's jurisdiction?

Pursuant to subsection 13.5(3) of the *Construction Act*, an adjudication cannot be commenced if the contract is "completed". According to subsection 2(3), a contract is deemed to be completed if the lesser of either 1% of the contract price or $5,000 remains outstanding. In his decision, the adjudicator found that the contract was not completed because an unpaid invoice exceeded 1% of the contract price, without evaluating whether any contract work remained unfinished. On this basis, the adjudicator determined that he had jurisdiction to make the order for payment from Mr. Jamrik to 2688126 Ontario Inc. o/a Turnkey Construction's ("**Turnkey**").

However, the Divisional Court found that applying the test under subsection 2(3) of the *Act* to determine that the contract was not completed was an error of law. There is an abundance of caselaw under section 2(3), which does not only apply to

the *Construction Act* adjudication provisions, which provides that "completion" of a contract refers to the performance of the work, not the state of accounts.

Was the adjudicator bound by precedence?

The Divisional Court then considered whether the adjudicator was bound by this caselaw, rejecting Turnkey's argument that "requiring adjudicators to seek guidance from the case law would frustrate the goal of timely adjudication…".

Adjudicators are bound by decisions of the Divisional Court and the Ontario Court of Appeal. As a best practice, the Court suggested that adjudicators should follow decisions of the Ontario Superior Court of Justice as well. Timely adjudication concerns could be mitigated by allowing parties to submit legal arguments during adjudication.

Procedural fairness and unargued submissions

The Court found that where the adjudicator is required to make a determination on a point that had not been raised by the parties in their submissions, such as the issue of contract completion in the case at hand, the adjudicator should give notice to the parties and allow them to prepare supplementary submissions.

This practice ensures procedural fairness and helps prevent incorrect legal interpretations. The Court reinforced that adjudications aim to facilitate ongoing work and payment, underscoring the importance of thorough and fair adjudication.

In coming to this determination, the Divisional Court also considered the purpose of interim determinations, being that "[adjudications] exist because of a recognition that money should continue to flow, and work continue to be done…", as opposed to the normal course of litigation and lien actions. This demonstrated that the issue of contract completion was integral to the purpose of adjudications, which ultimately spoke to the importance of an adjudicator taking jurisdiction on this basis.

Conclusion

The Divisional Court granted Mr. Jamrik's application and remitted the case for a new adjudication because the original adjudicator failed to properly address whether the contract work was completed. This decision emphasizes the need for adjudicators to follow established legal precedents, and maintain procedural fairness, including by allowing supplementary submissions on unargued points where appropriate. An adjudicator must be correct, in law, on jurisdictional issues, but will be afforded deference on findings of fact related to their jurisdictional analysis.

Ultimately, the decision highlights the balance between timely resolution and adherence to legal principles.

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Adjudication: Paying award into a lawyer's trust account not good enough

In *High Tech Power Inc. v. BDA Inc.*, 2024 ONSC 4327, Justice Janet Mills of the Ontario Superior Court of Justice clarified that payment into a lawyer's trust account does not constitute "payment" under Section 13.19(2) of the *Construction Act*. This decision underscores the court's commitment to enforcing prompt payment and preventing practices that undermine the prompt payment and adjudication framework.

Background of the Dispute

High Tech Power Inc. successfully secured an adjudication award of $316,960.26. Instead of transferring this amount directly to High Tech, BDA Inc. deposited the funds into its lawyer's trust account. While some of the funds were eventually released to High Tech, the balance was not paid.

BDA sought a motion to reduce its lien bond. While High Tech was not opposed to a portion of the relief sought on the motion, it was opposed to BDA's position that the lien bond be reduced by the full adjudicated award, rather than just the amount which had been released to High Tech.

Payment and Trust Issues

Under Section 13.19(2) of the *Construction Act*, a party required to pay an adjudicated amount must do so within 10 days of the adjudication determination. Upon agreement, BDA's lawyer released $161,037.68 to High Tech to cover a debt owed to its unionized workers, leaving $155,922.58 in trust. High Tech's surety demanded the funds remain in trust pending a preservation order.

