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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] 1 S.C.R. 116

Can An Arbitrator Determine The Rights Of Non-Parties?

The Alberta Court of Appeal recently considered an arbitration award in which the arbitrator had decided the rights of non parties to the arbitration. In *MJS Recycling Inc. v. Shane Homes Limited,* the Court held that the arbitrator had no authority to determine the rights of non-parties. The court set aside the award and remitted the matter back to the arbitrator for a determination in accordance with the court's decision. The process and logic applied by the

Court provides a useful precedent for considering the powers of arbitrators and the courts when the rights of non parties are affected by an arbitral decision.

Shane was one of a number of builders that owned shares in MJS. MJS bought all of the shares in *MJS* owned by the builders. One of the elements of the purchase price was the builders' agreement to use *MJS* for certain percentages of their waste management disposals for five years.

The share purchase agreement provided for arbitration of any disputes pursuant to the *Arbitration Act* of Alberta and stated that the arbitrator's decision was final and binding and that there was no appeal on a matter of law or otherwise.

MJS alleged that Shane had failed to purchase the required amount of waste management contracts from MJS. MJS stopped making payments to Shane under the share purchase agreement and commenced arbitration proceedings against Shane. Neither MJS nor Shane attempted to make the other builders parties to the arbitration.

The arbitrator held that, due to Shane's failure to purchase the required percentage of waste management contracts, MJS was entitled to stop payments to all the builders and no longer owed monies to any of the builders. The arbitrator also held that MJS's sole right was to be discharged from liability to all the builders and that MJS had no right to damages against Shane alone.

MJS brought an application to review the award. The Alberta Queen's Bench judge held that the arbitrator had acted beyond his jurisdiction by making an award involving the rights of the non-party builders, but declined to grant any relief due to the "final and binding" and "no appeal" provisions of the share purchase agreement.

The Alberta Court of Appeal agreed that the arbitrator had acted without jurisdiction in rendering a decision which affected the rights of the non-party builders. The Court of Appeal disagreed with the lower court's view about the appropriate result of that finding, and held that the "final and binding" and "no appeal" provisions of the share purchase agreement did not preclude the court from setting aside the award based on jurisdictional error under section 45 of the *Arbitration Act* of Alberta, particularly since that section is excluded from those sections of that Act that the parties may contract out of. Once jurisdictional error was found, it followed that the court had power to set aside the award. As the Court of Appeal said:

> "It is difficult to conceive of any proper basis for allowing an award to stand that is beyond the scope of the arbitration agreement which is the foundation of an arbitrator's jurisdiction."

Having held that the arbitrator had acted without jurisdiction, the Court of Appeal held that (absent, presumably, disqualifying conduct of the applicant) the court was virtually obliged to grant MJS the appropriate remedy, which was to set the award aside and remit the matter to the arbitrator under section 45(8) of the *Arbitration Act*. Remittal of the matter to the arbitrator was the appropriate order since the arbitrator had acted in excess of his jurisdiction

which he admittedly had. It would obviously not have been the appropriate court order if the arbitrator had no jurisdiction at all.

The way in which the Court of Appeal stated its decision to remit is interesting. It did not tell the arbitrator how to make its award against Shane. Rather, it stated its anticipation of the appropriate conduct of the arbitrator:

> "In these circumstances, we are of the view that the matter should be remitted to the arbitrator so that he can craft a revised award within the scope of his powers. Specifically, we anticipate that his new award will reflect that MJS is only not responsible for payment to Shane …not to the other members of the Builders' Group…..
>
> Finally, we wish to make it clear that in remitting the matter to the arbitrator we do not intend to tie his hands with respect to the award to be made against Shane in this arbitration. We observe that his award was expressly made "subject to the Orders" therein which we have ruled exceeded his jurisdiction. It may well be that he will now see fit to grant other or further damages payable by Shane, or to grant other equitable relief, as a result of its breach. The parties agreed to submit their dispute to arbitration and provided that the new award is within the arbitrator's jurisdiction, we are inclined to the view of the chambers judge that they should "live with it."

The Court of Appeal concluded its decision by remarking that, while one arbitration proceeding would have been preferable, MJS and Shane had not included the other builders in the arbitration. Accordingly, any dispute between MJS and the other builders would have to be dealt with in a separate arbitration.

This is an important decision, not only in relation to the authority of arbitrators, but also the authority of the courts. It reminds us that:

1. A "no appeal" and "final and binding" clause in an arbitration agreement does not in any way apply to or affect the court's jurisdiction to grant judicial review of an arbitration award on jurisdictional grounds;

2. (Absent specific authority to do so) an arbitrator has no power to affect the rights of non-parties; and

3. Once a court finds that the arbitrator has made a jurisdictional error, the court must grant an effective remedy, to set aside the award, and (if the arbitrator has authority) remit the matter to the arbitrator in accordance with the court's decision.

Arbitration - Non-parties – Setting aside award – Administrative Law – Construction Law

*MJS Recycling Inc. v. Shane Homes Limited,*2011 ABCA 221

Thomas G. Heintzman, O.C., Q.C. September 11, 2011

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