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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*, 4<sup>th</sup> 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

## **Can An Arbitration Claim Be Dismissed For Delay?**

Does an arbitral tribunal have authority to dismiss an arbitration claim for want of prosecution? Some arbitration statutes expressly state that a tribunal has the power to do so. Absent such an express power, the British Columbia Court of Appeal has held that the tribunal has no inherent authority to do so:

***Premium Brands Operating GP Inc. v. Turner Distribution systems Inc.***

The **Uniform Arbitration Act** developed by the Uniform Law Conference of Canada confers, in section 27(4), an express power on the arbitral tribunal to dismiss an arbitration claim for want of prosecution. That Uniform Act has been adopted in Alberta, Saskatchewan, Manitoba, Ontario, New Brunswick and Nova Scotia. But in other provinces such as British Columbia, the Uniform Arbitration Act has not been adopted.

A power to dismiss for delay is not found in the UNCITRAL Model Law and in the International Commercial Arbitration statutes in Canada that have adopted the Model Law. So this decision has wide importance for those arbitrations.

### **The Background**

Premium Brands was the successor to companies which had contracted with Turner for the provision by Turner of warehouse and distribution services. The contracts contained arbitration clauses. Turner commenced arbitration in March 2000. A hearing was held in June 2000 and an award was made in July 2000 in which the arbitrator ordered a further hearing into issues arising from his award. Various proceedings occurred over the succeeding years until in 2009, Premium brought a motion to dismiss the arbitration for want of prosecution.

The arbitrator found that he had no authority to dismiss the claim for want of prosecution. He held that Rule 34(2) of the B.C. *Domestic Commercial Arbitration Rules* did not apply. That sub-rule authorized the arbitrator to dismiss the arbitration if he found that the proceedings had become “unnecessary or impossible.” He found that there had been excessive delay which would have resulted in a dismissal of the proceedings for want of prosecution if he had the power to so order. However, he held that it was not impossible to proceed with the arbitration.

The arbitrator’s decision was upheld by the British Columbia Supreme Court. A further appeal was then brought to the British Columbia Court of Appeal, which dismissed the appeal.

### **Was justice denied because of the delay?**

Premium’s principle argument was that the failure to prosecute the arbitration claim with reasonable dispatch resulted in a denial of natural justice. It submitted that an arbitral tribunal has inherent jurisdiction to dismiss a claim if the proceedings amounted to a denial of natural justice. In addition, it submitted that the powers of the arbitral tribunal were analogous to those of a court which has the power to dismiss for want of prosecution.

The British Columbia Court of Appeal noted that the arbitrator had found that it was not “impossible” to proceed with the arbitration. The Court understood that finding to mean that it was not impossible to proceed in accordance with natural justice, even though the passage of time would have resulted in the dismissal of the proceeding for delay if the power to so dismiss had been given to the arbitrator.

## **The Court of Appeal rejected Premium’s arguments for three reasons:**

First, the bilateral obligations undertaken by the parties in an arbitration agreement are not similar to those undertaken by parties to a civil action in court. In the latter case, the court is a state-operated dispute resolution system in which the defendant is obliged to participate by the plaintiff commencing the action. Arbitration is a dispute system voluntarily adopted by both parties.

In this circumstance, the respondent in the arbitration cannot sit back and wait for the claimant to run out of time to prosecute the claim. Rather, the respondent has the obligation to seek remedies from the arbitrator to move the proceeding along with reasonable dispatch. If the respondent does so, the arbitrator can issue directions with respect to the delivery of pleadings, documents and a timely hearing. If either party disobeys those directions, then the arbitrator has full power to dismiss the arbitration claim. But if the respondent fails to utilize the arbitration process to which it agreed to seek such directions, the arbitrator has no jurisdiction to dismiss the arbitration for want of prosecution.

Second, the Court of Appeal distinguished the inherent power of the arbitrator to make orders that ensured that the arbitration occurred in a fair manner – what may be called procedural orders – from orders dismissing the arbitration claim on a self-standing basis. The arbitral tribunal has inherent power to order that a party post security for costs, or to require parties to deliver pleadings or undertake various proceedings leading to a hearing. The tribunal has authority to strike out a party’s claim or defence for failure to comply with those sorts of orders. But if a party does not seek and obtain an order by the arbitral tribunal relating to the conduct of the arbitration which the other party disobeys, then the tribunal has no inherent authority to dismiss the arbitration claim.

Third, the power of a court to dismiss for want of prosecution arises from the specific statute and rules of civil procedure governing the court. Some arbitration statutes also confer that power on the arbitral tribunals governed by those statutes. In the absence of an express power being given by statute or the parties in their arbitration agreement, the Court of Appeal held that the arbitral tribunal has no implied power to dismiss the proceeding.

## **For three reasons this decision is of wider importance than arbitral practice in British Columbia:**

First, its reasoning will apply to domestic arbitrations in other jurisdictions which, like British Columbia, have not expressly given arbitrators the power to dismiss for delay.

Second and most importantly, its reasoning applies to international commercial arbitration statutes. Those statutes adopt the UNCITRAL Model Law and do not generally incorporate an express power to dismiss for delay. Thus, Chapters V and VI of the **Ontario International Commercial Arbitration Act** do not contain an express power to dismiss for delay. Rather, Section 32(3) states that the arbitral tribunal has authority to dismiss if the conduct of the proceeding has become “unnecessary or impossible.” This wording is the same as Article

32(2)(c) of the UNCITRAL Model Law. The wording is also the same as Rule 34(3) of the **B.C. Domestic Commercial Arbitration Rules**. Accordingly, the reasoning of the B.C. Court of Appeal will be directly applicable to any suggestion that an international commercial arbitral tribunal has an inherent authority to dismiss for delay.

Third, this decision is a reminder that an arbitrator does not have any substantive powers except those which the governing statute and the arbitration agreement confer on it. This means that, before entering into an arbitration agreement and before selecting the law to apply to it, the parties must carefully review the proposed agreement and the proposed governing law in order to ensure that the powers that they want the arbitrator to have, or not have, are clearly understood beforehand. Otherwise, they will not be inferred or implied into the powers of the arbitrator later.

**Arbitration – Powers of the Arbitral Tribunal – Dismissal for Delay:**

***Premium Brands Operating GP Inc. v. Turner Distribution Systems Inc. 2011 BCCA 75***

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November 26, 2011

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