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Thomas Heintzman is counsel at McCarthy Tétrault in Toronto. His practice specializes in litigation, arbitration and mediation relating to corporate disputes, shareholder's rights, securities law, broadcasting/telecommunications and class actions.

He has been counsel in many important complex actions, arbitrations, and appeals before all levels of courts in many Canadian provinces as well as the Supreme Court of Canada.

Thomas Heintzman is the author of *Goldsmith & Heintzman on Canadian Building Contracts,* 4th Edition which provides an analysis of the law of contracts as it applies to building contracts in Canada.

Goldsmith & Heintzman on Building Contracts has been cited in 183 judicial decisions including the two leading Supreme Court of Canada decisions on the law of tendering:

M.J.B. Enterprises Ltd. v. Defence Construction (1951), [1999] 1 S.C.R. 619 and
Double N Earthmovers Ltd. v. Edmonton (City), 2007 SCC3, [2007] 1 S.C.R. 116-2007-01-25 Supreme Court of Canada

When Does The Negotiation End And The Limitation Period Begin For An Arbitration Claim?

Construction Law - Arbitration – Negotiations – Limitation Periods - Contracts

An arbitration clause in a construction contract may be written in a way that encourages the parties to settle their differences by negotiation and agreement. But if the parties attempt to do so and fail, can one of the parties then say to the other: "Gotcha! The limitation period for your claim has now passed!" That is the issue which the Ontario Court of Appeal recently addressed in *L-3 Communication Spar Aerospace Limited v. CAE Inc.*

SPAR was awarded a contract to develop a hardware and software system. SPAR subcontracted some of the deliverables to CAE. SPAR was required to deliver data about those deliverables to CAE within a certain timetable. The subcontract said that if the data was not delivered within 90 days of that timetable "and the parties cannot agree to a price adjustment due to the delay….beyond the 90 days", then CAE was relieved of its obligations under the subcontract "only to the extent that performance is not possible as a direct result of Spar to provide that information". The subcontract then stated: "The price and other adjustments that are not agreed between the parties may be referred to arbitration" under the arbitration clause in the contract.

SPAR provided certain data to CAE, but CAE took the position that it was inadequate, and that SPAR should obtain further data from the vendors of the relevant software to SPAR. Spar refused to do so, and its refusal to do so was clear by November 2005. CAE proceeded to obtain the data from SPAR's vendors. CAE's evidence was that it had discussions with SPAR about settling the question of who would pay for the cost of obtaining that data.

When the cost and price issue was not settled by December 2008, CAE demanded payment for the cost of obtaining the data from SPAR's suppliers. SPAR responded by stating that CAE's demand was premature and that CAE was required to proceed by way of the arbitration. When CAE then delivered a Request to Arbitrate in January 2009, SPAR took the position that CAE's arbitration claim was barred by the two year limitation period in Ontario. SPAR said that the limitation period commenced in November 2005 when SPAR unequivocally said that it would not obtain the data. SPAR commenced a court application for a declaration to that effect.

The Ontario Superior Court dismissed SPAR's application and its decision was upheld by the Ontario Court of Appeal.

The Superior Court held that, under the wording of the subcontract, the right to arbitrate arose and the limitation period for CAE's claim commenced, not from the date that SPAR said that it would not obtain the data, but from the date that the parties had failed to agree on a proper price adjustment. The Court held that that date was not until at least the fall of 2007, and accordingly the arbitration claim was commenced in time. The Court did not agree with CAE that the limitation period did not commence until CAE had full knowledge of the full costs of obtaining the data. But it did agree that the entitlement to arbitrate and the limitation period did not commence until "SPAR indicated its intentions to avoid any and all financial responsibility for the increased costs associated with procuring the data".

The Court of Appeal agreed. It held that the commercially reasonable interpretation of the subcontract was that "a dispute over failure by SPAR to deliver information as required together with the cost consequences caused thereby is one that the parties were obliged to attempt to resolve between themselves. Failing agreement either party is entitled to take the dispute to arbitration." Only then did the right to arbitrate arise and the limitation period commence running.

The Superior Court also found that, by its conduct, SPAR was estopped from asserting that the limitation period was running from November 2005. In light of its decision on the primary matter, the Ontario Court of Appeal did not deal with this issue.

Two comments can be made about this decision:

First, it is a welcome recognition of the duty to negotiate where such a duty is contained in the contract. Had the courts held that the limitation period started running from the time SPAR refused to obtain the data, the obligation to negotiate the price and costs dispute would have been effectively removed from the contract. When parties include an obligation to seek an agreement over those sorts of matters, then full recognition and effect should be given to that obligation. The only way to do so is to hold that the limitation period does not commence until that process is complete. That causes no hardship on either party, since either party can at any time state that negotiations are over and refuse to negotiate further.

Second, this decision is a reminder that it is the exception. It is the exception because most construction contracts do not contain an express duty to negotiate and attempt to agree on costs or other matters in dispute under the contract. Accordingly, in most instances it is dangerous for a party to continue to negotiate when, based upon the date of the other party's alleged wrongful conduct or its discovery, a limitation period is looming. In most cases, the limitation period will have started to run and the party with the claim must protect its litigation rights, and then negotiate.

So there are two lessons to be learned:

First, when you are negotiating the contract and want to provide for an obligation to negotiate, expressly state that obligation in the contract and expressly state that any limitation period will only commence once the negotiations are complete.

Second, if you are in the midst of a contractual dispute and a limitation period is looming based on the date of the wrongful conduct or its discovery, then initiate the arbitration claim and negotiate later, unless you are very certain that the contract provides that the limitation period is not running in the meantime.

Construction Law - Arbitration – Negotiations – Limitation Periods:

L-3 Communication Spar Aerospace Limited v. CAE Inc., 2010 ONSC 7133; 2011 ONCA 435 (CanLII)

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