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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, 4<sup>th</sup> 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

## **Building Contracts – Inducing Breach of Contract**

Today we examine the application of the tort of **Inducing Breach of Contract** to the field of **Building Contracts**. The New Brunswick Court of Appeal recently dealt with this tort in its decision in *SAR Petroleum et al. v. Peace Hills Trust Company*.

The Court addressed the following issue:

When a lender knows that its refusal to advance funds to the owner will cause the owner to default on its payment obligations to the contractor, does that refusal amount to

inducing the breach of the owner's contract with the contractor, and make the lender liable to the contractor for inducing breach of contract?

The lender had agreed to lend \$3 million to the owner. The owner had contracted with the contractor to build a gas station on first nation's lands under a contract which did not include a holdback provision. When the owner ran short of funds, the lender decided to withhold funds. It did so in reliance on the New Brunswick *Mechanics' Lien Act* which likely did not apply to first nation's land. The owner failed to make payments to the contractor and the contractor sued the lender for inducing breach of the contract between the owner and the contractor.

The New Brunswick Court of Appeal held that the lender was not liable to the contractor if its real intent was to protect its rights as a lender and not simply to harm the contractor.

The Court held that a number of the ingredients in the tort of inducing breach of contract were satisfied. Thus, it held that causation was satisfied because the breach of the construction contract was a natural and foreseeable consequence of the lender's failure to make timely progress payments and the lender's failure to pay the percentage holdbacks. It held that the "knowledge" ingredient of the tort was satisfied because the lender and its lawyer had been provided with a copy of the contract and they were aware that the construction contract contained no holdback provision and that delay in payments by the lender would result in a breach of the construction contract. The Court also held that the lender knew that its actions would result in a breach of the construction contract because it knew that the owner needed the money from the lender to honour its contractual obligations to the contractor.

However, the Court held that the contractor could not show that the lender "intended" the breach of the construction contract. To satisfy that element of the tort, the contractor was required to show that the primary objective of the lender was not to protect its own economic self interest, but rather to cause the breach of the construction contract. That "intention" issue could be tested in a number of ways. Thus, if the defendant would obtain the very advantage that the plaintiff was seeking under its contract, then the "intention" element would likely be satisfied. Here, the lender was not seeking the construction contract, or the benefits of that contract. Its sole or predominant intention was to protect itself as lender. As the Court said:

"The law seeks to discourage those who deliberately embark on a course of action with the object of obtaining a contractual benefit promised to another .....On the other hand, defendants who in good faith are pursuing their economic interests in accordance with

existing contractual rights will fall outside the intended scope of the tort. Certainly they cannot be accused of acting for an improper purpose.”

The Court concluded that the lender did not profit from the breach of the construction contract, other than through the protection of its rights as lender. The lender’s conduct did not qualify as “improper or opportunistic conduct.” Accordingly, the ingredient of “intention” did not exist in this case. In this sense, the breach of the construction contract was a consequence of the lender protecting its economic position as lender, not a result which the lender primarily intended and desired.

The Court also tested the existence of a wrongful “intention” by looking at the advice which the lender received from its lawyer. The lawyer provided a series of opinions advising the lender to maintain a holdback. In these circumstances the Court was unwilling to hold that the lender had the wrongful “intention” required for this tort.

The tort of inducing breach of contract has not often been applied to construction projects. That is surprising since the tort seems well designed for those projects. On its face, it would enable a contractor, sub-contractor or supplier which has been unpaid and cannot get paid from the insolvent party with which it contracted to turn its legal claim on another party which allegedly caused the project to fail.

In this context, the decision in *SAR Petroleum* provides a useful framework to test the conduct of the various parties to a construction project. It shows that a plaintiff will have a difficult time asserting a claim for inducing breach of contract if the defendant is simply protecting its own economic position, does not intend to obtain the benefits of the plaintiff’s contractual position and has acted on legal advice.

**Building Contract – Inducing Breach of Contract:** *SAR Petroleum et al. v. Peace Hills Trust Company*, 2010 NBCA 22 (CanLii)

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