

# Can a Construction Adjudication in Ontario be Commenced after a Contract or Subcontract Has Been Terminated or Abandoned A Recent Determination Provides Guidance

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Whether or not an adjudication under Ontario's *Construction Act*, RSO 1990, c.C30, can be commenced once an incomplete contract or subcontract has been terminated or abandoned has perplexed adjudicators and construction lawyers for some time. Can an owner or contractor, for example, forestall an adjudication by simply terminating the contract or subcontract at issue before it is incomplete?

In a recent adjudication, Adjudicator Edward (Ted) Dreyer addressed the issue in a comprehensive way, making considerable references to case law authority. Having been filed with the Superior Court of Justice in Guelph (under Court File No. CV-21-00000197), the determination is a matter of public record. While not binding on adjudicators or the Court, it is a worthwhile read for anyone who might face similar jurisdictional issues. [A copy is available here.](#)

In the matter before him, the owner had argued that because the contract at issue had been terminated or abandoned, adjudication was not available:

- by virtue of s.13.5(3) of the *Act*, which provides that an adjudication may not be commenced “if the notice of adjudication is given after the date the contract or subcontract is completed, unless the parties to the adjudication agree otherwise”; and
- by virtue of s. 13.18(5) of the *Act*, which provides that an adjudicator's determination may be set aside if “the contract or subcontract is invalid or has ceased to exist”.

In relation to s. 13.5(3), the contractor's response to the argument was rather straight-forward: the s.13.5(3) limitation on rights of adjudication is tied to completion, and not termination or abandonment. Termination and abandonment, the contractor submitted, are concepts applied in relation to the expiry of liens which are not intended to apply to rights of adjudication.

Mr. Dreyer determined as follows (among other reasons) in relation to the issue:

“The context of the *Act* as a whole suggests that the termination of a contract was not intended to prevent a contractor from commencing an adjudication to enforce payment of a proper invoice.

"Completed" for the purpose of subsection 13.5(3) means "completed" for the purpose of section 2(3) ... Looking at the context of the *Act* as a whole, it is important that the word "termination" was added to section 31(2) as a separate triggering event for the running of the 60 days for the expiration of a contractor lien. The addition of the word "termination" to section 31(2) signals a legislative intent to distinguish a "terminated" contract from a "completed" contract. If the legislature had intended the adjudication period to expire upon the termination of a contract or subcontract, it would have said so in subsection 13.5(3). Alternatively, if all contracts that were terminated were also completed, then the amendment to section 31(2) would have been unnecessary.

Furthermore, permitting a contractor to commence an adjudication after its contract is terminated is consistent with the remedial purpose of the *Act*.

... On the one hand, interpreting "completed" as it appears in section 13.5(3) in a manner consistent with section 2(3) is consistent with the legislative intent of using adjudication to resolve gridlock. In the conventional method of project delivery where an owner enters into a single contract with a single contractor, there is little risk of project gridlock when the work remaining to be performed pursuant to the contract is the lesser of 1% of the contract value and \$5000. There is no risk of project gridlock at that point because the work is finished.

On the other hand, the termination or abandonment of a contract or subcontract gives rise to the real possibility of project gridlock. There is a high likelihood of a contractor or subcontractor that is terminated part way through the performance of their contract or subcontract will preserve a claim for lien that may disrupt the flow of funds on the as-yet incomplete project. If adjudication was intended as a tool for resolving project gridlock, it is precisely in circumstances where the contract or subcontract is terminated or abandoned where a party should have access to early and prompt dispute resolution to resolve that gridlock.”

In relation to s.13.18(5), the owner argued that the contract had ceased to exist because, in its view, the contract had been abandoned. It further argued that it would make no sense for an adjudicator to make a determination which was destined to be set aside. The contractor argued that abandonment does not amount to termination. Rather, abandonment will (only) result in an innocent party being able to treat its obligations under a contract as being at an end if the abandonment amounts to a repudiation which is accepted by the innocent party.

In addressing the issue, Mr. Dreyer went back to first principles, starting with the fact that section 13.18(5) was modeled after section 46(1) of Ontario’s *Arbitration Act*. He reviewed the case law in relation to that provision, including the role repudiation might play in its application. He noted the House of Lords “seminal case” of *Heyman v Darwins* (1942) AC 356, where Lord MacMillian ultimately concluded that upon termination/repudiation “the contract is not put out of existence, though all further performance of the obligations undertaken by each party in favour of the other may cease.” Mr. Dreyer also observed that Ontario caselaw has applied the “principle that arbitration clauses survive the termination of the contract”, referencing *Automatic Systems Inc. v. E.S. Fox Ltd.*, 1995 CarswellOnt. 246 at paragraph 30 and *Cityscape Richmond Corp. v. Vanbots Construction Corp.* 2001 CarswellOnt. 517 at paragraph 19 in that regard.

Ultimately, after noting that “adjudication is available in the United Kingdom even after the contract in question has been terminated or abandoned” Mr. Dreyer ultimately concluded that “the Ontario Legislature did not intend for adjudication to be unavailable” in such circumstances.

As above, Mr. Dreyer’s determination is not binding. It may nonetheless assist both parties and adjudicators to deal with such jurisdictional issues, going forward. This might be especially the case where parties are not represented by counsel or where the adjudicator does not have a legal background. We also note that parties can avoid the issue entirely if they agree, in their contracts or subcontracts, to have rights of adjudication survive the completion of same, as is allowed for under s. 13.5(3) of the *Act*.

## CITATIONS

*Arbitration Act*, 1991, SO 1991, c 17 (CanLII)

*Automatic Systems Inc. v. E.S. Fox Ltd.*, 1995 CarswellOnt. 246

*Cityscape Richmond Corp. v. Vanbots Construction Corp.* 2001 CarswellOnt. 517

*Construction Act*, RSO 1990, c.C30 (CanLII)

*Heyman v Darwins* (1942) AC 356

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