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Thomas Heintzman specializes in the field of alternative dispute resolution. He has acted as counsel in trials, appeals and arbitrations in Ontario, Newfoundland, Manitoba, British Columbia and New Brunswick and has made numerous appearances before the Supreme Court of Canada.

Mr. Heintzman practised with McCarthy Tétrault LLP for over 40 years with an emphasis in commercial disputes relating to securities law and shareholders' rights, government contracts, broadcasting and telecommunications, construction and environmental law.

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

## **Is A Third Party Obligated To Bring Its Claim Under An Arbitration Agreement?**

A recurring issue in arbitration law is whether a third party is bound to assert his or her claims by way of arbitration, even though the third party is not a party to the arbitration agreement. In *Yaworski v. Gowling Lafleur Henderson LLP*, the Alberta Court of Appeal recently held that, where a limited partnership was a party to an agreement containing an arbitration clause, the owner of the limited partnership was obliged to arbitrate any disputes arising under the agreement.

## Facts

Mr. Yaworski's limited partnership was an income partner of the law firm Gowling Lafleur Henderson between 2004 and 2009, and Mr. Yaworski worked in the Gowling firm. The agreement between Yaworski LP and the firm terminated in 2009. Mr. Yaworski then commenced an action for breach of contract. The action was stayed by a judge of the Alberta Court of Queen's Bench on the ground that the claim must be arbitrated. That decision was upheld in the recent decision of the Alberta Court of Appeal.

## Reasons of the Court of Appeal

The Alberta Court of Appeal held that Section 7(1) of the **Alberta Arbitration Act** and Section 18 of the **Alberta Judicature Act** authorized the judge of first instance to stay Mr. Yaworski's action.

Section 7(1) states that "if a party to an arbitration agreement commences a proceeding in a court in respect of a matter in dispute to be submitted to arbitration under the agreement," the court shall stay the action, subject to certain exceptions. Section 18(1) contains the court's equitable jurisdiction to stay any proceedings when the court deems it fit to do so. In combination, the Court of Appeal held that the court was entitled to stay the action even though it was not brought by the party to the arbitration clause, Yaworski LP.

The Court of Appeal was not prepared to allow Mr. Yaworski to escape the arbitration clause which his limited partnership had entered into. It said:

"However, arbitrations cannot be avoided by simply having a related party commence a lawsuit claiming relief with respect to arbitrable subject matter. In this case Yaworski PC and Gowlings agreed that all disputes between them was to be arbitrated. In fact the arbitration clause is so broad as to make the issue of whether something is subject to arbitration, arbitrable....

In our view the combination of section 7 of The Arbitration Act, section 18 of the Judicature Act, and the court's inherent jurisdiction to control its own process to avoid unnecessary and duplicitous proceedings provided the chambers judge with jurisdiction to stay Yaworski's suit pending the arbitration."

Moreover, the Court of Appeal was of the view that the real claim belonged to Yaworski LP, not Mr. Yaworski. Therefore, the judge at first instance had been right to stay the action brought by Mr. Yaworski. In this way the proper claim, brought by Yaworski LP, could be asserted by

way of arbitration, and if there was any issue about the jurisdiction to hear various claims of Mr. Yaworski and his limited partnership, the arbitrator could address them:

“[22] Our conclusion regarding the continuation of Yaworski PC as a Gowlings partner strongly suggests that at least most of the cause of action against Gowlings advanced by Yaworski in his personal suit actually rests with Yaworski PC. Again if any part of that is outside the purview of the arbitration that question can be determined by the arbitrator.

## **Discussion**

On its face, this is a relatively straightforward decision. It holds the parties to an arbitration clause to their agreement and refuses to allow one party to circumvent the agreement by allowing a person controlling that party from suing personally. The decision does, however, raise a number of issues.

It seems clear that Section 7(1) of the *Arbitration Act* would not have empowered the court to grant the stay order unless the party bringing the action can somehow be brought under that subsection. In this circumstance it seems wise to state in arbitration agreements that the parties are executing the agreement as principals, and also on behalf of, and so as to bind, the shareholders, assignees and any other persons asserting facts or issues dealt with in the agreement.

In the absence of such a provision, the party seeking the stay must rely on the general equitable powers under Section 18 of the *Judicature Act*. One wonders what exactly is the limit of the court’s power under this section. Is the power totally wide open? Or was the court’s finding that the claim was really one which could only be asserted by Yaworski an essential ingredient to the court’s decision to stay the action?

If that is so, then there may be two results:

**First**, Mr. Yaworski’s action should have been dismissed on the ground that it was brought by a party which had no claim. This is the effective decision of the Court of Appeal, as it said: “On the record Yaworski cannot make out a proper claim for summary judgment because the cause of action or at least most of it rests with Yaworski PC.” The rest of the decision may be *obiter*.

**Second**, the Court of Appeal is effectively saying that the words “to an arbitration agreement” in Section 7(1) should not be in the subsection. The important words are “in respect of a matter in dispute to be submitted to arbitration”. The Court of Appeal appears to be saying that, if the dispute falls within the arbitration agreement, then it should be arbitrated, no

matter who brings the claim. That may well be a sensible reading of the subparagraph even though it eliminates four words.

See **Heintzman and Goldsmith, *Canadian Building Contracts*** (4<sup>th</sup> ed.), Chapter 10, Parts 1 and 4

***Yaworski v. Gowling Lafleur Henderson LLP, 2013 ABCA 21***

**Arbitration – Stay of Court Proceedings - Third parties**

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