

When Owners are not “owners”

Loopholes in lien liability? BY JAMES L. LEBO, Q.C. AND ANDREA M. SWABUK



Two recent decisions of the Alberta Court of Queen's Bench suggest a gap in the lien liability of owners in Alberta who have work performed on their property that would otherwise be subject to lien claims. These decisions should be of particular concern to contractors, especially those working on new development construction.

In Alberta an “owner” is specifically defined under the Alberta Builders’ Lien Act (the “Act”) to mean “... 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.”

Although this definition seems relatively straightforward, these recent cases suggest that determining whether a party is an owner for lien purposes may be more complicated. In particular, a purchaser/land developer may not always be considered an owner under the Act.

The case of *Acera Developments Inc. v. Sterling Homes Ltd.*, 2009 ABQB 494, demonstrates the unique criteria that the court has referred to when determining an owner under the Act. Acera had entered into a lot purchase agreement with Sterling for 136 lots in Cochrane, Alberta. Sterling was to buy the subdivided land and serviced lots from Acera and build homes on them. The homes were for Sterling to sell for its own benefit. Acera was to register a plan of subdivision. However, Acera ultimately failed to get approval for this plan. The lots could not be transferred to Sterling and Sterling subsequently registered a lien for \$1.5 million against the lands owned by Acera.

Acera challenged the validity of the lien and argued that the fact that Acera had encouraged Sterling to build on the lots could not be interpreted as constituting a request to do so. While Acera knew and consented to Sterling commencing construction of the houses, the court found that the work was not done for Acera's benefit. The court concluded that the lien was invalid, as Acera was not an owner.

This decision is of concern because it significantly limits the definition of an “owner” under the Act. Before this decision, it seemed safe for a party such as a contractor to assume that a land developer would be considered an “owner”, and therefore be susceptible to liens being filed on the property for work requested by the developer. It is now less clear what will constitute a “request” under the Act. An appeal of this decision by Sterling was argued before the Court of Appeal of Alberta in early May 2010, and the Court of Appeal has reserved its decision.

The second decision of the Alberta Court of Queen's Bench that reminds contractors they may not always be able to count on their builders' lien rights is *E. Gruben's Transport Ltd. v. Alberta Surplus Sales Ltd.* 2010 ABQB 244. In this case, the landowner entered into an agreement for sale of its lands. The purchaser/developer applied for subdivision approval and contracted to commence the building of roads. The purchaser began experiencing financial difficulties and did not pay the road builder, who registered a lien against the lands. The lands however, continued to be owned by the vendor. The agreement for sale was later cancelled due to the purchaser's default, although the vendor carried on with the subdivision. The vendor subsequently applied to dismiss the road builder's lien.

The court held that the vendor was merely a passive participant in the roadwork and therefore had not requested the work to be done. The court found that the vendor did not fall within the statutory definition of owner under the Act and was therefore not subject to liens registered by contractors, and the lien was discharged.

Like the Acera decision, this case is also troubling from the perspective of a contractor working on a new development. On a job, it is difficult to regard the landowner as just a passive participant, since it is the development itself which often provides value to the land. It is therefore surprising, from the perspective of a contractor who has done work and added value to the land, that there are no lien rights when payment for this work goes into default. It is possible that this case may be limited to its own circumstances, where there was a failed agreement for sale, but the trend of these two cases suggests otherwise. In any event, contractors would be prudent to inquire if the party developing a project actually has some legal interest in the lands, or face the risk of proceeding without lien rights.

Given these decisions, careful consideration must be given by owners and contractors to lien rights and liabilities for work done in new developments. One cannot merely assume that a developer/purchaser is necessarily an owner within the meaning of the Act. A finding that the purchaser is not an owner can lead to a very unhappy result for a contractor who has expended significant funds on construction activity which would normally be thought to give rise to lien rights. **CB**

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