The central issue was by how much the lien bond should be reduced. BDA argued that the lien bond should be reduced by $316,960.26, being the entire adjudicated amount, whereas High Tech argued that the lien bond should only be reduced by the amount it received, being $161,037.68.

Legal Precedents and Tests

The decision draws on the legal test established in *Pentad Construction Inc. v. 2022988 Ontario Inc.*, 2021 ONSC 824, and reaffirmed in *Demikon Construction Ltd. v. Oakleigh Holdings Inc. et al.*, 2024 ONSC 2151. These cases outline that the court's authority to adjust the amount paid into court as lien security depends on whether the evidence provided substantiates a reasonable basis for the claim.

Since a motion under s. 44(5) is akin to a summary judgment motion, both parties had to put their best foot forward: BDA had to show that there was no reasonable basis for the amounts claimed by High Tech in its lien, and High Tech was required to provide evidence to demonstrate that there was a reasonable basis for the amount it claimed.

Court's Finding

Justice Mills concluded that the funds held in BDA's lawyer's trust account could not substitute for payment to High Tech. The funds remained under BDA's control and could potentially be managed in a manner contrary to High Tech's interests.

As a result, Justice Mills reduced the lien bond by $161,037.68, reflecting the actual amount released to High Tech, and awarded reasonable and proportionate costs to High Tech.

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Notable Case Law

***Zhang v. Primont Homes (Caledon) Inc.*, 2024 ONCA 622**

As a general rule, expert evidence is required to support a claim against a licensed professional (such as real estate agents, architects or engineers). A breach may, however, be established without the need for expert evidence if a case involves non-technical matters or those of which an ordinary person may be expected to have knowledge.

In this action against a real estate agent, it was open to the trial judge to find that the agent's representation that a property was located at a completely different location three kilometres distant involved a non-technical matter. No expert evidence was accordingly required to find that the agent's misrepresentation was negligent.

***Nikom v. The Block Inc.*, 2024 ONSC 4349**

Where a contractor failed to reply to a notice of delay and failed to return to work on the project, it demonstrated an intention not to be bound by the terms of the contract and was held to have abandoned the project. In light of that, the owner was justified in not releasing any further payments to the contractor and to terminate the contract and seek its damages. Also, in such circumstances, by demanding payments that were not yet due under a contract, the contractor had acted unreasonably and repudiated the contract.

***Re: North House Foods Ltd. Proposal*, 2024 ONSC 3567**

In a case that might serve as a reality check on the value of a lien against a leasehold interest in a bankruptcy situation, Regional Senior Justice MacLeod agreed with the proposal trustee's assessed value of the security as $0 on the basis that it was either impossible to sell the lease to which lien attached, or the cost of realizing on the security would exceed the amount that could be recovered. While the values suggested by the lien claimant's experts might have been reasonable estimates of value to a debtor in possession of the premises of keeping lease in good standing, they were not a value that could be realized on a court supervised sale of the leasehold interest at the end of a lien action.

***Sjostrom Sheet Metal Ltd. v. Geo A. Kelson Company Limited*, 2024 ONSC 3183 (A.J.)**

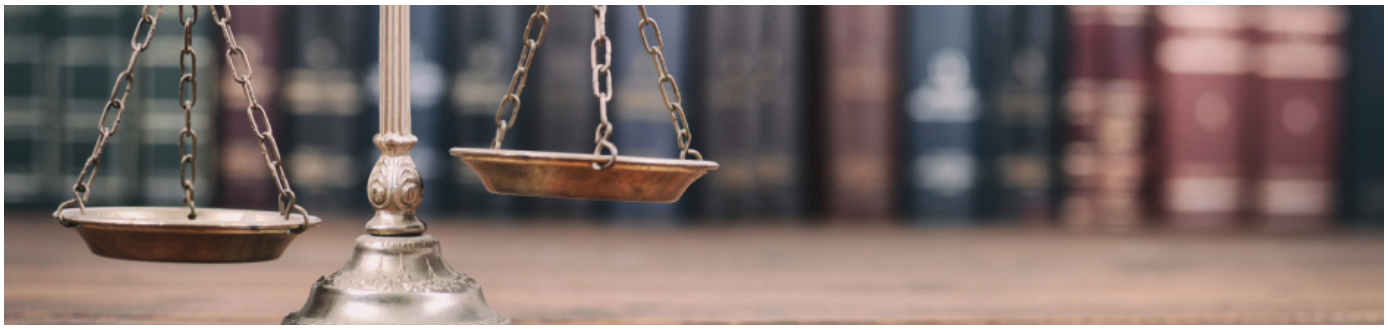
A potentially disastrous financial impact on a company from the trial result is not a relevant consideration when determining costs. Absent exceptional circumstances or improper conduct by the defendant, a lien claimant who unsuccessfully advances a lien claim at trial and thereby causes a defendant to incur costs should not be insulated from an adverse costs award solely because of their current financial situation.

