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Thomas Heintzman specializes in the field of alternative dispute resolution relating to corporate disputes, shareholder's rights, securities law, broadcasting/telecommunications and class actions.

He has acted as 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 *Heintzman & Goldsmith on Canadian Building Contracts*, 4<sup>th</sup> 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:

## **Can Money Paid Into Court Be Used To Discharge Other Liens?**

When a contractor pays money into court to discharge a lien of a sub-contractor, can that money only be used to discharge that lien holder's claim? Or is it available to pay the liens of all eventual lien holders? In ***Canadian Western Bank v. 702348 Alberta Ltd.***, the Alberta Court of Queen's Bench recently decided that all lien holders have a claim to that money under the ***Alberta Builders Lien Act***. This may depend on the specific wording of the Alberta Act. Indeed the Alberta Court recognized that the result is not the same in Saskatchewan.

The Alberta Court held that the 2007 decision of the Alberta Court of Appeal in ***Maple Raiders Inc. v Eagle Sheet Metal Inc.*** had decided the issue. In *Maple*, the general contractor

paid money into court to discharge the lien of a sub-sub contractor (the “lien discharge monies”). The general contractor later applied to create a lien fund for all the claimants, under s.27(3) of the Alberta Act, to replace the previous monies paid into court, and to have the lien discharge monies incorporated into the lien fund. The effect of incorporating the lien discharge monies into the lien fund was to diminish the sub-sub-contractor’s share from about \$26,000 to \$7,000. The Alberta Court of Appeal upheld the lower court’s decision in *Maple* granting the contractor’s application. It held that the principle that all lien holders are to be treated equally mandated the result.

The Alberta Court of Appeal in *Maple* held that the payment into court of the lien discharge monies did not make the owner liable for the full amount of those funds, but only such portion as the lien holders in total might be entitled. Put another way, the payment into court did not make the owner liable for more money to the other lien holders. That would be the effect if the original lien holder could keep the lien discharge monies solely for payment of its lien and prohibit the other lienholders from having access to those monies.

In *Canadian Western Bank*, the Alberta Court Queen’s Bench held that the same principles apply when the original lien claimant is a sub-contractor, not a sub-sub-contractor. The lien claimant asserted that the decision in *Maple* should not apply since it was a sub-contractor and in a direct contractual relationship with the contractor which paid the money into court. Since it had a direct contractual right to be paid by the contractor, the sub-contractor argued that the lien discharge monies were effectively security for its direct contractual claim. The Alberta Court disagreed, holding that those monies stood in place of the land, for the benefit of all lienholders.

The Alberta Court acknowledged that the result might be different in another province. It pointed to the Saskatchewan decision in *Town-N-Country Plumbing & Heating (1985) Ltd. v Schmidt*. In that decision, the Saskatchewan Court of Appeal relied upon the Saskatchewan Act which provides that, when a lien holder’s lien is discharged by payment into court, the lien holder has a first charge upon those monies. Accordingly, the Saskatchewan Court of Appeal held that the lien holder was entitled to those monies to the exclusion of other lien holders. There is no similar “first charge” provision in the Alberta Act.

The construction, builders and similar lien statutes in Manitoba, New Brunswick, and Newfoundland and Labrador all state that the lien holders whose lien has been discharged by payment of money into court or by provisions of security has a first charge on that money or security. Accordingly, in those provinces the result in *Town-N-Country Plumbing & Heating* appears to apply. The legislation in other provinces does not state that the lien holder whose lien has been so discharged has a first charge on that money or security. Accordingly, in those

provinces the result in *Canadian Western Bank* appears to apply. The usefulness of this disparity in legislative regimes seems doubtful.

### **Does the Canada Revenue Agency have a claim to the lien funds?**

Another interesting aspect of the *Canadian Western Bank* decision is the claim by the Canada Revenue Agency (CRA) to the lien funds. CRA claimed these moneys because the general contractor that paid them into court had not made the proper deductions and remittances to the CRA under the Income Tax Act (ITA). CRA claimed that s.227(4) of the ITA imposed a trust in favour of Her Majesty on the lien fund in priority to that of the lien claimants.

### **This claim raised the issue: who owns the trust funds in court:**

- the contractor (because it paid the moneys into court)
- the owner (since those funds stand in place of the Lands)
- or the lien holders?

The Court held that a trial on that issue must be held to determine “the issues upon which [the contractor] paid the moneys into court to clear [the owner’s] title to the land.” The decision to direct a trial of the issue seems unnecessary since the question appears to be a legal one and not dependent on the facts. The sole purpose of the payment by the contractor into court was to release a claim against the owner’s land. The money paid into court stands in place of any remaining claim against the owner’s land. In these circumstances, the contractor’s claim to those funds appears more akin to a resulting trust than ownership.

In the result, a sub-contractor cannot be assured that it will ultimately receive the money paid into court to discharge its lien. In some provinces, other lien claimants may have a right to those funds. So may the CRA.

### **Can the sub-contractor improve its situation by making other arrangements?**

The decision in *Canadian Western Bank* raises a further question. What if the order paying the money into court stated that the lien claimant has a first charge on those funds (following the Saskatchewan Act)? What if the order said that the monies were to be held by the lien claimant, rather than paid into court, subject to the litigation to resolve the lien claim? Can the court make such an order, or can parties make such an agreement, and deprive the other lien claimants of their claim to these monies? If it is solely a matter of the parties’ intentions, as the Alberta Court appears to hold *Canadian Western Bank*, then the court or the parties might make such an arrangement. But if the matter is one of law, and the parties cannot

contract out of the statutory regime, then neither the court nor the parties could deny the other lien claimants their share of the lien discharge monies. In any event, it is unlikely that the contractor or owner would agree to that sort of arrangement.

As a result, when a lien holder's claim is discharged by payment of monies into court, the lien holder's claim to those monies will remain precarious depending on the provincial jurisdiction of the claim and, possibly, the terms upon which the monies are paid into court.

***Construction Liens - Payment into Court - Priority of lien-claimants***  
***Canadian Western Bank v. 702348 Alberta Ltd., 2012 ABQB 89***

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