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Thomas Heintzman specializes in arbitration, mediation and litigation relating to corporate disputes, shareholder's rights, securities law, broadcasting/telecommunications, class actions, construction and environmental law.

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

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

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

Conduct After An Arbitration Award May Nullify That Award

A party to a contract may terminate the contract and then start an arbitration to confirm the validity of the termination. If the arbitral tribunal grants such a declaration, then that party better watch out that it doesn't continue to treat the contract as still continuing. If it does, it may waive the termination, and the arbitration will be for naught. So held the Saskatchewan Court of Queen's Bench in ***Subway Franchise System of Canada Ltd. v. Laich***. Clearly, this decision is of considerable importance in construction projects, franchise agreements or in other ongoing contractual relationships.

The Background

In 2003, Subway entered into a franchise agreement with Laich for a Subway store in La Ronge, Saskatchewan. In 2009, Subway terminated the franchise agreement. The franchise agreement contained an arbitration clause providing for the arbitration of disputes in Connecticut. In May 2010, the arbitrator upheld the termination of the franchise agreement by Subway.

Subway then sought to enforce that award in Saskatchewan pursuant to the Saskatchewan ***International Commercial Arbitration Act*** (ICAA)*,* and statues relating to landlord and tenant and enforcement of foreign judgments. In 2011, the Saskatchewan Court held that the award would not be enforced because Subway had continued to treat the franchise agreement as outstanding after the arbitration award.

The Court held that Subway had met the requirements of the **Model Law** in the ICAA. The Court also found that no objections to the award could be raised since no request for recourse against the award had been brought within the time specified in the Model Law. Nevertheless, the Court held that the arbitral award was not enforceable because, after the award, both parties continued to operate pursuant to the provisions of the franchise agreement. Laich continued to make all remittances and there was no change in the support given by Subway to the franchise operation. Laich continued to pay the royalties due under the franchise agreement. In what was undoubtedly a form letter, Subway wrote to Laich extending "congratulations on a job well done".

The Saskatchewan Court found that, by its conduct, Subway had "waived the termination decision by the arbitrator as it continued to work with and support the respondent in a profitable partnership."

The Court also refused to enforce the arbitral award for damages, being $250 per day during the period that Subway did not recover possession. The Court refused to enforce this award because to do so would doubly compensate Subway which had, during that period, received the remittances and royalties from Laich. The Court also dismissed Subway's application for possession of the premises.

While this dispute may be viewed by some as a franchise dispute of little significance, the decision has an importance to construction projects and to other situations where ongoing contractual relationships may exist.

One of the parties may not be willing to take the risk of unilaterally forcing the other party off the site or out of the premises. That party may need an arbitral (or court) decision approving its view that the other party has repudiated the contract and that it is entitled to terminate the contract. During the period that the dispute is being dealt with by the tribunal, the innocent party will have to leave the other party in place and not disturb the contractual setting.

But the moment that the innocent party obtains such a decision, then according to the Saskatchewan Court, it must immediately stop dealing with the other party in the normal course. It must refuse any further payments or benefits from the other party and treat the

relationship as at an end. Its failure to do so may eliminate every value that it secured from the arbitral award.

Three thoughts come to mind:

First, is this decision commercially unreasonable? Is it consistent with modern electronic technology? Should we expect a huge international commercial business to turn off all its normal termination procedures so that a tiny franchisee (or sub-contractor, or agency) does not slip through the termination machinery and continue to be treated as a compliant contracting party? Even though some of us might answer No to these questions, we should expect a trial judge to be unsympathetic to the large organization in these circumstances.

Second, as a technical matter, this case may not strictly be about waiver. The parties were apparently bound by the arbitrator's decision that the franchise agreement had terminated due to the principles of *res judicata*. Rather, the parties conduct may be seen as the re-establishment of their agreement. By continuing to abide by the agreement, they made a new agreement.

Third, surely there are easy ways for an organization to address the problem. It can send out a notice at the very beginning of the termination process (and better still, again immediately after the arbitration award) stating that no conduct on its behalf, including the acceptance of money, extension of services or correspondence on its behalf, shall be considered to be a waiver of its position that the agreement is terminated or a waiver of any rights under an arbitral or court award, and that if it accepts any monies from the other party it does not do so in recognition of any continuing contractual rights of the other party and holds those monies in trust to be dealt with in accordance with the arbitral decision. That sort of letter should be a standard form in the termination documents of any contractor, franchisor or principal.

Once again, this decision is a wake-up call to everyone engaged in a dispute arising from an ongoing contract:

Don't continue to treat the contract as ongoing after a decision confirming its termination. If you do, then the contract may be revived and the decision may be worthless.

Arbitration - Enforcement - Waiver

***Subway Franchise System of Canada Ltd. v. Laich*, 2011 SKQB 249**

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