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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 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 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:

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

Which Dispute Resolution System Applies – Construction Lien or Arbitration?

Courts have difficulty reconciling the rights of parties to arbitration when there are construction liens, cross claims, counterclaims and third party rights involved. How can arbitration, which is a bilateral dispute resolution system, resolve those disparate rights? And what appeal rights are there for the parties who are dissatisfied with a judge's conclusion that the dispute does not fall within the arbitration clause? The New Brunswick Court of Appeal recently addressed those questions in ***SNC-SNAM, G.P. a partnership between SNC Lavelin Inc and Snamprogetti Canada Inc. v. Opron Maritimes Construction Ltd.***

The Background

SNC-SNAM was the general contractor at a construction project at the Canaport LNG Terminal in Saint John, New Brunswick. SNC-SNAM granted a sub-contract to Opron which contained an arbitration clause. Liens were filed by sub-subcontractors to Opron. Opron filed a claim over for contribution or indemnity in respect of those lien claims against SNC-SNAM. In addition, Opron filed its own action against SNC-SNAM.

SNC-SNAM applied for a stay of both claims of Opron based upon section 36 of the **New Brunswick *Arbitration Act*** which requires that all claims subject to an arbitration clause be arbitrated. The application was dismissed on the grounds that the claims involved sub-subcontractors and accordingly the claims should be dealt with in court and not arbitrated. In addition, the judge held that the mechanics lien trial could and should dispose of all claims relating to the mechanics' liens. SNC-SNAM appealed that decision to the New Brunswick Court of Appeal.

The Issues

The first issue was whether any appeal could be brought in light of sub-section 7(6) of the **New Brunswick *Arbitration Act***. That sub-section says that, "there is no appeal from the court's decision" under section 7 of the Act. The Court of Appeal held that it had jurisdiction to hear the appeal. It followed appellate decisions in Ontario and Manitoba in concluding that sub-section 7(6) only applied if the judge hearing the application held that the dispute fell <u>within</u> the arbitration clause and resolved the stay issue on that basis. The sub-section did not apply if the application judge held that the dispute fell <u>outside</u> the arbitration clause.

The Court of Appeal agreed with the application judge's interpretation of the **New Brunswick *Mechanics' Lien Act***, and his conclusion that the mechanics lien trial judge has the authority to deal with counterclaims, cross claims and third party claims. Even though the Act does not expressly make a statement to that effect (unlike Ontario's), the Act was amended in 1992 to state that the lien is to be enforced "according to the ordinary procedures" of the court. Under those ordinary procedures, a court has the authority to deal with all such claims. In light of that amendment, older decisions in New Brunswick holding that counterclaims could not be asserted in a mechanics' lien action were no longer good authority. The proper rule is that all counterclaims, cross claims and third party claims can be dealt with in a mechanics' lien action, if the court determines that, in justice and fairness, they should be.

The Court of Appeal declined to decide whether the mandatory provisions of section 36 of the **Arbitration Act** required the arbitration of this dispute. The facts had changed and the arguments before the Court of Appeal were different than they had been in the court below, making it apparent that the decision of the Court of Queen's Bench was in error. In all the circumstances, the Court of Appeal sent the matter back to the Court of Queen's Bench for a re-hearing.

This decision allows us to take stalk of the legal issues relating to arbitrations and construction and mechanics liens.

The first issue concerns the right to appeal a judge's decision on a motion to stay an action in the face of an arbitration clause. At first glance, it seems lop-sided for the Court of Appeal to hold that the application judge's decision may be appealed if he finds that the dispute falls outside the arbitration clause but not appealed if he finds that it falls within that clause.

However, that disparity can be rationalized by the structure of the Arbitration Act. That structure mandates that in the presence of an arbitration clause, any claim must be arbitrated, and the statutory language then goes on to deal with the powers and discretion of the court in that setting. If a court decides that the claim falls outside the arbitration clause, then the whole structure is avoided and it is reasonable for an appellate court to resolve the correctness of that decision.

This conclusion may be helpful to courts and parties elsewhere in the world which are wrestling with similar "no appeal" provisions in their arbitration statutes.

The second issue concerns the discretion of the application judge in the face of an arbitration clause and disparate rights arising from mechanics' or construction liens. Some courts have held that the judge has discretion not to stay the action in the face of such other claims. However, most courts have held that, since the adoption of the modern arbitration statutes and their mandatory direction that an action be stayed if there is an applicable arbitration clause, the claims between the parties to that clause must be stayed even if they arise from mechanics' or construction liens and even if there are other related claims between the parties or other parties.

The Court of Appeal might have resolved this latter issue and settled the principle in light of the modern **New Brunswick *Arbitration Act***. Owners and construction contractors need to know whether their disputes will be resolved by arbitration, by mechanics' or construction lien actions.

Instead the Court chose to have that issue first resolved by the Queen's Bench division. Hopefully, appellate courts in Canada and indeed the Supreme Court of Canada will soon settle this tension between these two important dispute resolution systems: arbitration and mechanics' and construction liens.

Arbitration - Building Contracts - Construction Liens:

***SNC-SNAM, G.P. a partnership between SNC Lavelin Inc and Snamprogetti Canada Inc. v. Opron Maritimes Construction Ltd.,* 2011 NBCA 60**

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