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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

Can a Construction Lien Be Based On a Pre-Incorporation Contract?

Construction Lien Claims- Pre-Incorporation Contracts

What happens when a pre-incorporation construction contract is made in the name of a company which does not do the work, and then the construction lien is filed in the name of the company that was later incorporated and did the work?

That was the situation faced by the Alberta Court of Appeal in *Canbar West Projects Ltd v. Sure Shot Sandblasting & Painting Ltd.* The Court held that the lien was valid and, furthermore, that the contract had been effectively adopted by the company that did the work.

A company known as Can-West Projects Ltd entered into a contract with Sure Shot to construct facilities on land owned by a company related to Sure Shot. The

problem was that Can-West was not then incorporated, and when the principals behind it went to incorporate the company, they found that the name was taken. So they incorporated a company by the name of Canbar West Projects Ltd. and that company registered the name “Can-West Projects” as a trade name. After it was incorporated, the rest of the work was done by Canbar West Projects Ltd and it registered the lien.

The trial judge held that Canbar did not have a valid lien because it had not entered into the contract, and that Canbar had not adopted the contract made in the name of Can-West. The Court of Appeal of Alberta reversed both of these findings.

First, the Court of Appeal held that, so far as the lien was concerned, it did not matter that the contract was not in the name of Canbar. The entitlement to a lien arises from three elements:

- the owner requests the work
- the claimant does the work
- and the work improves the value of the land

The lien does not arise from the existence of a contract. Indeed a contract with the owner will not exist between the owner and a sub-contractor and yet sub-contractors can file liens. Here, Canbar had done the work, at least from the date of its incorporation; and the land had been improved. The mere fact that the contract had been made with a contractor under another name did not mean that the owner had not requested the work to be done. In effect, the trial judge had incorrectly used principles relating to the making of contracts when the issue related to construction liens.

Some of the work had been done before Canbar’s incorporation. As to that work, the Court of Appeal referred to section 15(3) of the Alberta Business Corporations Act, which deals with pre-incorporation contracts. The Court held that Canbar had adopted the contract made in the name of Can-West, in two ways.

First, the name on the contract was very similar to the name of the company as incorporated. In this circumstance, the contract can be said to have been made “in its name” within the subsection. As the court said, “minor variations in name surely must be included with respect to contracts made in the name of a then non-existing corporation.”

Second, the contract was made “on behalf of” the company within the meaning of the subsection. The principals intended to incorporate a company, to use the Can-

West name and to have it perform the work, and they only adopted another name because that name was taken. The company in fact adopted and performed the contract and the owner took no objection to the company doing further work after they knew that the lien was filed in the name of CanBar.

On the latter point, the trial judge had held that the existence of another, totally unrelated, company having the Can-West name disentitled CanBar from adopting the contract. The Court of Appeal disagreed. The other Can-West company did no work on the project and did not file the lien. That company was totally irrelevant to the issue.

This decision is a reminder of two important principles. One relates to construction liens. Construction liens are a creature of statute, not contract law. They protect those who improve lands, by virtue of that improvement and not by virtue of a contract. The owner must request the work or materials, but the lien arises from the request and the subsequent improvement, not a contract.

The second principle relates to pre-incorporation contracts. Adoption of such a contract can, under the legislation, occur “by any act or conduct signifying [the corporation’s] intention to be bound”, but only as long as the original contract was made in its name or on its behalf. Those involved in pre-incorporation contracts should make both elements very clear, both that the contract was made in the future corporation’s name or on its behalf, and also that there is a clear adoption of the pre-incorporation contract, by an express corporate resolution or contract or other express written document to that effect. Absent that sort of clarity, pre-incorporation contracts can lead to litigation.

See Goldsmith and Heintzman, *Canadian Building Contracts* (4th ed.) at Chapter 1, para 1(a) (ii) and Chapter 11, para 2(a)(iii).

Construction Lien- Pre-incorporation Contracts:

Canbar West Projects Ltd v. Sure Shot Sandblasting &Painting Ltd., 2011 ABCA 107 <http://bit.ly/mmCQ7h>

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