Thomas G. Heintzman, O.C., Q.C.
McCarthy Tétrault
Toronto, Ontario
www.mccarthy.ca
416-362-1812
theintzm@mccarthy.ca
www.constructionlawcanada.com
www.heintzmanadr.com

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 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 SCC3, [2007] 1 S.C.R. 116-2007-01-25 Supreme Court of Canada

How Does A Court Find And Interpret An Oral Construction Contract

Construction Contract - Interpretation - Oral Contract - Subcontractor -

A contract in the construction industry is usually in written form. Often the contract will follow the CCDC form of contract. But what principles should apply to the interpretation of oral contracts? The British Columbia Court of Appeal recently addressed this issue in *Copcan Contacting Ltd v. Ashlaur Trading Inc.*

The alleged contract was for the logging of lands in British Columbia. While the contract was not for the construction of a building, the principles that the court applied are the same that are applied to building contracts.

The parties did not agree that there was a contract, and if there was such a contract, what the terms of it were. The plaintiff asserted that there was a contract and the defendant said that

there was not. The trial judge held that there was a contract. An appeal was taken to the British Columbia Court of Appeal.

The parties acknowledged that the test to determine whether there was a contract was an objective test, that is, whether a reasonable bystander observing the parties would have concluded that they had made a contract. In dealing with this question and with the question of what terms the contract (if made) contained, the Court of Appeal held that two principles applied.

First, the Court must assume that the parties understand the business environment in which they were conducting their negotiations. As the court said, the issue "must be viewed from the perspective of a reasonable person familiar with contracting practices in the British Columbia logging industry."

Second, since the contract was an oral contract, the court would give a certain latitude or flexibility in determining what the terms of the contract were. The court held that, having found there was an oral contract, the trial judge "was therefore entitled to exercise greater flexibility in the use of evidence in order to construe the contractual terms than can be utilized where the terms of the contract have been reduced to writing."

In arriving at this latter conclusion, the Court of Appeal relied upon the reasoning in one of its prior decisions in which it had said that "this flexibility follows intuitively from the recognition that oral contracts must often be construed without the key interpretive tool used to understand written contracts - the words of the agreement."

This decision demonstrates the inclination of a court to ensure that the reasonable expectations of the parties are not disappointed if, on the evidence, the court is satisfied that the parties made a contract. Of course, the party asserting that a contract was made must demonstrate that fact on a balance of probabilities. But if the court is satisfied that they did, then the court will be receptive to arguments about the contents of the contract in such a way that will give effect to the contract.

This decision is also a handy reference in relation to any dispute over an alleged oral contract. It contains the three essential principles applicable to the existence and terms of the oral contract: the objective test to determine its existence; the industry perspective from which the parties must be assumed to be acting; and the flexibility with which the court will determine the terms of the contract.

See *Goldsmith and Heintzman on Canadian Building Contracts,* Chapter 1, Parts 1(b)-(c) and 3

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Copcan *Contracting Ltd v. Ashlaur Trading Inc.,* 2010 BCCA 597

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