

When Owners are not Owners: An Update

BY JAMES LEBO AND ANDREA SWABUK



In the May/June 2010 Issue of Construction Business we described two decisions of the Alberta Court of Queen's Bench which seemingly narrowed the definition of owner from the perspective of builders' lien liability: *Acera Developments Inc. v. Sterling Homes Ltd.*, 2009 ABQB 494, and *E. Gruben's Transport Ltd. v. Alberta Surplus Sales Ltd.*, 2010 ABQB 244. Both decisions concern new developments and appear to limit the lien liability of owners and developers for work performed by contractors in new development construction.

In a decision released in October, 2010, the Court of Appeal of Alberta overturned the Queen's Bench decision in *Acera* (2010 ABCA 198). The Court of Appeal's decision is worthy of note.

In *Acera*, Sterling Homes entered into an agreement to purchase 136 subdivided and serviced lots from Acera to build homes on these lots. Sterling would sell the homes for its own benefit. Acera was to register a plan of subdivision, but ultimately failed to get approval for the plan. The lots could not be transferred to Sterling and Sterling subsequently registered a lien for

\$1.5 million against these lands owned by Acera.

In the Alberta Builders' Lien Act (the "Act") an "owner" means "...a person having an estate or interest in land at whose request, express or implied, and

- (i) on whose credit,
- (ii) on whose behalf,
- (iii) with whose privity and consent, or
- (iv) for whose direct benefit,

work is done on or material is furnished for an improvement to the land and includes all persons claiming under the owner whose rights are acquired after the commencement of the work or the furnishing of the material."

The Alberta Court of Queen's Bench accepted Acera's arguments that Acera's encouragement of Sterling to build on the lots did not amount to a request to do so. The Court found that although Acera knew and consented to Sterling commencing construction of the houses, the work was not done for Acera's benefit. Accordingly, the lien was found to be invalid, as Acera was not an owner.

Sterling Homes appealed the decision. The Court of Appeal articulated the necessary inquiry to determine whether Acera had requested that

work be done, or material be furnished, for an improvement to the lands. The Court also looked at whether the work done or the material furnished by Sterling was of "direct benefit" to Acera.

The Court of Appeal found that by its course of conduct Acera had impliedly requested the work be performed by Sterling. The Court stated it is not a condition precedent that there be direct communication amounting to an express request between an "owner" and a contractor, but something more than mere knowledge or consent of the owner must be present.

The Court of Appeal found sufficient interaction between Sterling and Acera to conclude that the home construction proceeded prior to subdivision at Acera's request. Acera knew construction was proceeding prior to subdivision approval and was actively involved in supervision of the construction. Sterling was contractually bound to Acera to construct to a specific standard and scope. Acera's architectural and construction guidelines required Acera to approve construction plans, and other services and materials, prior to construction. The construction was inspected by Acera as work progressed. In the Court of Appeal's opinion, this evidence supported the conclusion that the homes were constructed at Acera's request.

The Court also found that the work done and the material furnished by Sterling was a direct benefit to Acera, as Acera allowed Sterling to improve Acera's lands. The Court concluded that Acera was an "owner" under the Act, allowed the appeal and declared Sterling's lien to be valid.

This decision should give some comfort to contractors performing work in new developments, and certainly more so than before the Court of Appeal's decision. Nonetheless, contractors should continue to be cautious when performing significant construction activity in new developments, and not automatically assume that a developer/purchaser will be considered an owner within the meaning of the Act. **CB**

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