

A Few Things Commercial Owners Might Want to Know About Builders' Liens

Prepared for: Legal Education Society of Alberta

49th Annual Refresher: Real Estate

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For presentation in:

Lake Louise, Alberta – April 24 - 26, 2016

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INTRODUCTION

A builders' lien is an extraordinary thing. Unknown at common law, a builders' lien is a charge against land given by statute to those who do work or supply materials to improve that land.¹ In Alberta, a builders' lien exists solely because of the *Builders' Lien Act*, RSA 2000, c B-7, and is governed entirely by that Act's provisions.² And those legislative provisions, while sometimes generous and rewarding, are also strict and demanding.

Discussions of builders' liens often focus on the rights and remedies of the party registering a builders' lien, that is, the lienholder. This includes those who supply labour, provide materials, perform services and rent equipment.³ It also extends to those who do work or supply materials for the recovery of minerals.⁴ Focusing on lienholders makes sense: it is the lienholder who must file, perfect, prove and enforce the lien to enjoy the benefits, and much of the *Builders' Lien Act* prescribes how these things are to be done.

This paper, however, looks at things from a different perspective. It is a brief survey from the vantage of the party whose interest in land is or may be encumbered by a builders' lien – the owner. The intent is to alert owners of commercial properties to some of the issues arising from builders' liens that may affect them.

THERE ARE OWNERS, AND THEN THERE ARE "OWNERS"

Alberta's *Builders' Lien Act* says that someone who does work or supplies materials on a construction project can (if he follows the rules) register a builders' lien against the estate or interest of the "owner" of lands upon which the project is being built.

¹ *Clarkson Co. Ltd. v. Ace Lumber Ltd.*, [1963] SCR 110 at 114; *Tervita Corporation v. ConCreate USL (GP) Inc.*, 2015 ABCA 80.

² All section references in this paper are to the *Builders' Lien Act* R.S.A. 2000 c.B-7. Other provinces have statutes which create builders' liens – or as they are sometimes called, construction liens - but the terms, structure, and underlying principles of those other acts can vary considerably from Alberta's *Builders' Lien Act*. Great care must be taken in reading and applying cases from other provinces based on those other statutes.

³ Sections 6(1) and 6(4).

⁴ Section 6(2).

But who is the "owner"? Section 1(j) reads:

"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 a 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.

Let's unpack this. First, the "owner" has to have an estate or interest in the land. It's trite that the same piece of land can have several layers of interests or estates, and therefore the land might have multiple "owners" for the purposes of a builders' lien. One person, for example, will hold the underlying fee simple title; or that title might be shared among several people, perhaps in different percentages. At the same time, others might be tenants with leases (or even sub-leases) that let them occupy the property. Still others might have rights-of-way, encroachment rights or even equitable rights in the land.

These (and other) interests and estates can exist at the same time, but not all owners of these interests will necessarily be "owners" for the purposes of a particular builders' lien. Some might have had no connection whatsoever with the given project and so it would be unfair to encumber that interest with a builders' lien.

The next step in identifying and "owner" under the *Builders' Lien Act* is to identify those who requested the construction work in question. Only those who requested the work or materials will be "owners" for the purposes of a lien arising from that work or materials. Sometimes their request will have been clear and explicit (for example, when they tendered the project and signed the contract); sometimes the request will have been implicit (for example, they knew and approved of work being requested by others).

However, the *Builders' Lien Act* has four further requirements, each in the alternative. The Act says that the "owner" is the person "a) on whose credit, b) on whose behalf, c) with whose privity and consent, or d) whose direct benefit", the work was done. There is no quick explanation for these. Sometimes it's obvious (again, for example, where the "owner" signed the contract). But in other