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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

Construction Liens: Two Thorny Issues: Can non-lienable work be sheltered? Can off-site work be liened?

In *John Barlot Architect Ltd. v. 413481 Alberta Ltd*, the Alberta Court of Appeal has recently dealt with two thorny issues relating to a consultant's services and construction liens: Can a lien shelter non-lienable work? And can a consultant's services provided to one project be liened on a second project if they were also used on the second project?

The plaintiff architect undertook three kinds of services to the owner defendant, and filed a lien for those services when its contract was terminated and it was replaced as the architect on the project.

First, it provided rezoning, subdivision and development services for the project.

Second, the architect did some work for a Sales Centre for the project, and that work was properly the subject of a lien.

Third, the architect submitted plans to the owner which were actually plans that had been previously prepared to construct another building in another location. The owner used those plans to develop cost estimates. The plaintiff architect claimed that the work to prepare these plans was also protected under its lien.

The Alberta Court of Appeal applied prior judicial authority in Alberta and held that the services relating to rezoning, subdivision and development were not sufficiently connected to the construction to constitute an "improvement" to the land. Therefore, the lien was improperly filed in respect to that work.

The Court also confirmed the trial judge's finding that the plans for the other project were not in fact connected to the owner's project because they were not seen or used by the replacement architect. The plans which the plaintiff architect had prepared were different and "too far removed from the intended construction process" to support a lien.

Most importantly, the Alberta Court of Appeal arrived at two further legal conclusions. First, the Court held that even if the evidence of the plaintiff architect was accepted and the plans for the other building and the plans for the present project were similar, the plans for the other building were "not prepared 'in respect of' an improvement intended to be constructed on the subject land". Accordingly, while the plaintiff might have a claim in contract against the owner for the work in relation to those plans, the plaintiff had no lien rights. That conclusion means that work prepared for a first project and site but useable on a second project and site cannot, as a matter of statutory interpretation, give rise to lien rights in relation to the second project.

Second, the Court held that the valid lien for the Sales Centre work could not shelter the rezoning, subdivision and development work. The Court noted that there was little authority on the proposition that a valid lien in respect of some work could shelter other non-lienable work. However, it concluded that such a proposition was inconsistent with the whole scheme of the Act. The word "improvement" cannot be interpreted to include the words "plus any related work not in respect of the improvement". That proposition would also play havoc with the application of the words "price of the work" and the hold back and trust fund provisions of the Act. The owner and others receiving money on the project would never know what amount of non-lienable work was to be included in the hold back and trust funds. In addition, a contractor or supplier which had delivered a small amount of lienable work or supplies but a large amount of non-lienable work would be unfairly preferred over one who had provided no lienable work or supplies.

Two important conclusions can be drawn from this decision. First, the sections of the Construction and Builders' Lien Acts are highly integrated. Each provision depends on the others. Changing the impact of one section may change the impact of other sections. The Alberta Court of Appeal concluded that expanding lien rights to protect work on other projects, or other non-lienable work, would stretch the Act unfairly and unworkably.

Second, the decision also shows that the Construction and Builders' Lien Acts provide uncertain protection for "soft services" such as those provided by consultants. Originally, those services were not protected by some of these Acts, probably because the connection to the actual improvement of the land was thought to be indirect and debatable. When they are protected, courts will be careful not to expand the net of lienable consulting services to those which do not directly relate to the improvement to the lands.

Building Contract – Consultant- Construction Lien – Improvement- Sheltering:
John Barlot Architect Ltd. v. 413481 Alberta Ltd, 2010 ABCA 51 (CanLII)