

New Guidance on Jurisdiction Arguments for Adjudications

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In reasons released October 4, 2022, [the Divisional Court provided guidance](#) on when jurisdiction arguments have to be raised on *Construction Act* adjudications (and confirmation that adjudicators can properly determine jurisdictional challenges), and answered an important question on whether the abandonment or termination of a contract results in the contract ceasing to exist.

The matter came before Regional Senior Justice Ricchetti as a motion for leave to bring an application for judicial review, in an effort to set aside an adjudicator's determination. In the underlying adjudication, the Owner (Pasqualino) was ordered to pay \$119,314 to his Contractor (MGW-Homes) in respect of unpaid invoices for renovation work done at the Owner's property.

The Owner's motion for leave stated that his application would be based on jurisdictional arguments. Among other things, the Owner would be arguing that because the contract in question had been either terminated or abandoned prior to the commencement of the adjudication, it had "ceased to exist". The *Construction Act* only allows the Divisional Court to set aside a determination in seven limited circumstances, one of which is where "the contract or subcontract is invalid or has ceased to exist."

As an initial point, Justice Ricchetti confirmed that any challenge to an adjudicator's jurisdiction must be first raised with and resolved by the adjudicator. Justice Ricchetti cited the Supreme Court of Canada's decision in *Dell Computer Corp. v Union des consommateurs* for this proposition. The *Dell Computer* case was decided in the context of jurisdiction challenges in arbitrations, but Justice Ricchetti stated that the rationale is equally applicable to an adjudication and an adjudicator's determination under the *Construction Act*.

If a party wants to challenge jurisdiction, and wants to preserve their ability to raise a jurisdictional challenge at the Divisional Court, they first must raise it with the adjudicator.

Justice Ricchetti's decision has also provided much-welcome guidance on the issue of when a contract has ceased to exist. To date, it has been somewhat unclear whether a party could cause a contract to "cease to exist" by abandoning or terminating the contract.

In Justice Ricchetti's view, "whether the construction contract was abandoned or terminated, even if that had been established before the Adjudicator, would not have made the construction contract "cease to exist"". This shuts the door on the argument that a contract ceases to exist simply because it has been abandoned or terminated.

Finally, it is worth noting that the Owner raised a further jurisdictional challenge that was dismissed out of hand. The Owner tried to argue that because the Contractor had a parallel lien claim outstanding at the same time they commenced their adjudication, their adjudication conflicted with the lien claim. Justice Ricchetti found no conflict because the *Construction Act* specifically permits an adjudication at the same time as a lien claim (s.13.5(5)), and also provides a mechanism by which security posted to the credit of the lien action can be reduced following payment of the adjudication award (s.44(5)). Not only did Justice Ricchetti find no conflict, but he stated that the two processes work harmoniously together.

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