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

Alberta Court Of Appeal Holds That A Court Action Is Not A Notice Of Arbitration

In previous articles I have warned readers about the dangers of the limitation period in relation to arbitration claims. You can look at my prior articles dated July 17, 2011, February 26, 2012 and August 26, 2012. These dangers are highlighted by the recent decision of the Alberta Court of Appeal in ***Lafarge Canada Inc. v. Edmonton*** **(City)**. The court held that that a Statement of Claim in an action is not a notice of arbitration under an arbitration clause. This may mean that an arbitration claim subsequently commenced is outside the limitation period.

Background

Lafarge entered into a contract with the City to provide cement pipe for a light rail transit project. The City alleged that Lafarge had not delivered the pipe in a timely manner and it set off the delay costs against Lafarge's invoices. The supply contract contained an arbitration clause which stated that "if any disputes arise under the Contract and the parties are not able to resolve it, the parties shall appoint a single arbitrator to conduct an arbitration in accordance with the ***Arbitration Act***."

On May 28, 2009, or about 22 months after the dispute arose, Lafarge and the City entered into a standstill agreement. That agreement provided that the limitation period did not run during the term of that agreement, that the parties could terminate that agreement and that if they did then the parties had 3 months to commence proceedings before the limitation period would apply. Lafarge terminated the standstill agreement on February 2, 2011 and commenced an action on February 11, 2011. The City served its Statement of Defence on March 14, 2011, the City pleading ***inter alia*** that the parties had agreed to submit any disputes arising under the contract to arbitration. In delivering the Statement of Defence, the City's solicitor said: "I think arbitration may be mandatory but we [sic] happy to discuss future process". In July 2012 Lafarge delivered its documents and the City said that it would move to stay the action on the basis of the arbitration clause, and also asserted that Lafarge's claim was now statute barred. The City's motion was not brought until June 2012.

Chamber Judge's Decision

The chambers judge held that the Statement of Claim in the action was a sufficient notice of arbitration under s. 23 of the Alberta ***Arbitration Act***. Section 23 states an arbitration may be commenced in any way recognized by law, including the following:

(a) a party to an arbitration agreement serves on the other parties notice to appoint or to participate in the appointment of an arbitrator under the agreement; and
(b) a party serves on the other parties a notice demanding arbitration under the arbitration agreement.

The judge therefore found that there were no limitations defence which applied and that the arbitration process had been sufficiently notified to the City by Lafarge in time under s. 23 of the ***Arbitration Act.*** The chambers judge held that in those circumstances it was unnecessary for him to address alternative issues concerning delay and attornment.

Alberta Court of Appeal's Decision

The Alberta Court of Appeal reversed the chambers judge's decision, holding that the Statement of Claim was not a notice of arbitration under section 23 of the Alberta ***Arbitration Act***. The court held that to treat the Statement of Claim "as a form of notification of arbitration under s. 23 does not amount to giving a liberal reading to s. 23 of the Act but bursts its

conceptual boundaries," and that "to characterize what amounts to the *opposite* of notice to commence arbitration as being the same as notice to commence arbitration would take s. 23 outside the scope of predictable meaning."

The Court declined to decide any issues arising from its decision, and in particular whether the City had attorned to the court's jurisdiction or whether its delay precluded it from bringing the stay motion. The Alberta Court of Appeal returned the matter to the Court of Queen's Bench to consider whether there should be a stay of the lawsuit in light of waiver, including attornment and delay in the stay application.

Discussion

As I have said in my prior articles, people tend to forget about limitation periods in respect of arbitration claims because they think they already have a contract so there must be an entitlement to assert an arbitration claim. Since there is no court office in which to start the arbitration claim, people tend to assume that there is no formality to the commencement of the arbitration claim. Not so. The provincial ***Arbitration Acts*** have very specific criteria about what amounts to the commencement of an arbitration claim. If those criteria are not met, then no arbitration claim has been commenced and the limitation period continues to run.

So, in the present case, Lafarge commenced an action within the limitation period stated in the standstill agreement but not an arbitration claim as defined in the Alberta Act. The Alberta Court of Appeal has held that the action did not amount to an arbitration claim. While Lafarge may be held entitled to continue with its action by reasons of the City's waiver, attornment or delay, the Alberta Court of Appeal's decision means that it has not commenced an arbitration claim so far as the limitation period is concerned.

The fairness of this decision could be questioned. If the City knew of the claim through the commencement of the action, should it thereafter be able to rely on a limitation period? Should the City be required to renounce a limitation defence in the arbitration when seeking a stay of the action? There are old cases holding that if a defendant seeks to stay an action on the ground that the courts of another country are the more convenient forum, then the defendant must give an undertaking not to raise a limitation defence in the other forum. Should this rule be adopted on motions to stay actions based upon an arbitration clause?

Some might object to this rule on the ground that it will encourage parties to commence actions in the face of arbitration clauses and then insist on a waiver of the limitation period in the arbitration. After all, so it goes, arbitration clauses are obvious and can and should be adhered to.

But such a rule does seem sensible. After all, an action is a perfectly proper way to commence a claim. In fact, outlawing a court action is contrary to public policy. It is only if the other party insists on the arbitration clause that arbitration becomes mandatory; if the other party does not, then the court action is perfectly proper. The commencement of the action tells the defendant that there is a claim. If the defendant invokes the arbitration clause, there is an element of fairness in requiring the defendant not to assert the limitation defence in the arbitration. Maybe the further proceedings in the ***Lafarge*** case will explore this issue.

See *Heintzman and Goldsmith on Canadian Building Contracts* (4th ed.), chapter 10, parts 3, 5 and 6.

***Lafarge Canada Inc. v. Edmonton* (City), 2013 ABCA**

Arbitration - Limitation periods – Stay of action or arbitration – Building contracts – Public contracts - Alternative dispute resolution - Relation of arbitration to court proceedings

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