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Thomas Heintzman specializes in alternative dispute resolution. He has acted in trials, appeals and arbitrations in Ontario, Newfoundland, Manitoba, British Columbia, Nova Scotia and New Brunswick and has made numerous appearances before the Supreme Court of Canada.

Mr. Heintzman practiced with McCarthy Tétrault LLP for over 40 years with an emphasis in commercial disputes relating to securities law and shareholders' rights, government contracts, insurance, broadcasting and telecommunications, construction and environmental law. He was an elected bencher of the Law Society of Canada for 8 years and is an elected Fellow of the American College of Trial Lawyers and of the International Academy of Trial Lawyers.

Thomas Heintzman is the author of *Heintzman & Goldsmith on Canadian Building Contracts*, 5th Edition which provides an analysis of the law of contracts as it applies to building contracts in Canada.

Heintzman & Goldsmith 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:

Waiver During A Bidding Process Held To Bar Claim Arising From The Tender

The Ontario Superior Court recently dealt with the troubling issue of whether an owner can rely upon a waiver of claims signed by a bidder during a tender to defeat a contractor's claim arising from the tender. In *Todd Brothers Contracting Ltd. v. Algonquin Highlands (Township)*, the

court held that the owner was entitled to do so. The court also dealt with two other issues relating to tenders: whether there was a contract between the owner and the bidder; and whether the limitation period to assert a claim arising from the tender had expired.

For these three reasons this decision is an important one in relation to the law of tenders. .

Background

Todd Brothers was the lowest bidder in an invitation to tender which closed in April 2009. The invitation to tender had been issued by the Township for the construction of a new runway and the rehabilitation of an existing runway at the Township's airport. An environmental assessment of the project was undertaken of the project by the federal environmental agency. Todd Brothers then agreed to extend the time for acceptance of its tender to July 15, 2009. The municipality decided to proceed with the project in phases because some phases did not require environmental approval. Todd Brothers agreed to the phasing of the project, and to a further extension of the time for acceptance of its tender.

In September 2009, Township council passed a resolution accepting Todd Brothers' tender in accordance with the tender documents, subject to the Canadian Environmental Assessment Act.

Prior to the Township council resolution accepting its tender, Todd Brothers signed a "Compensation Waiver Acknowledgment" which provided that Todd Brothers would:

“not seek any compensation for ... work identified but not completed ... in the event that the Township cannot proceed to any of the phases as a result of matters beyond the control of the Township of Algonquin Highlands, or delays resulting from the review being completed by the CEAA ... any other public issues/concerns or the withdrawal of funding from applicable sources.”

The Canadian Environmental Assessment Agency (CEAA) completed its review in December of 2010. However, the new municipal council decided not to proceed with the project. Ultimately, the Township proceeded with a joint project with the provincial government which resulted in the first three parts of the original project not proceeding.

Todd Brothers started an action against the Township on July 10, 2013, asserting that the Township's failure to proceed with the full project was a breach of contract. The limitation issue was whether Todd Brothers had discovered or ought to have discovered its claim prior to July 10, 2011. If so, its claim was barred by the two year limitation period in the ***Limitations Act, 2002***.

Decision of the Ontario Superior Court

The first question was whether any contract had come into existence between Todd Brothers and the Township. The Township submitted that although the Township council passed a resolution accepting Todd Brothers' tender, the tender documents said that an award of the

contract required the Township's "written confirmation mailed to the successful bidder", and no such confirmation was mailed; and that no acceptance of the tender was ever communicated to Todd Brothers.

The court rejected that submission, stating:

“This provision does not, as argued by the Township, make an award of the contract conditional upon the Township's "written confirmation mailed to the successful bidder". Rather, it provides an obligation on the part of the contractor to sign the contract contained in the RFT, within seven days of being advised that its tender was accepted. If the Township failed to mail written notice of the award to Todd Brothers, it cannot rely upon that failure to argue that acceptance of the tender did not create a binding agreement.”

In arriving at this conclusion, the court relied upon the Contract A/Contract B analysis of the Supreme Court of Canada in the ***Ron Engineering*** decision. The court in the present case explained the application of ***Ron Engineering*** as follows:

“Contract A is formed when a contractor submits a compliant bid in response to an invitation to tender. The principal terms of Contract A are the irrevocability of the tender during the acceptance period provided for in the RFT, and the obligation of both parties, if the tender is accepted, to enter into a contract (Contract B), on the terms set out in the RFT. The obligation of the parties to enter into Contract B arises from Contract A, and is not dependent upon communication of the acceptance from the owner to the contractor.”

The second question was whether the waiver signed by Todd Brothers barred its claim. The court held that it did. The circumstances fell within the wording of the waiver. The court concluded that the Township was unable to proceed with the first three parts of the project due to the ongoing CEAA review. Once that process was finished, then the Township was:

“unable to proceed with those parts of the original project after December of 2010, because of the joint airport improvement proposal made by MNR. Had the Township failed to pursue the joint project with MNR, as required by the OMAFRA contribution agreement, it risked withdrawal of provincial funding.”

The third issue was the limitation question. The court held that Todd Brothers did not discover nor ought to have reasonably discovered its claim before July 2011. Its claim only arose when “Todd Brothers discovered that this work would no longer be made available to it.” In July 2012, the discussions with the environmental authorities were still ongoing and Todd Brothers had reason to believe that they would work out. It was not reasonable to insist that Todd Brothers commence an action at that point when discussion between the parties were still unfolding.

Discussion

Each of these three issues are of interest. The first point raises two questions:

What events give rise to a contract under an invitation to tender?

And if a contract arises, did it oblige the Township to enter into Contract B-the building contract?

The court answered the first question. It concluded that Contract A was formed when Todd Brothers submitted its bid and the tenders closed. At that point there was a Contract A between Todd Brothers and the Township governing the bidding process. That contract came into being automatically and without any need for a communication from the Township to Todd Brothers.

The court did not apparently answer the second question. Under the ***Ron Engineering*** regime, Contract A required the Township to enter into Contract B – the construction contract – unless there was a justifiable reason not to do so. But the court did not consider whether there was justification for the Township not to enter into Contract B. Why were the CEAA process and the dealings with the province of Ontario not a sufficient justification for the Township not to proceed with the contract with Todd Brothers? Indeed, in its discussion of waiver, the court appears to have concluded that the CEAA process and the dealings with the provincial government did justify the Township in not entering into the building contract with Todd Brothers.

The court's conclusions about waiver also seem problematic. What was the consideration for the waiver? Todd Brothers was the low bidder and, under the ***Ron Engineering*** analysis, the Township was obliged to enter into the building contract with Todd Brothers, absent reasonable justification for not doing so. It does not seem open to the Township to say that it awarded the contract to Todd Brothers in consideration of receiving the waiver: as the court said, the Township was obliged to award the contract to Todd Brothers due to the ***Ron Engineering*** regime. So what was the consideration that made the waiver enforceable? Why was it not a gratuitous promise or unilateral offer that Todd Brothers was entitled to withdraw?

See Heintzman and Goldsmith on Canadian Building Contracts (5th ed.), chapter 3, part

***Todd Brothers Contracting Ltd. v. Algonquin Highlands (Township)*, 2015 CarswellOnt 3045
2015 ONSC 1501**

Building Contracts – Tendering – Contract A-Contract B- consideration - waiver – limitation periods

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