ENTERED

1002000

COM
Oct 16 2020

COURT FILE NUMBER	2001-05482
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
	IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, as amended AND IN THE MATTER OF THE COMPROMISE OR ARRANGEMENT OF JMB CRUSHING SYSTEMS INC. and 2161889 ALBERTA LTD. AND IN THE MATTER OF A PLAN OF ARRANGEMENT OF JMB CRUSHING SYSTEMS INC. and MANTLE MATERIALS GROUP, LTD.
APPLICANTS	JMB CRUSHING SYSTEMS INC., 2161889 ALBERTA LTD., and MANTLE MATERIALS GROUP, LTD.
DOCUMENT	**BRIEF OF LAW OF JMB CRUSHING SYSTEMS INC. FOR ORDERS IN RESPECT OF BUILDERS' LIENS**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Gowling WLG (Canada) LLP 1600, 421 – 7th Avenue SW Calgary, AB T2P 4K9 **Attn:** **Tom Cumming/Caireen E. Hanert/Alison J. Gray** Phone: 403.298.1938/403.298.1992/403.298.1841 Fax: 403.263.9193 File No.: A163514

TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. FACTS 1

- A. Background 1
- B. Bonnyville Project 3
- C. The Liens 4

III. ISSUE 5

IV. LAW AND ARGUMENT 6

- A. The Legislative Scheme 6
- B. The Havener Liens and the Additional RBEE Lien Claim are Invalid 8
- C. The Shankowski Liens are Invalid 8

V. CONCLUSION 12

I. INTRODUCTION

1. The Applicant, JMB Crushing Systems Inc., submits this brief in support of its Application to declare certain liens filed under the *Builders' Lien Act*, RSA 2000, c B-7 (the "***BLA***") invalid and have them discharged from title to the Havener Land and the Shankowski land (as described below).

2. Liens were registered against title to the Havener Land and the Shankowski Land by RBEE Aggregate Consulting Ltd. ("**RBEE**") and J.R. Paine & Associates Ltd. ("**J.R. Paine**") for aggregate crushing and testing in respect of a contract between JMB and the M.D. of Bonnyville No. 87 (the "**MD of Bonnyville**"). The liens registered against the Havener Land are invalid because none of the aggregate extracted, crushed and tested pursuant to the contract with the M.D. of Bonnyville was extracted from the Havener Land and no work was done on the Havener Land by RBEE or J.R. Paine. Thus, the Haveners are not an "owners" under the *BLA* and no work done by RBEE and J.R. Paine constituted an "improvement" of the Havener Land, as defined by the *BLA*.

3. The liens registered on the Shankowski Land are also invalid. While aggregate from the Shankowski Land was extracted, crushed and tested, such work was done to complete the 2020 supply under the contract with the M.D. of Bonnyville. Thus, Shankowski is not an "owner" under the *BLA* and no work done by RBEE and J.R. Paine constituted an "improvement" to the Shankowski Land, as defined by the *BLA*.

4. Consequently, JMB submits the liens registered by RBEE and J.R. Paine against the Havener Land and the Shankowski Land are invalid and should be ordered discharged from title.

II. FACTS

5. The following are found in the Affidavit of Jason Panter sworn October 9, 2020 (the "**Panter Affidavit**").

A. Background

6. JMB's business is the extraction, processing, transportation and sale of gravel, sand and other aggregates in the Province of Alberta. JMB either directly or through its subsidiary 2161889

Alberta Ltd., has rights of access to over 50 aggregate pits in Alberta through surface material leases with the Province of Alberta and royalty agreements with private individuals or companies, and has freehold title to one aggregate pit. The aggregates are produced to customer specifications and delivery services are provided to any location in northeastern Alberta.

Panter Affidavit at para. 4

7. JMB, through its predecessor company JMB Crushing Systems ULC ("**JMB ULC**"), entered into an Aggregates Royalty Agreement (the "**Shankowski Royalty Agreement**") with Jerry Shankowski ("**Shankowski**"). Shankowski is the owner of lands located at SW-21-56-7-W4 (the "**Shankowski Land**").

Panter Affidavit at para. 5

8. Pursuant to the Shankowski Royalty Agreement, JMB was granted the exclusive right to access the Shankowski Land to explore, prospect for, test, get, process and dispose of aggregates contained in the Shankowski Land.

Panter Affidavit at para. 6

9. In exchange for the exclusive rights granted to JMB, JMB was to pay royalties to Shankowski at differing rates depending upon the type and size of the aggregate removed from the Shankowski Land. The royalties were payable 90 days after the aggregate was removed from the Shankowski Land. In the aggregate industry it is common for land owners to grant licenses to aggregate companies in exchange for the payment of royalties on the volume of aggregate extracted from the land.

