Is an adjudicator's decision under the PPCLA final and binding?

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The Alberta Court of King's Bench recently rendered its first decision interpreting the dispute adjudication sections of the *Prompt Payment and Construction Lien Act*[1] (Alberta) (PPCLA). In *Welcome Homes Construction Inc v Atlas Granite Inc*, 2024 ABKB 301,[2] Application Judge Schlosser (AJ Schlosser) clarified that the adjudication procedures under the PPCLA are intended to resolve contractual disputes, not determine the validity of liens. Interestingly, AJ Schlosser also provides commentary that at first blush may characterize an adjudicator's determination as final and binding. The characterization of an adjudicator's determination as final and binding may, however, run against the legislative intent of the PPCLA and a number of other sections of the PPCLA that appear to suggest otherwise. To the degree there is uncertainty in AJ Schlosser's decision on this point, further judicial consideration will likely be required in future decisions.

The decision

The dispute under consideration arose out of a contract between Welcome Homes Construction Inc. (Welcome Homes) and Atlas Granite Inc. (Atlas) for the supply of marble countertops for a new residence. In short, Welcome Homes refused to accept or pay for the work and materials provided by Atlas, terminating the contract on March 9, 2023. Atlas then filed a lien on May 17, 2023 for the cost of the unpaid work and materials. Welcome Homes then served on Atlas a notice to commence an action on July 4, 2023. Prior to litigation, the parties agreed to submit the dispute to the new PPCLA adjudication process. Following the adjudicator's decision, Welcome Homes served on Atlas a notice to prove lien. The parties then sought advice and directions from the court.

AJ Schlosser rendered a decision setting out as follows:

i. Adjudication determines contractual rights – not lien ights

In its application, Welcome Homes asserted that the adjudicator's order is subject to proceedings to challenge the validity of the lien on the basis that the lien was filed out of time. AJ Schlosser acknowledged (but did not find) that it appeared the Atlas lien was filed out of time. On this issue, AJ Schlosser ultimately held that the adjudication

process determines contractual rights, not lien rights. Consequently, lien rights are not relevant to an adjudicator's decision such that the decision may be overridden by a notice to prove lien by the opposing party.[3] In other words, the resolution of the contractual dispute would not be disrupted on account of the fact that the validity of the lien may also have been at issue.

ii. Challenging an adjudicator's order

AJ Schlosser also went on to address whether an adjudicator's determination is interim or final. In so doing, AJ Schlosser highlighted differences in the language of the Ontario and Alberta legislation, in relevant part as follows:

- ***Ontario***: "The determination of a matter by an adjudicator is binding on the parties to the adjudication until a determination of the matter by a court […]"
- ***Alberta***: "The determination of a matter by the adjudicator is binding on the parties to the adjudication, except where (a) a court order is made in respect of the matter, (b) a party applies for a judicial review of the decision […]"[4]

AJ Schlosser appears to have interpreted the use of the word "until" in the Ontario act as signaling a legislative intent that an adjudicator's determination be only interim binding, while the use of the word "except" in Alberta's act signifies that the adjudicator's decision is final and binding.[5] This is further reinforced by AJ Schlosser's suggestion that "the mechanism for challenging an adjudicator's order in Alberta is judicial review", which right is limited both in the permissible grounds for review and the time within which a review may be commenced. AJ Schlosser seems to use the words "determination", "order" and "decision" of an adjudicator interchangeably, which adds some uncertainty to the intent of the written reasons. It is, therefore, possible to interpret AJ Schlosser's decision as supporting an interpretation of the PPCLA that an adjudicator's determination is intended to be final and binding, with only a limited ability to challenge the outcome through judicial review.

However, AJ Schlosser also went on to say that the PPCLA provides that an adjudicator's decision is binding on the parties except where it is displaced by a court order or judicial review. The use of the word "or" in AJ Schlosser's decision on this point suggests that obtaining an order through some other court process, other than judicial review (such as, for example, at the conclusion of trial), may also displace an adjudicator's determination. Notably, this appears to have overlooked section 33.6(5)(c), wherein the parties may agree after the fact to arbitrate and ultimately obtain an arbitral decision that would, based on a plain reading of the PPCLA, also displace an adjudicator's determination.

Ultimately, it is unclear what conclusion can be reached from AJ Schlosser's decision on the issue of whether an adjudicator's determination is interim binding or final and binding. However, based on other sections of the PPCLA and the legislative intent shown during the development of the act, there is an argument to be made that an adjudicator's determination is only interim binding (even in Alberta).

Legislative intent of adjudication under the PPCLA

The initial Bill 37, titled the *Builders' Lien (Prompt Payment) Amendment Act, 2020*, sought to amend the former *Builder's Lien Act*[6] (Alberta) and as part of those amendments, introduced a dispute adjudication regime. Under Bill 37, the determination of a matter by an adjudicator would be final and binding on the parties to the adjudication subject only to judicial review.[7] However, prior to finalizing the amendments to the *Builder's Lien Act*, the Alberta Legislature introduced Bill 62, titled the *Red Tape Reduction Implementation Act*. Bill 62 introduced a significant number of changes to the proposed adjudication regime.

