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

Goldsmith & Heintzman 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:

M.J.B. Enterprises Ltd. v. Defence Construction (1951), [1999] 1 S.C.R. 619 and
Double N Earthmovers Ltd. v. Edmonton (City), [2007] 1 S.C.R. 116

Mary Carter Decision Upheld By The Supreme Court Of Canada

In my article of April 2011, I reported about the decision in ***Aecon Buildings v. Stephenson Engineering Limited***. In that decision, the Ontario Court of Appeal stayed an owner's claim because of the non-disclosure of a Mary Carter agreement. The Supreme Court of Canada has recently dismissed an application for leave to appeal from that decision. Accordingly, the ruling by the Court of Appeal will stand as good law across Canada on this issue.

Background to the Supreme Court's Decision:

The City of Brampton had been sued by Aecon. The City then sued the consultant, blaming it for the problem giving rise to Aecon's claim. In turn, the consultant claimed over against the sub-consultant.

Before instituting its claim against the consultant, the City had effectively settled the claim against it by Aecon. This sort of settlement, in which the settling parties continue as parties to the action, is known as a **Mary Carter agreement**. The City did not disclose to the consultant that it had previously settled with Aecon. The City proceeded with its claim over against the consultant within the context of an apparently continuing claim against it by Aecon. The settlement agreement was only disclosed when it was discovered by the consultant who then demanded that it be produced.

The Ontario Court of Appeal held that the non-disclosure of the settlement agreement was an abuse of process and stayed the City's claim against the consultant. As a consequence, the claim by the consultant against the sub-consultant was also stayed.

The City of Brampton sought leave to appeal to the Supreme Court of Canada from the decision of the Ontario Court of Appeal. On June 30, 2011, The Supreme Court dismissed the application. As is usual, the Supreme Court gave no reason for its decision.

However, this is one of the rare occasions in which the reasoning of the Supreme Court can be discerned. That is because of a decision which the Court released on June 23, 2011: ***Aecon Buildings, a Division of Aecon Construction Group Inc. v. Stephenson Engineering Limited*, 2011 SCC 33**. In that decision, a panel of the Court denied a motion of the City to admit further evidence about the importance of the proposed appeal. The City wanted that evidence before the Court due to a requirement in section 43 of the Supreme Court of Canada Act that any application for leave to appeal in a civil case must demonstrate that the proposed appeal raises a matter of public importance.

The City's proposed evidence consisted of a number of articles written about the Court of Appeal's decision. In those articles, the authors spoke about the importance of that decision to the ongoing conduct of actions in which Mary Carter agreements are made. However, the Supreme Court held that the articles did not address an issue of real importance. It said: "Here, however, the issues are straightforward. Must the *Mary Carter*-type agreement be disclosed immediately and if it isn't what are the consequences?"

Justice Binnie answers the "importance" question:

Justice Binnie was a member of the panel and wrote the decision denying leave to admit this further evidence on the application. He answered the "importance" question as follows:

> "I think "immediate disclosure" is self-explanatory. Its application in a particular case will be fact dependent. Here, as stated, the applicant never did *volunteer* disclosure of the existence of the agreement to the parties or to the court. The Court of Appeal decided that in the circumstances a stay of proceedings was warranted. The procedural

> point about how a party goes about disclosing the existence of such an agreement to the court (were they to decide to do so) is not something that raises a legal issue of public importance for this Court."

As a further indication of the narrowness of the issue sought to be raised in its Court, the panel further observed:

> "Nobody expresses any doubt that the rule stated by the Court of Appeal is consistent with its past authority, or suggests that the remedy for abuse of process was not, as a matter of law, available."

While the panel of the Court said that "whether the rule itself raises a legal question of public importance is for the leave panel to decide," the die had been cast in the Court's decision on the motion to admit further evidence. The court's decision to dismiss the application for leave to appeal was a predictable result of the Court's view of the narrowness and lack of importance of the issue.

As a result, the comments in my article of April 3, 2011 are now under-lined: "This decision is a reminder of the drastic remedies available to the Courts if litigation is conducted unfairly" and the parties must be scrupulous to ensure that Mary Carter and other similar agreements affecting the conduct of litigation are immediately disclosed.

The irony, of course, is that the settlement of disputes is itself of public value, especially in the field of construction law. Settlements allow the parties to reduce their risks and avoid the expenditure of money on litigation, and they save the public resources spent on courts. Construction disputes frequently arise from good faith differences of opinion about the meaning of building contacts and about events during tenders and on the job site. These differences are part of the cost of doing business and the parties owe it to themselves to make every reasonable effort to settle and not prolong their differences.

But if they do settle, then they owe a duty to the court system to disclose the settlement. Otherwise, the justice system cannot properly function. Since the judge has no independent power or authority to inquire into the events, the justice system depends upon the adversarial system to arrive at the just result. If some of the apparent adversaries are no longer true adversaries, then that fact must be disclosed to the court.

Construction Law – Settlement – Agreement - Litigation - Champertous - Abuse of Process:

Aecon Buildings, A Division of Aecon Construction Group Inc. v. Stephenson Engineering Limited (SCC Judgments in Leave Applications, June 30, 2011, No. 34112)

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