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When is a Registered Owner of Land not an "Owner" under Alberta's *Builders' Lien Act*?

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Case Commented On: *Georgetown Townhouse GP Ltd v Crystal Waters Plumbing Company Inc*, 2018 ABQB 617

As Master Prowse explains, this case involves an often-litigated issue: when can an owner of land, who knows that work is being done on the land, defeat the liens of unpaid contractors because the owner is not within the definition of "owner" in section 1(j) of the *Builders' Lien Act*, RSA 2000, c B-7? Master Prowse's decision offers a succinct and up-to-date answer to that question in one of three common contexts, and advice on where to begin researching the answer in the other two contexts.

The original purpose of builders' liens – which exist only because a statute creates them – was to provide a simple and inexpensive method for a person to collect money due them for work done to or material supplied to a building site. Anyone who did work or supplied material used to improve land for an owner, contractor or subcontractor is given a lien on the interest of the owner of the land being improved.

The definition of "owner" in the *Builders Lien Act* is not the same as the definition of owner in other statutes or other areas of law. It is probably not even what most people think of when they think of an owner of land. Section 1(j) of the *Act* defines "owner" as follows:

> (j) "owner" means a person having an estate or interest in land at whose request, express or implied, and
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> (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;

Note the structure of the definition; there are three elements. An "owner" has to have an estate or interest in land, *and* they have to request the work or material, *and* they have to fit within one of the four situations described, i.e., that the work or material has to be done or supplied on their credit, on their behalf, with their consent, *or* for their direct benefit. In connection with the concept of a "request, express or implied," previous courts have held that it involves more than

mere knowledge or consent; it requires "active participation" before it can be said that a "request" was made (*Royal Trust Corp. of Canada v. Bengert Construction Ltd.*, 1988 ABCA 58, 58 Alta. L.R. (2d) 97 at 104).

Master Prowse begins by noting that there are three different types of cases in which the issue of who is an "owner" usually arises (at para 3).

First, the question often comes up when a landlord rejects liens placed on its land by unpaid contractors of a tenant. There is a well-developed body of case law about the degree and type of participation by a landlord that will make the landlord's interest lienable even if section 15(1) of the *Act* has not been complied with (at paras 5-6). Master Prowse provided a summary of eight of those cases in his decision in *Labbe-Leech Interiors Ltd. v TRL Real Estate Syndicate (07) Ltd.*, 2009 ABQB 653. Because the case before him did not concern a landlord-tenant situation, Master Prowse declined to go into more detail on this type of case. Nevertheless, he has pointed to the place to begin research in the landlord-tenant context.

Second, the question often comes up when a purchaser buys land on which a building is to be built and then, after taking title once the building has been built, denies liability for liens placed on its land by unpaid contractors of the builder. For these types of situations, Master Prowse identified the leading case, *Royal Trust Corp. of Canada v Bengert Construction Ltd.*, 1986 CanLII 1798 (AB QB). Master Prowse does summarize the Royal Trust decision (at para 9) and notes that a similar result occurred in *Permasteel v Semon*, 2000 ABQB 275, which is readily available (at para 10). He points to two other more recent decisions which might also be helpful, but, because the case before them did not involve a purchaser-builder scenario, Master Prowse does not elaborate further.

Third, the question often comes up when a developer/owner agrees to sell the land to a purchaser, the purchaser builds on the land before the land is registered in the name of the purchaser, and the developer disavows liens placed on the land by unpaid contractors of the purchaser. This was the situation in the case heard by Master Prowse.

Georgetown was the developer/owner who agreed to sell 48 lots to ReidBuilt Homes. Georgetown claimed that its interest in the land could not be liened by the contractors and subcontractors of ReidBuilt Homes. The success or failure of Georgetown's claim depended on the degree to which Georgetown became involved in Reidbuilt Homes' building activities (at para 14). Master Prowse held that, although Georgetown had made sure in its contract that it could become involved in ReidBuilt Homes' building activities to a considerable degree, it did not in fact become involved to any significant extent (at para 14). Having the authority or ability to become involved was not enough, by itself, to make Georgetown an "owner" under the *Builders Lien Act*. What was more significant was what in fact happened (at para 24).

For example, in the contract between Georgetown and ReidBuilt Homes, Georgetown had the right to approve the style and colour of the houses, to approve the plans for the houses, to approve the contractors providing utility servicing within the lots and to supervise the utility servicing, to approve Reidbuilt Homes signage and advertising, and the obligation to provide marketing support for the sale of homes on the lots. There was no evidence that Georgetown was asked for or gave any of those approvals. In connection with the marketing support, the only evidence was that Georgetown set up a website for the subdivision which indicated ReidBuilt Homes would be constructing single-family dwellings.

Although the lienholders argued that it was the expectations of the parties as set out in the contract at the outset that should govern, Master Prowse did not agree that Georgetown's contractual authority was anything more than a relevant factor (at paras 23-24). The most significant factor was "what in fact happened" (at para 24). And what had in fact happened was very little in terms of active participation by Georgetown.

To support those conclusions, Master Prowse relied on a case from the landlord-tenant context, *K & Fung Canada Ltd. v N.V. Reykdal & Associates Ltd.*, 1998 ABCA 178. In that case, the landlord had reserved the right to become involved in the construction in the lease with the tenant. However, the landlord exercised very few of those rights and the Court of Appeal held that the contracted-for participation had to materialize because active participation – required if something was to amount to being done at the "request, express or implied" of the landlord – is a question of fact (at para 27, quoting *K & Fung* at paras 8, 10).

Master Prowse also reviewed three cases involving a purchaser-developer scenario.

In the first, *Stealth Enterprises Ltd. v Hoffman Dorchik*, 2000 ABQB 311, affirmed 2002 ABCA 58, the registered owner was held not to be an "owner" under the *Builders' Lien Act* because the owner had no say in the construction. Likewise, in the second, *E. Gruben's Transport Ltd. v Alberta Surplus Sales Ltd.*, 2010 ABQB 244, the court held that the registered owner was not an "owner" because its involvement was entirely passive. In the third case, *Acera Developments Inc. v Sterling Homes Ltd.*, 2010 ABCA 198, the Court of Appeal noted the developer had approved all of the plans necessitated by the construction, as required by the parties' contract, and had also inspected the construction work as it was done. That degree of involvement by the developer was enough for the Court of Appeal to conclude that the work was done at the developer's "request" (at para 39, quoting *Acera Developments* at para 36).

The *Stealth Enterprises*, *E. Gruben's Transport* and *Acera* cases reviewed by Master Prowse offer examples of the degree of involvement that amounts to active participation and therefore to a "request" as required by the definition of "owner." Master Prowse decided that the lien on Georgetown's interest in the land was invalid because of the lack of active participation, in fact, by Georgetown. Georgetown could have been far more involved, but it was not. It is the actual degree of involvement that counts, rather than the degree of involvement possible according to the parties' agreement.

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