EYFORD
PARTNERS

MEMORANDUM

To	The Surety Association, BC Chapter	**From**	Christopher A. Schuld
Date	Wednesday, 26 February 2025		
Re	2025 Q1 legal update		

Recent case law insights, from opposite ends of the spectrum of magnitude:

Case 1: *Aquino v. Bondfield Construction Co.,* 2024 SCC 31

https://www.canlii.org/en/ca/scc/doc/2024/2024scc31/2024scc31.html

The issue arising in this matter is whether Bondfield and Forma-Con perpetrated a fraud, or whether those corporate entities were able to shield themselves from such an allegation by attributing the fraudulent activity to a person who was acting outside of his corporate authority.

The nature of the fraudulent activity is described below:

> [12] The monitor and trustee's investigations revealed that, for years, Mr. Aquino and several other appellants had been fraudulently taking tens of millions of dollars from Bondfield and Forma-Con through a false invoicing scheme. The scheme was simple. Mr. Aquino and his accomplices made up false invoices from certain suppliers — including Mr. Aquino's holding company — for services that were never provided. Bondfield and Forma-Con then paid the false invoices promptly, often within a few days, at the direction of Mr. Aquino or other appellants. Bondfield paid more than $21.8 million and Forma-Con paid more than $11.3 million towards false invoices in the five years before the commencement of insolvency proceedings, the period within which alleged transfers at undervalue to non-arm's length parties are reviewable.

The context is important here. Bondfield's business was being managed by a monitor and trustee in the context of insolvency. The applicant – Mr. Aquino, the company principal – wanted the court to treat Bondfield's payments of these invoices as if they were the normal course of business, carried out at a time when the company was solvent. The trustee, on the other hand, sought to establish that the corporations (not just the person, Mr. Aquino)

carried out the fraud. That conclusion would entitle the monitor and trustee to pursue the recipients of these improper payments.

The court addresses this key distinction:

> [54] Here, however, the debtors are Bondfield and Forma-Con, not Mr. Aquino. To satisfy s. 96(1)(b)(ii)(B), the trustee and monitor must show that Bondfield and Forma-Con intended to defraud, defeat, or delay a creditor. This requires showing that it is appropriate to attribute Mr. Aquino's fraudulent intent to Bondfield and Forma-Con. I address that issue next.

The courts below were ultimately validated by the Supreme Court of Canada, applying a corporate attribution principle that the directing mind of Bondfield made this decision to pay improper invoices. In other words, Mr. Aquino did not make these payments personally. He used his role within Bondfield to enable the corporation to make the improper payment, thereby establishing that it was Bondfield that perpetrated the fraud.

> [89] Consequently, the test for corporate attribution under s. 96 of the *BIA* is simply whether the person was the directing mind and whether their actions were performed within the sector of corporate responsibility assigned to them. If these criteria are met, the actions, knowledge, state of mind, or intent of the directing mind should be attributed to the corporation, regardless of whether the fraud and no benefit exceptions are engaged (see Wood (2022), at pp. 260-61).
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> [98] Mr. Aquino, as the directing mind of Bondfield and Forma-Con, intended to defraud, defeat, or delay creditors of Bondfield and Forma-Con through the false invoicing scheme. In conducting the false invoicing scheme, he acted in his assigned sector of corporate responsibility of engaging with suppliers and overseeing the provision of services and materials. His intent should therefore be attributed or imputed to Bondfield and Forma-Con under s. 96(1)(b)(ii)(B) of the *BIA*.

CASE 2: *Staraza v. Colliopoulos,* 2024 CanLII 124082 (ON SCSM)

https://www.canlii.org/en/on/onscsm/doc/2024/2024canlii124082/2024canlii124082.html

It is a unique instance where we would discuss an Ontario Small Claims court matter, but this is on novel content that is important to the surety industry. Ontario's *Construction Act,* RSO 199, c. 30, was introduced in 2019 with great involvement from the surety industry. This decision has to do with the prompt payment features of the Act.

The matter arose after two adjudications. These adjudications can be done mid-stream during a construction project, and feature a 35-day turnaround, with an aim to keep money flowing on a project whether or not a larger dispute lies in the background.

Here, adjudication #1 was dismissed. The claimant, a contractor, had not properly invoiced their own claim. The contractor rectified this by issuing a proper invoice and then proceeding with adjudication #2. In adjudication #2, the adjudicator found in the contractor's favour, made a ruling, and the respondent owner paid.

Sounds rosy, right?

Well, the same contractor then filed a small claims action, seeking (a) the legal costs of the first adjudication, (b) the legal costs of the second adjudication, and (c) the contract balance.

The defendant owner opposed, calling this an abuse of process and citing *res judicata,* meaning that the issues had already been determined. This decision, remarkably, is a finding that this claimant contractor is, in fact, entitled to pursue this relief by way of its small claims action.

In dismissing the contractor's motion, the small claims judge wrote:

> [13] The ODACC was established, effective October 1, 2019, to provide a quick and efficient means to administer construction-related adjudications, mainly disagreements over contractual obligations, for the adoption of prompt payment processes to ensure funds continue to flow on projects, and to encourage more efficient dispute resolution.
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> [15]… [my own emphasis added]
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> a) Section 13.13(7) of the *Act* provides that: "The determination and reasons of an adjudicator are admissible as evidence in court."
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> b) Section 13.15(1) of the *Act* provides that the determination of an adjudicator is binding on the parties, until a determination of the matter by a court or through arbitration under the *Arbitration Act, 1991*, or by settlement negotiations leading to a written agreement, or by seeking leave of the Divisional Court to review the determination of the adjudicator on a judicial review. In effect, the determination by the adjudicator is interim (as suggested by the title to Part II.1, "Construction Dispute *Interim* Adjudication"). In this case, unless accepted by the parties, nothing precluded the plaintiff from bringing the matter to court if the plaintiff disagreed with the results of the adjudication.
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> c) Section 13.15(2) provides that this court is not precluded from considering the merits of a matter determined by an adjudicator. This provision once again highlights the interim nature of a determination by an adjudicator. If the parties accept that determination, then the

> dispute between them is resolved. However, if one of the parties brings the dispute to court (or to arbitration as provided in the *Act*), then there could essentially be a trial *de novo*, with the determination of the adjudicator as part of the evidence before the court, but not binding on the court. Issues related to what is owed for all the work done by the plaintiff, and whether there should be a reduction in favour of the defendants for the alleged poor workmanship, would be considered again by this court in a trial, though the trial judge could take into consideration the ODACC Determination.

While the written decision does not make this particularly clear, the judge's finding is that the contractor has every right to use small claims court, and that right is not limited to new issues (as happened to be the case) but can also include review of anything that was the subject of adjudication.

There was some additional ugliness between the parties. It bears mention that the plaintiff was a self-represented contractor, the defendant was represented by a designated paralegal, and this dispute concerns $5,217.67. The small claims judge dismissed the opposing allegations of unprofessionalism and a declaration of a vexatious litigant.

What stands out here is that throughout Canada, judicial review of an adjudicator's ruling has a threshold. Before having merits heard, an applicant seeking a judicial review must establish that there has either been a substantive error or a breach of procedural fairness. Those notions are not even mentioned here. The judge appears to go out of his way to emphasize the interim nature of an adjudicator's decision, when made in the context of Ontario's *Construction Act,* and uses the specific references to court and arbitration proceedings within the Act, to emphasize the transitory nature of the adjudication process.

For their trouble, the plaintiff was awarded $100 in costs, payable by the defendant, for having to oppose the owner's attempt at dismissal.