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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,*** 4th Edition which provides an analysis of the law of contracts as it applies to building contracts in Canada.

Does Inaction Amount To Acceptance Of A Repudiation Of Contract?

Can inaction by a party to a contract amount to an acceptance of the repudiation of the contract by the other party? That was the issue in the very recent decision of the Ontario Court of Appeal in ***Brown v. Belleville (City)***.

This is an important issue in construction law because of the critical effect of the acceptance or non-acceptance of contractual repudiation. The acceptance of repudiation brings the entire contract to an end. But if repudiation is not accepted then the contract continues. So whether there has been an acceptance of repudiation can be of pivotal importance.

If the contract has come to an end by acceptance of repudiation, then contractual performance obligation may terminate, warranty periods and limitation periods may start running, and insurance rights may start or end. So it is vital for a builder or owner to know whether the contract has been terminated.

Yet, a builder or owner may not have the time or inclination to respond to wrongful conduct by the other side. But if an owner or contractor doesn't respond, can they be taken, by inference, to have accepted the wrongful conduct and brought the contract to an end? Does an owner or contractor in effect have an obligation to respond? Can they leave matters up in the air without specifically dealing with a repudiation by the other side? That was the issue in ***Brown v. Belleville (City).***

The Factual Background

In 1953 a municipality entered into an agreement with a farmer under which the municipality agreed to maintain and repair a storm sewer drainage system that it had constructed on and near the farmer's lands. Six years later, the municipality stopped maintaining and repairing the drainage system. The lands affected by the drainage system were sold by the farmer's heirs to a third party.

In the 1980's, that third party tried to have the municipality maintain the drainage system. The municipality refused to do so, clearly repudiating the agreement. In 2003, the affected lands were sold to the Browns who asked the successor municipality, Belleville, to maintain and repair the drainage system. Belleville refused to do so and repudiated the agreement.

The Browns then sued Belleville. Belleville defended the action and one of the positions it asserted was that the Brown's claim was barred by the limitation period. Belleville asserted that the repudiation by it and its predecessor municipalities had long ago been accepted by the Browns and their predecessors, in effect by inaction. Accordingly, Belleville said that the agreement had long since terminated and the limitation period had run.

The Court of Appeal's decision

The Court of Appeal started its analysis by noting that a repudiation of a contract does not, in itself, bring the contract to an end. Only if the innocent party elects to accept the repudiation does the contract come to an end. The innocent party is not obliged to accept the repudiation, and if he or she does not so accept then the contract continues in effect.

The Court of Appeal then stated the test to determine whether there has been an acceptance of a repudiation. The court said that the acceptance:

> "must be <u>clearly and unequivocally communicated</u> to the repudiating party within a reasonable time. Communication of the election to disaffirm or terminate the contract may be accomplished directly, by

> either oral or written words, or may be inferred from the conduct of the innocent party in the particular circumstances of the case."(emphasis added)

The Court of Appeal quoted from another decision in which it was said that:

> "mere inactivity or acquiescence will generally not be regarded as acceptance for this purpose. But there may be circumstances in which a continuing failure to perform will be sufficiently unequivocal to constitute acceptance of a repudiation."

The Court of Appeal agreed with the trial judge that the third party's "silence or inaction in the face of [the municipality's] repudiation of the Agreement falls short of satisfying the requirement of clear and unequivocal communication to the repudiating party of the adoption of a repudiatory breach or anticipatory repudiation of contract."

The mere fact that the municipality did not exercise its rights did not mean that it could not have done so, nor did it mean that the Browns or their predecessors had precluded the municipality from doing so. The Court noted:

> "the municipality did not seek access to the affected lands to carry out maintenance or repair activities does not mean that such access was unavailable."

The Court of Appeal stated that the burden of proving an acceptance of repudiation was on the municipality and there was no evidence of such acceptance by the Browns or their predecessors in title.

Comments

This decision is another example of appellate courts in Canada sticking to the fundamental principles of contract law. The requirement that an acceptance of repudiation must be clearly made and clearly proven means that the wrongful party cannot benefit from its own wrongful conduct and induce a termination by its own repudiation.

It may have taken a fair bit of chutzpah for the municipality to say: "we repudiated the contract, and you accepted it, didn't you know!" But that is the situation in which every exasperated contracting party finds itself when stuck with a contract that it has long since repudiated and wants to be rid of. Unfortunately, it can't unilaterally get rid of it, and the contract can go on, and on, and on, until the repudiation is accepted by the innocent party, if it ever is.

Besides being favourable to the innocent party, this state of the law protects the inactive party, the party that doesn't have the time, inclination or resources to take the time to determine if it will accept the repudiation of the wrongful party, or simply doesn't want to.

So, on a construction project, a serious wrong by one party does not mean that the contract comes to an end. The law's choice is that, in those circumstances, it is better that the contract continues and not come to an end. It only comes to an end if the other party wants it to.

See *Heintzman and Goldsmith on Canadian Building Contracts*, 4th ed., chapter 1, part 4(c)

***Brown v. Belleville (City),* 2013 ONCA 148**

Construction Contract – Termination - Repudiation - Acceptance - Limitations

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