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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

The Limitation Period Quagmire Between Litigation And Arbitration

The limitation period is a vexing issue to any party involved in a commercial dispute. This truism applies even more to construction disputes because there are a variety of events that may trigger the beginning of the limitation period. The limitation issue becomes even more vexing when the proceeding can be either: by way of arbitration, by way of an action or by way of a counterclaim. Add to that confusion a motion by one party to stay its own action in favour of arbitration. How could any party know when the limitation period started? That was the situation in ***Penn-Co construction v. Constance Lake First Nation***.

The bottom line of this decision is that the limitation period is not stayed while the court sorts out whether the dispute should be resolved by court litigation or arbitration.

The Background

In June 2003, **Penn-Co** entered into a contract with **Constance Lake** to build a school on the reserve. The work was to be completed by November 2004. Constance Lake took possession of the school in February 2005. Disputes remained between the parties about payment and the completion of the project. In December 2005, Constance Lake served a notice alleging that Penn-Co was in default under the contract and gave Penn-Co five days to cure the default or provide a schedule to do so. In May 2006, Constance Lake then served a Notice of Default on Penn-Co's bonding company. In September, 2006, Constance Lake served a notice on Penn-Co terminating the contract due to the inability or refusal of Penn-Co to perform the balance of the contract work. In October, 2006, Constance Lake entered into a contract with another contractor for the "completion" of the contract.

In January 2007, Penn-Co started an action against Constance Lake for damages for breach of contract. At the same time, Penn-Co brought a motion to stay its own action pending arbitration. Constance Lake opposed the motion on the basis that the action should proceed, not an arbitration. The motion was dismissed in September 2007, and Penn-Co's appeal was dismissed by the Court of Appeal in November 2008. In May, 2009, Constance Lake served a Statement of Defence and Counterclaim, but did not have it formally issued by the court. In September 2009, Penn-Co served its Defence to Counterclaim, and in October 2009, Penn-Co issued a third party notice seeking contribution and indemnity from certain sub-trades in respect of the counterclaim. In April 2010, Penn-Co delivered an amended Defence to Counterclaim asserting that the Counterclaim had been issued outside the two year limitation period in the Ontario *Limitations Act, 2002*. Penn-Co then brought a summary judgment motion to dismiss the Counterclaim.

The Decision

The motion judge held that the Counterclaim had been issued outside the limitation period and dismissed the Counterclaim. There was no dispute that the limitation period commenced at the latest in September 2006 when Constance Lake terminated the contract. Accordingly, the two year limitation period ended in September 2008, long before Constance Lake served its Counterclaim in May 2009.

Constance Lake's argued that the limitation period was extended due to Penn-Co's motion to stay its action in favour of arbitration. Constance Lake argued that until that motion was dismissed there was every possibility that Penn-Co's action would be stayed and that the dispute would be dealt with by arbitration, and that accordingly the limitation period did not start to run until November 2008 when the Court of Appeal dismissed Penn-Co's appeal on that issue. Constance Lake argued that Penn-Co's motion either suspended the limitation period or amounted to a waiver of the running of the limitation period by Penn-Co.

Section 52(2) of the Ontario *Arbitration Act, 1991* does provide that, if the court sets aside an arbitration award, terminates an arbitration or declares an arbitration to be invalid, then the court may order that the time period from the commencement of the arbitration to the date of the order shall be excluded from the limitation period. Constance Lake argued that, by analogy, the period during Penn-Co's stay motion should also be excluded from the limitation period.

The motion judge rejected that argument. The court which had dismissed Penn-Co's stay motion, and the Court of Appeal, had not done any of the things referred to in Section 52(2); setting aside the arbitration award or terminating or declaring invalid the arbitration. Nor was the present motion judge doing any of those things.

The motion judge also rejected the assertion that he had discretion to go beyond either section 52(2) of the *Arbitration Act, 1991* or the *Limitation Act* and, by judicial interpretation, expand on the specific terms of either statute. To do so would be contrary to the *Limitation Act* itself which contemplates that the provision of that statute are the only limitation periods to be applied, and would also be contrary to the previous directions of the Court of Appeal that any suspensions of the periods contained in the *Limitation Act* must be found in that Act itself or another statute, not in judge-made law.

The motion judge also did not accept the argument that Penn-Co had waived the limitation period or that there was, effectively, an agreement between the parties to waive the limitation period. At any time Constance Lake could have commenced an action, or could have issued a Counterclaim in Penn-Co's action after it was issued in January 2007. At no time did Penn-Co relinquish or waive its right to rely on the limitation period.

The Importance of Keeping Your Eye on The Limitation Period

This decision is, perhaps, more about not letting the opposition dazzle you with fancy procedures than it is about determining when a limitation period commences and ends. In the absence of statutory authority or agreement to that effect, the notices to bonding companies, the commencement of proceedings by the other party, or motions or other fancy moves by the other side will not do anything to stop the limitation period from running for the other party's claim.

In a construction project, there may be all sorts of opportunities to serve notices, give directions, make claims against bonding companies and even commence litigation which may confuse and confound the other party. But those moves should not distract the other party into thinking that the limitation period is no longer an issue for its own claim. It is.

In particular, if any time is taken up in deciding whether one party's claim should proceed in court or by arbitration, that period of time does not extend the limitation period for the other party's claim to be commenced.

So it is necessary to keep an eye on the limitation period from the beginning. And certainly, after a party to a contract terminates that contract, or purports to do so, a big, solid mark and reminder should be made in the diary which alerts that party to commence court or arbitration proceedings within the limitation period after that date, no matter what the other party does.

Construction Law - Arbitration - Limitation Period :

Penn-Co construction v. Constance Lake First Nation, 2011 ONCS 5875

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