Panter Affidavit at para. 7

10. JMB ULC also entered into an Aggregates Royalty Agreement dated November 8, 2018 with Helen and Gail Havener (the "**Havener Royalty Agreement**"). The Estate of Helen Havener and Gail Havener own the land described as NW-16-56-7-W4M (the "**Havener Land**").

Panter Affidavit at para. 8

11. Pursuant to the Havener Royalty Agreement, JMB was granted the exclusive right to access the Havener Land to explore, prospect for, test, get, process and dispose of aggregates contained in

the Havener Land. JMB was also granted the right of first refusal to match any offer to purchase made on the Havener Land.

Panter Affidavit at para. 9

12. In exchange for the exclusive rights granted to JMB, JMB was to pay royalties to the Haveners at differing rates depending upon the type and size of the aggregate removed from the Havener Land. The royalties were payable 90 days after the monthly report of aggregate removed from the Havener Land is produced.

Panter Affidavit at para. 10

B. Bonnyville Project

13. On or about November 1, 2013, JMB ULC contracted with the MD of Bonnyville for the production, hauling and stockpiling of crushed aggregate materials for use in road construction (the "**Bonnyville Contract**").

Panter Affidavit at para. 11, Ex. C

14. In order to complete the 2020 supply for the Bonnyville Contract, JMB:

(a) Extracted aggregate from the Shankowski Land. In the aggregates industry, the removal of top soil and overburden to expose the raw aggregate pit run is also often referred to as "stripping". The exposed raw aggregate pit run is then kept in what is referred to as a gravel bank;

(b) Entered into a Subcontractor Services Agreement with RBEE, on or around February 25, 2020, pursuant to which RBEE agreed to provide crushing services of rock and gravel to JMB. RBEE was to provide crushing services to produce gravel from the raw aggregate pit run. RBEE was to provide crushing services in respect of the Bonnyville Contract;

(c) Between approximately February 25, 2020 and April 8, 2020, RBEE crushed the raw aggregate pit run extracted from the Shankowski Land. To do so, RBEE would move the raw aggregate pit run from the gravel bank (also referred to in the industry as "gravel marshalling") to RBEE's mobile crushing unit. This mobile crushing unit was brought onto the Shankowski Land by RBEE to perform the crushing services. Once the crushing services were complete, the mobile crushing unit would be removed from the Shankowski Land and returned to RBEE's premises;

(d) Asked RBEE to perform some stripping on the Shankowski Land. While JMB did the vast majority of stripping on the Shankowski Land for the Bonnyville Contract, RBEE did perform a small amount of stripping, as JMB did not strip and expose enough raw

aggregate pit run to complete the volume of crushing for the 2020 supply for the Bonnyville Contract. RBEE invoiced JMB $7,500 in stripping costs;

(e) Engaged J.R. Paine on or about April 1, 2020, to perform aggregate testing services in respect of the Bonnyville Contract. As part of the aggregate testing services provided, J.R. Paine tested the crushed aggregate from the Shankowski Land to ensure it complied with the specifications in the Bonnyville Contract. J.R. Paine's testing services were completed by April 8, 2020. J.R. Paine did not perform any testing services on the Havener Land or of aggregate from the Havener Land in respect of the Bonnyville Contract; and

(f) After the raw aggregate pit run was crushed to contract specifications, it would be stockpiled on the Shankowski Land until transported to the MD of Bonnyville yard, where it was stored until needed.

Panter Affidavit at para. 12, Ex. D to G

15. RBEE did not crush or extract any raw aggregate pit run extracted from the Havener Land, and no aggregate testing was done by J.R. Paine of aggregate from the Havener Land, in respect of the Bonnyville Contract. Had aggregate been extracted from the Havener Land and supplied to the MD of Bonnyville, JMB would have paid royalties to the Haveners, which it did not.

Panter Affidavit at para. 13

C. The Liens

16. On May 13 and May 15, 2020 respectively, J.R. Paine and RBEE registered liens pursuant to the *BLA*, being instrument numbers 202 104 972 (J.R. Paine) and 202 106 449 (RBEE) on title to the Havener Land (the "**Havener Liens**"), which is legally described as:

