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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

Who Knew that Mary Carter was Involved in Construction Law?

In *Aecon Buildings v. Stephenson Engineering Limited*, the Ontario Court of Appeal recently dismissed a construction law claim because a Mary Carter agreement was not immediately disclosed.

A Mary Carter agreement is a settlement agreement between a plaintiff and defendant in which the defendant remains an active party to the litigation and the claim also proceeds against other parties. Since the defendant continues to participate in the action, the appearance is conveyed that the defendant is still liable to the plaintiff, contrary to the reality of the settlement. For this reason courts have always insisted that a Mary Carter agreement be immediately disclosed to all parties. But what happens if it isn't? The Ontario Court of Appeal faced that situation in this case.

The general contractor, Aecon, sued the owner, the City of Brampton, for damages due to the delay in the construction project. The City blamed the consultant for the delay. The consultant blamed the sub-consultants.

Before the action was commenced, Aecon and the City settled Aecon's claim on the basis that Aecon would only recover from the City the amount that the City recovered from the consultant.

While the settlement was effectively made before the action was commenced by Aecon against the City, it was reduced to writing the day after that action was commenced. Once the action was commenced, the City claimed over against the consultant and the consultant claimed over against the sub-consultants.

Aecon and the City remained active parties in the litigation, but the settlement agreement was not immediately disclosed to the consultant or sub-consultants who only discovered it later through other sources and demanded that it be produced.

The Court of Appeal held that the delay in the disclosure of the settlement agreement amounted to an abuse of process, even though the disclosure did occur before the affected parties were required to plead. The agreement had only been produced several months after its existence was discovered by the consultants and when it was specifically requested.

The Court said that the only way for it to control its own process, in order to ensure that Mary Carter agreements are immediately produced, was to dismiss the City's claim against the consultant and thereby the further claims by the consultant against the sub-consultants. Permitting the litigation to proceed without disclosure of the agreement rendered "the process a sham and amounts to a failure of justice" in the Court's view.

This decision is a reminder of the drastic remedies available to the Courts if litigation is conducted unfairly. While Mary Carter agreements are most often used in personal injury or medical malpractice actions, they can also be used to settle construction litigation. When they are, the parties must be scrupulous to ensure that the agreement is immediately disclosed. Otherwise, any further claims in the action may well be dismissed.

Aecon Buildings v. Stephenson Engineering Limited, 2010 ONCA 898 (CanLII)

Construction Law – Claims – Settlement – Agreement – Litigation – Champertous - Abuse of Process - Motion

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