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Thomas Heintzman specializes in commercial litigation and is counsel at McCarthy Tétrault in Toronto. His practice focuses on 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 Building Contracts, 4th Edition which provides an analysis of the law of contracts as it applies to building contracts in Canada.

Goldsmith & Heintzman on Building Contracts has been cited in 182 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

Does A Breach of Fiduciary Duty Fall Within an Arbitration Clause?

In the recent decision, *St. Pierre v. Chriscan Enterprises Ltd.*, the British Columbia Court of Appeal considered whether a claim by an owner against the project manager for breach of fiduciary duty fell within the wording of the arbitration clause in the project management agreement.

The arbitration clause stated that disagreements "as to the interpretation of this contract or the quality of the material or construction arranged by the project manager or any issues relating to project deficiencies" were to be arbitrated under the British Columbia *Commercial Arbitration Act.*

The owner's claim was that the project manager had arranged for some of the work to be contracted to a company in which the principal manager of the project manager, Chriscan, had an interest and that the project manager or its principal had received secret profits in this way.

The owner asserted that its fiduciary duty claim against the project manager relating to those secret profits did not fall within the arbitration clause.

The B.C. Court of Appeal disagreed. It noted that, if the arbitration clause referred to "all disputes", then there would be no argument and the dispute would clearly have to be arbitrated. The Court held that, while the present arbitration clause was narrower, it still captured the dispute which depended on determining whether the relationship between the parties was a fiduciary one or not. That issue depended upon an "interpretation of the contract" between the parties. Accordingly, the dispute fell within the arbitration clause.

The Court held that "it is only by interpreting the contract, in its factual context, that the legal nature of their relationship and whether the appellants' allegations have any merit can be determined".

This decision reflects the tendency in Canadian law to include any claim within an arbitration clause which arguably falls within it. In this case, the parties appeared to be at some pains to draft a narrow arbitration clause, yet the Court held that the clause applied to conduct quite outside the actual performance of the construction project – a secret profit allegedly earned by the project manager through a related company. It is hard to imagine an arbitration clause and a claim which are more disassociated, yet the Court held that the claim fell within the arbitration clause.

The lesson here is that an arbitration clause in a construction project should either be drawn to encompass "all claims" in dispute, or if the parties intend to limit the disputes which may be arbitrated then those limitations should be set out in explicit exclusionary language.

*St. Pierre v. Chriscan Enterprises Ltd., 2011 BCCA 97 (*CanLII)
Arbitration Agreement – Claims - Construction Law - Contract – Fiduciary – Secret Profits - Disagreement
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