MERIDIAN 4 RANGE 7 TOWNSHIP 56
SECTION 16
QUARTER NORTH WEST
CONTAINING 64.7 HECTARES (160 ACRES) MORE OR LESS
EXCEPTING THEREOUT: HECTARES (ACRES) MORE OR LESS
A) PLAN 4286BM – ROAD 0.0004 0.001
B) ALL THAT PORTION COMMENCING AT THE SOUTH WEST CORNER OF THE SAID QUARTER SECTION; THENCE EASTERLY ALONG THE SOUTH BOUNDARY 110 METRES; THENCE NORTHERLY AND PARALLEL TO THE WEST BOUNDARY OF THE SAID QUARTER 110 METRES; THENCE WESTERLY AND PARALLEL TO THE SAID SOUTH BOUNDARY TO A POINT ON THE WEST BOUNDARY; THENCE SOUTHERLY ALONG THE SAID WEST BOUNDARY TO THE POINT OF COMMENCEMENT
CONTAINING 1.21 3.00

C) PLAN 1722948 – ROAD 0.360 0.89
EXCEPTING THEREOUT ALL MINES AND MINERALS

Panter Affidavit at para. 13, Ex J

17. On May 13 and May 15, 2020 respectively, J.R. Paine and RBEE registered liens pursuant to the *Builders Lien Act*, RSA 2000, c B-7, being instrument numbers 202 104 972 (J.R. Paine) and 202 106 447 (RBEE) on title to the Shankowski Land (the "**Shankowski Liens**"), which is legally described as:

FIRST
MERIDIAN 4 RANGE 7 TOWNSHIP 56
SECTION 21
QUARTER NORTH WEST
CONTAINING 64.7 HECTARES (160 ACRES) MORE OR LESS
EXCEPTING THEREOUT: HECTARES (ACRES) MORE OR LESS
A) PLAN 1722948 – ROAD 0.417 1.03
EXCEPTING THEREOUT ALL MINES AND MINERALS
AND THE RIGHT TO WORK SAME

SECOND
MERIDIAN 4 RANGE 7 TOWNSHIP 56
SECTION 21
QUARTER SOUTH WEST
CONTAINING 64.7 HECTARES (160 ACRES) MORE OR LESS
EXCEPTING THEREOUT: HECTARES (ACRES) MORE OR LESS
A) PLAN 1722948 – ROAD 0.417 1.03
EXCEPTING THEREOUT ALL MINES AND MINERALS
AND THE RIGHT TO WORK THE SAME

Panter Affidavit at para. 14, Ex K

18. RBEE also asserts a builder's lien claim against JMB's registered interest in the Havener Land, which interest is evidenced by a caveat registered as 002 170 374 on June 20, 2000 (the **"Additional RBEE Lien Claim**").

Panter Affidavit at para. 14

III. ISSUE

19. The sole issue before this Court is whether the Havener Liens, the Additional RBEE Lien Claim, and the Shankowski Liens are valid. More specifically, the issue is whether the Haveners and Shankowski qualify as an "owner" as defined in the *BLA*, and whether the work done by RBEE

and J.R. Paine, namely aggregate crushing and testing, is an "improvement" to the Havener Land and the Shankowski Land, as required by the *BLA*.

20. JMB asserts the Havener Liens, the Additional RBEE Land Claim and the Shankowski Liens are invalid. With respect to the Havener Land, no aggregate was extracted from the Havener Land to complete the 2020 supply of the Bonnyville Contract, so no work was done by RBEE or J.R. Paine with respect to the Havener Land. Consequently, the Haveners are not an "owner" under the *BLA*, as they requested no work be done to the improve the Havener Land, and no work was done that was affixed to the land or intended to be or become part of the land, as is required for there to be an improvement under the *BLA*.

21. Similarly, the Shankowski Liens are invalid. While aggregate from the Shankowski Land was extracted, crushed and tested to compete the 2020 supply under the Bonnyville Contract, Shankowski is not an "owner" under the *BLA*, as JMB requested the work be done, which work was not for an improvement to the Shankowski Land. Further, the extraction, crushing and testing of the aggregate from the Shankowski Land is not an "improvement" as defined by the *BLA*, as again, the aggregate was not affixed to the Shankowski Land after extraction, nor was it intended to be or become part of the land.

IV. LAW AND ARGUMENT

22. As stated above, neither the Havener liens, the Additional RBEE Lien Claim, nor the Shankowski liens are valid liens under the *BLA*, as they do not comply with the legislative requirements.

A. The Legislative Scheme

23. When determining the right of a lien claimant to maintain a lien, builders' lien legislation must be strictly interpreted. Further, because builders' liens interfere with common law property rights, no right should be found unless the law clearly expresses it.

