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Thomas Heintzman specializes in commercial litigation and is counsel at McCarthy Tétrault in Toronto. His practice focuses on 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 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 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 182 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

Tenders in Construction Projects – Which Limitation Period Applies?

What is the limitation period for the commencement of an action arising from a tender in a construction project?

If the owner is a municipality or other public body, does a limitation period in its incorporating legislation apply to the tender? These were the questions recently faced by the Prince Edward Island Court of Appeal in *Central Roadways v. City of Summerside*.

In May 2008 the City of Summerside sought tenders for the resurfacing of city streets. Two bidders, Central Roadways and another bidder, submitted tenders. Central Roadways' tender was the lowest, but on June 16, 2008 the City's Council met and decided to award the contract to the other bidder, and advised Central Roadways the next day.

In November 2008, Central Roadways asked the City why its tender was not accepted and requested a copy of Council meeting minutes of June 16, 2008. The City replied by letter

dated November 27, 2010. It provided a copy of the minutes but the minutes did not disclose any reasons why the other tender was accepted and not the tender of Central Roadways.

On February 20, 2009, Central Roadways commenced an action against the City. The City brought a motion to dismiss the action on the ground that it was barred by the limitation period in s-s.46 (2) of the City of Summerside Act.

Section 45 and 46(1) of that Act provided that notice was to be given to the City in the case of damage sustained from unsafe conditions, or from nuisances or encumbrances, on City streets or sidewalks. Section 46(1) then said that, except as provided in S. 46(1), all actions against the City were to be commenced within six months of the cause of action arising.

The City asserted that this limitation period applied to the claim arising from the tender, and the judge who heard the motion agreed. But the P.E.I Court of Appeal reversed the decision.

The Court of Appeal examined the wording and history of the City of Summerside Act and concluded that the six month limitation period only applied to claims arising from City bylaws or claims relating to unsafe conditions or nuisances and encumbrances on City property. Even though the word "all" in s. 46(2) was normally all-encompassing, it should not be so interpreted in light of these surrounding circumstances.

The Court of Appeal noted that the limitation period in P.E.I. for claims in contract is six years and that a limitation period of six months is a very different limitation period. Since the shorter limitation period was found in a statute for the City's benefit, it should be interpreted against the City in the event of any ambiguity. The Court said:

"Interpreted to include all causes of action against the City, the very short six-month limitation period would seriously circumscribe the right of a person to commence any action against the City. This being so, any ambiguity must be resolved in favour of a less restrictive limit on the time within which to commence an action."

The Court of Appeal held that the claim by Central Roadways was in contract, since it arose from the alleged breach of its contract with the City inherent in its submission of a tender to the City's invitation. While there might be good policy reasons for the City to provide very short limitation periods for actions arising from slip and falls or other accidents on City streets,

"there is no valid policy reason why other actions against the City, like an action for breach of contract, should have the time for the commencement thereof limited to a very short six months...If the Legislature is of the mind that there are valid policy reasons for a shorter limitation period for the commencement of such actions against municipalities like the City, then it should express the policy more clearly in the Act so as to specifically exclude these actions from the scope of the ***Statute of Limitations.***"

This decision contains warnings about limitation periods relating to tenders.

The first warning is that a claim arising from a tender is a claim in contract and must be brought within the limitation period for a contract claim. In addition, a tort claim relating to the tender must be brought within the limitation period relating to tort claims.

The second warning is this: look for any limitation period contained in the tender documents. The tender documents may themselves contain a specific and shorter limitation period. A shorter contractual limitation period may be permitted under the general limitation statute. Thus, In Ontario, s.22(5) of the *Limitations Act, 2002* permits the normal two year limitation period to be shortened in business agreements, but not consumer agreements.

And third, ensure that there are no other statutory limitation periods which may apply to the tender. In Ontario, that is unlikely since s.19 of the *Limitations Act, 2002* states that a statutory provision containing a conflicting limitation period is of no effect unless that provision is set out in the Schedule to the *Limitations Act, 2002*. But if there is a limitation provision in another statute which is potentially enforceable, then depending on the origin and nature of that provision, the decision in the *Central Roadways* case may require that the limitation provision be read against the public body and only enforceable if it clearly applies to the tender.

Tenders – Limitation Period- Construction Contract – Actions – Breach of Contract -

Central Roadways v. City of Summerside, 2011 PECA 4 (CanLII)