Under Bill 62, the Alberta Legislature introduced the following changes (which now form a part of the PPCLA):

- except in the case of an application for judicial review under section 33.7, nothing within the adjudication regime under the PPCLA restricts the authority of the court or an arbitrator to consider the merits of a matter determined by an adjudicator;
- a party to an adjudication may register an adjudicator's order as an order of the court so long as: (a) the parties have not entered into a written agreement to appoint an arbitrator under the *Arbitration Act* (Alberta), and (b) the parties have not entered into a written agreement that resolves the matter; and,
- the former language of the determination of a matter by the adjudicator is final and binding on the parties under Bill 37 was removed.

Further, the *Prompt Payment and Adjudication Regulation* (Alberta), that was introduced after the coming into force of the PPCLA sets out that:

- any party to an adjudication may commence an action in court within two years after the notice to commence an adjudication is sent, other than an application for judicial review under section 33.7 of the act; and,
- for the purposes of the exceptions to an adjudicator's determination being binding on the parties, a "written agreement" means an agreement made by the parties **after** the adjudicator makes a determination of the matter.

These additions and changes to the previous Bill 37 indicate that there are alternate paths to challenge an adjudicator's determination beyond only judicial review. Moreover, the debates associated with Bill 62 indicate that the Alberta Legislature intended to alter the adjudication process to be interim binding upon parties, rather than final and binding in order to "[allow] the issues to be brought to court if they're not satisfied with the adjudicators."[8]

The changes introduced by Bill 62 mirrored Ontario's approach to adjudication under its own legislation,[9] which recognizes adjudication as "an interim dispute process that is temporarily binding on the parties"[10] pending "a determination of the matter in court, by an arbitrator, or pursuant to a written agreement of the parties".[11]

Accordingly, taking into consideration the other sections of the PPCLA and its regulation, and in light of the Alberta Legislature's comments with respect to Bill 62, it seems reasonable to conclude that the legislative intent of the adjudication regime under the PPCLA was intended to provide an interim binding determination. An adjudicator's decision should be followed on an interim basis, but the legislative exceptions to those determinations being binding include that the matter may be

substantively reconsidered by a court (or arbitrator) within two years of the notice to commence an adjudication having been sent.

Takeaways

AJ Schlosser's decision in this case may arguably give rise to multiple interpretations around the finality of an adjudicator's determination under the adjudication regime in the PPCLA. A number of factors suggest that such a determination should only be interim binding, as opposed to final and binding and subject to challenge only through the limited grounds permitted for judicial review.

The decision might have benefitted from a more fulsome consideration of all the angles under the PPCLA, including for example, that a "written agreement" to arbitrate or settle is defined in the PPCLA regulation to mean "an agreement made by the parties after the adjudicator makes a determination of the matter".[12] Further, section 33 of the PPCLA regulation expressly allows any party to an adjudication to commence an action in court within 2 years after the notice of adjudication is sent. These sections suggest that there must be some broader right to challenge an adjudicator's determination than what AJ Schlosser proposes.

Given the scarcity of case law that considers the PPCLA adjudication regime at this time, it remains to be seen whether subsequent court decisions will take a similar view of an adjudicator's decision as "final and binding". If so (and at present), parties may wish to invest themselves heavily in the adjudication process to ensure they are putting their best foot forward.

For more information on the *Welcome Homes* decision, or about the *Prompt Payment and Construction Lien Act* generally, please reach out to one of the key contacts listed below.

Footnotes

[1] *Prompt Payment and Construction Lien Act*, RSA 2000, c P-26.4 [PPCLA].

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

[3] *Welcome Homes* at paras 24-26.

[4] *Welcome Homes* at paras 20-22.

[5] *Welcome Homes* at para 23.

[6] *Builders' Lien Act*, RSA 2000, c B-7.

[7] Bill 37, *Builders Lien (Prompt Payment) Amendment Act, 2020*, 2nd Sess, 30th Leg, Alberta, 2020 (assented to December 9, 2020).

[8] See Alberta, Legislative Assembly, *Hansard*, 30th Leg, 2nd Sess, No 106 (1 June 2021) at 5017; and see Alberta, Legislative Assembly, *Hansard*, 30th Leg, 2nd Sess, No 107 (May 31, 2021) at 5111.

[9] *Construction Act,* RSO 1990, c C 30.

[10] *SRK Woodworking Inc v Devlan Construction Ltd et al*, 2022 ONSC 1038 at para 90.

[11] *Ledore Investments v Dixin Construction*, 2024 ONSC 598 at para 34; also see *Anatolia Tile & Stone Inc v Flow-Rite Inc*, 2023 ONSC 1291 at para 3.

[12] *PPCLA Regs*, s 1(2) **[emphasis added]**.

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