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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

Does The Removal Of Equipment Amount To An Improvement For Lien Purposes?

An important issue for construction and builders liens is whether destroying or removing land, structure and equipment qualifies as an "improvement." Why shouldn't it, if it benefits the owner? After all, the land itself couldn't care less. It is the benefit to the owner of the land that an "improvement" is all about.

In *West Fraser Mills Ltd. v. BKB Construction Inc.*, the British Columbia Supreme Court recently applied the traditional approach to this issue and held that the removal of equipment was not an improvement and did not give rise to a builders lien. This decision is noteworthy in itself, but it also raises the question of whether the result would be different under a recent amendment to **Ontario Construction Lien Act** which specifically deals with the installation of equipment.

The Background

West Fraser shut down its paper mill in Kitimat, B.C. It then sold the paper machinery separately from the land. It did so, as the court found, in order to enhance the total proceeds that it received from the land and machinery although the removal of machinery lowered the value of the land.

Under the agreement by which West Fraser sold the machinery, the buyer was obliged to remove the equipment. The buyer hired BKB to remove the machinery and BKB hired a subcontractor to assist it in the removal. BKB and its subcontractor were not paid in full by the buyer and filed a builders' lien against West Fraser's property.

The B.C. Supreme Court found that West Fraser was an "owner" under the **B.C. Builders Lien Act** since West Fraser held an estate or interest in the land and, through its sales contract with the buyer, had knowledge of and had given its consent to the work of removing the machinery. In addition, the removal of the machinery directly benefitted West Fraser by enabling the sale of the machinery to occur on terms advantageous to it.

The Court also held that BKB and its subcontractor were both "subcontractors" under the Act. It said that:

"The Act does not require a direct contractual relationship between the respondents and West Fraser for liens to arise. Additionally, it does not require contractual relationships between BKB or [its subcontractor] and any person engaged directly by West Fraser."

However, the Court held that the removal of the machinery was not an improvement of the land. Demolition work may be an improvement, it said, if undertaken as part of a project to create an altered structure, but work to preserve the value of removed or salvaged material which does not benefit the landowner *qua* landowner is not an improvement within the Act.

The Court held that the removal of the machinery fell into the latter category. The land or buildings were not improved by the removal of the machinery nor was the removal incidental to a project to improve the land.

This decision is noteworthy on two accounts.

First, it is surprising that the court found that the value of the land was not improved by the removal of the machinery. Surely the abandoned paper mill machinery detracted from the

value of the land. Otherwise, why did West Fraser require the buyer to remove it, and to do so at the buyer's cost? If the lien claimant proved that the market value of the land was increased by the removal of the machinery, would the result have been the same?

Second, would the result have been different under other provincial lien Acts? Thus, the **Ontario Construction Lien Act** was amended in 2010 to broaden the definition of "improvement" to include "the installation of industrial, mechanical, electrical or other equipment on the land." Under the Ontario Act, the definition of "improvement" already included the demolition or removal of any building, structure or works on the land. The 2010 amendment was apparently intended to reverse the 2007 decision in **Kennedy Electric Ltd. v. Rumble Automation Inc.** (which, interestingly was not cited in the *West Fraser* decision). In *Kennedy Electric*, the Ontario Court of Appeal held that the installation of large assembly-line equipment for the manufacture of truck frames was not an "improvement."

By logic, the amendment to the Ontario Act should apply to the removal as much as the installation of equipment, but does it? Is the equipment "building, structure and works on the land"? It could be argued that it is not, because if it is, then there was no need to amend the Act in 2010, since the words "building, structure and works on the land" were already in the Act, and it was amended for the very reason that those words did not include "equipment." The part of the definition of "improvement" which refers to demolition or removal was not also amended to refer to "equipment".

If the argument (that the installation of the equipment is within the Act but the removal is not) was successful, it would be unfortunate because the legislative purpose behind including the equipment seems so obviously applicable to the removal. But making legislative intent clear is a challenge.

**Construction Law – Construction Liens - Removal of Equipment:
West Fraser Mills Ltd. v. BKB Construction Inc. 2011 BCSC 1460**

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