



Thomas G. Heintzman, O.C., Q.C.

McCarthy Tétrault

Toronto, Ontario

www.mccarthy.ca

theintzm@mccarthy.ca

www.constructionlawcanada.com

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

A Builders Lien Does Not Apply to the Lease of an Airport

The British Columbia Court of Appeal recently considered the constitutional limits of the *Builders Lien Act* of that province. In *Vancouver International Airport Authority v. British Columbia*, the Court held that the Act did not apply to the leasehold interest of the Vancouver International Airport Authority. The Court drew the constitutional boundary based upon the purpose of the lease from the Federal Crown. The drawing of the boundary based upon the purpose of the lease may raise questions relating to the enforcement of provincial lien statutes against sub-leases of federal lands or from federally regulated institutions.

The Authority leases the Vancouver Airport from the Federal Crown under a 60 year Lease. The Lease required the Authority to use the Airport Lands for the management, operation and maintenance of an international airport. It also required the Authority to keep the Demised Premises free of encumbrances, to

indemnify the Federal Crown from construction or builders liens and prohibited the Authority from transferring its leasehold interest except with the consent of the Federal Crown.

The Builders Lien Act of British Columbia says that any agreement that provides that the Act is not to apply is void.

The B.C. Court of Appeal upheld the decision of the lower court that the Builders Lien Act did not apply to the Authority's Lease. The Court first applied the constitutional principle of "interjurisdictional immunity". This principle holds that, under the *Constitution Act*, there is a core of legislative jurisdiction reserved to each of the federal Parliament and the provincial legislatures, and that provincial legislatures cannot invade the core of federal legislative authority. The B.C. Court of Appeal applied recent decisions of the Supreme Court of Canada which limited the interjurisdictional immunity principle to circumstances in which provincial legislation impairs, and not merely affects, a federal power. Accordingly, if the *Builders Lien Act* impaired the federal authority over aviation, then the Act was inapplicable to that extent.

The Court then reviewed the extent of the federal power over aviation. It acknowledged that anything which is an "integral and vital part of aeronautics and aerial navigation" falls within that power and that, accordingly, airports are integral to aviation. The Court concluded that the ultimate "hammer" in a builder's lien is the enforcement of the lien, which would impair the operation of the airport if the lease was seized. In addition, the ability to register a lien impaired the ability of the Authority to obtain financing of the improvements necessary to fulfil the Authority's mandate.

The Court distinguished the decision in *Western Industrial Contractors Ltd. v. Sarcee Developments Ltd* (1979), 98 D.L.R. (3d) 424 (Alta. C.A). In that case, the Crown had leased land to a native development corporation, and the Alberta Court of Appeal held that the lease was subject to the provincial builders' lien legislation, notwithstanding the federal *Indian Act*. The B.C. Court of Appeal held that the distinction between the two cases arose from the purpose of the lease in each case. In *Sarcee*, the purpose of the lease was for a commercial development having nothing to do with the federal legislative power. In the *Vancouver International Airport Authority* case, the purpose of the Lease "concerns the matter of aeronautics" and therefore the Lease fell within the exclusive federal jurisdiction.

The Court did not rule on an alternative argument, namely, that the airport land itself was “Public Property” and therefore within exclusive federal jurisdiction under s. 91(A) of the Constitution Act.

The Court’s decision raises interesting questions for sub-leases of federal land or from federally regulated institutions. If the sublease from the airport is to a donut shop, or a clothing or magazine store, would the same result pertain? Would the unpaid lien holder’s claim against the store owner interfere with the “purpose” of the airport? What if the sub-lease was from a bank or a port authority, which are both federally regulated institutions, to a purely commercial operation having nothing to do with banking or shipping? Would the lien holder’s claim against the shop owner and its sub-lease fall within the *Vancouver International Airport Authority* decision, or the *Sarcee* decision? Does the answer change depending how important the lessee’s operations are to the commercial success, or how distant they are from the aeronautical nature, of the airport? Thus, does a sub-lease of space to an airline fall on one side of the line and the donut shop sub-lease fall on the other? These are questions for which the present decision provides no clear answers.

Construction Liens – Constitutional law: *Vancouver International Airport Authority v. British Columbia (Attorney General)*, 2011 BCCA 89 (CA nLII)