***Welcome Homes Construction Inc v. Atlas Granite Inc*, 2024 ABKB 301**

While the Ontario Act makes an adjudicator's determination is binding on the parties to the adjudication until a determination of the matter by a court or an arbitrator, the Alberta Act provides that a determination is binding on the parties except where a court order is made in respect of the matter. That has been interpreted to mean that while the Ontario Act sets out an interim dispute process that is temporarily binding on the parties, the Alberta legislation appears to provide a final result that remains binding on the parties except where the arbitrator's decision is displaced by a court order or judicial review.

***Prasher Steel Ltd. v. Pre-Eng Contracting Ltd.*, 2024 ONSC 4772 (Div. Ct.)**

Subcontractor lien claims do not expire on a subcontract-by-subcontract basis under s. 31(3)(ii) of the Act. Unlike a general contractor's lien, a subcontractor's lien persists until 60 days after last supply "to the improvement" under s. 31(3)(iii). Any owner or contractor wishing to terminate a subcontractor's lien rights in respect to one of several subcontracts may have recourse to s. 31(3)(iii) of the *Act*, which would require certification of completion of the subcontract pursuant to s. 33.



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Building Insight Podcasts

Episode 40: Student Success: Insights from our Summer and Articling Students

July 2024

Robyn Jeffries, Summer Student, is joined by Justin Lyon, Summer Student, and Jacob Jones, Associate, for a discussion on all things Student Recruitment. In this episode, Robyn, Justin and Jacob discuss how to navigate the Toronto recruitment cycles and share their advice on how to succeed as summer and articling students.

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Episode 39: Careers in Construction Law: From Private Practice to In-House Counsel

March 2024

Katie McGurk, Associate, joins Barbara Capes, General Counsel at Kiewit Canada Inc., and Caitlin Steven, Legal Counsel & Contracts Manager at Chandos Construction, for a discussion on working as in-house counsel in the construction industry. In this International Women's Day episode, Katie, Barbara and Caitlin discuss the transition from private practice to working in-house, and how we can entice more female lawyers to pursue careers in construction law.

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Episode 38: Adjudicating the Future: Trends and Insights in Construction Dispute Resolutions in 2023 (Where we are and where we are going)

January 2024

Lena Wang, Partner, and Amir Ghoreshi, Associate, review and discuss the statistics, trends, and key takeaways from the recent ODACC annual reports against the backdrop of an increase in popularity of *Construction Act* adjudications and recent noteworthy court decisions that are shaping the adjudication landscape.

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Episode 37: Bankruptcy and Insolvency in Construction

April 2023

Brendan Bowles, Partner, Markus Rotterdam, Director of Research, and Megan Zanette, Articling Student, discuss recent developments in Ontario case law surrounding bankruptcy and insolvency in the construction industry.

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Episode 36: 2022 Annotated Construction Act and Conduct of Lien, Trust and Adjudication Proceedings

June 2022

Partners, Brendan Bowles and Lena Wang, and Director of Research, Markus Rotterdam, discuss the 2022 Annotated Construction Act and Conduct of Lien, Trust and Adjudication Proceedings texts available from Thomson Reuters Canada Limited. Key updates to the books are discussed and commentary on their development is given.

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Episode 35: Construction Prompt Payment and Adjudication in Canada

May 2022

John Paul Ventrella, Partner, and Matthew DiBerardino, Articling Student, discuss some key considerations regarding the conduct of a construction adjudication in Ontario and the status of prompt payment and adjudication legislation in other Canadian jurisdictions.

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