> *Rahco International Inc. v Laird Electric Ltd.*, 2006 ABQB 592 ("***Rahco***") at para. 25 **[Tab 1]**
>
> *Royal Bank of Canada v 1679775 Alberta Ltd.*, 2019 ABQB 139 at para. 27 **[Tab 2]**

24. In referring to the Supreme Court of Canada's decision in *Clarkson Co. Ltd. v Ace Lumber Ltd.*, the New Brunswick Court of Appeal stated:

> We should not, therefore, give a large and liberal interpretation to the words "to be used in an improvement".
>
> *Beloit Canada Ltd. v Fundy Forest Industries Ltd.*, 1981 CanLII 2865 (NB CA) at para. 16 **[Tab 3]**

25. Section 6(1) of the *BLA* governs the lien claims in this case. Section 6(1) provides:

> 6(1) Subject to subsection (2), a person who
>
> (a) does or causes to be done any work on or in respect of an improvement; or […]
>
> for an owner, contractor or subcontractor has,…a lien on the estate or interest of the owner in the land in respect of which the improvement is being made.
>
> *BLA*, s. 6(1) **[Tab 4]**

26. "Owner" is defined in s. 1(j) of the BLA as "a person having an estate or interest in land at whose request, express or implied,…work is done…for an improvement", and "Improvement" is defined in s. 1(d) of the BLA as:

> anything constructed, erected, built, placed, dug or drilled, or intended to be constructed, erected, built, placed, dug or drilled, on or in land except a thing that is neither affixed to the land nor intended to be or become part of the land.
>
> *BLA*, s 1(d), (j) **[Tab 4]**

27. Consequently, to have a valid builders' lien, the following must be proven:

(a) The owner must request the work be done for an improvement to her land;

(b) There must be an improvement to the owner's land;

(c) The improvement must be a thing constructed, erected, built, placed, dug or drilled, on or in the land; and

(d) The improvement must be affixed to the land or intended to be or become part of the land.

B. The Havener Liens and the Additional RBEE Lien Claim are Invalid

28. JMB submits the Havener Liens and the Additional RBEE Lien Claim are invalid and should be discharged from title because the work done by RBEE and J.R. Paine does not amount to an improvement to the Havener Land, as is required by the *BLA*. Further, any work done by RBEE and J.R. Paine was not done at the request of the Haveners as an "owner" under the *BLA*.

29. While the Haveners are the registered owners of the Havener Land, they are not an "owner" under the *BLA*, because they did not expressly or impliedly request any work be performed by JMB, RBEE or J.R. Paine for an improvement on the Havener Land. In fact, the work done and services provided by RBEE and J.R. Paine was in no way connected to the Havener Land; no aggregate from the Havener Land was used to complete the 2020 supply under the Bonnyville Contract.

Panter Affidavit at para. 13

30. Given the Haveners are not an "owner" under the *BLA*, no consideration need be given to whether the work done by RBEE and J.R. Paine in respect of the Bonnyville Contract amounted to an "improvement" on the Havener Land.

31. Based on the above, JMB submits the Havener Liens and the Additional RBEE Lien Claim are invalid and should be discharged from title to the Havener Land.

C. The Shankowski Liens are Invalid

Shankowski is not an "owner" under the BLA

32. Shankowski is the registered owner of the Shankowski Land. However, he is not an "owner" under the *BLA*, because he did not expressly or impliedly request the work completed by JMB, RBEE or J.R. Paine be done for an improvement on the Shankowski Land.

33. As noted above, "owner" is defined in s. 1(j) of the *BLA* as a person with an estate or interest in land <u>who requests another to undertake work for an improvement on the land</u> in which that person has an estate or interest. Whether an owner made an express or implied request for the work is a question of fact.

Royal Trust Corp. of Canada v Bengert Construction Ltd., 1988 ABCA 58 ("***Bengert CA***") at para 18 **[Tab 5]**

34. In this case, JMB contracted with RBEE and J.R. Paine to provide work to complete the 2020 supply to the MD of Bonnyville pursuant to the Bonnyville Contract. Shankowski is not a party to the Bonnyville Contract, so he could not have expressly or impliedly requested the aggregate be extracted, crushed and tested in performance of the Bonnyville Contract. The "owner" for purposes of the *BLA* is the MD of Bonnyville, as it contracted with JMB for the supply of aggregate and JMB, in turn, contracted with RBEE and J. R. Paine to provide work in order to fulfill JMB's contractual obligation of supply. The fact that JMB obtained the aggregate from the Shankowski Land pursuant to the Shankowski Royalty Agreement is irrelevant, as it is the Bonnyville Contract that must be the focus of the analysis when determining who qualifies as an "owner" under the *BLA*.

35. The facts in this case are similar to those in *Sustainable Developments Commercial Services Inc.*, where the respondent registered a lien against the land to which it hauled aggregate. The work was done under and pursuant to a prime contract between the County of Vermilion and the applicant. The respondent was to haul aggregate to be stockpiled for the benefit of the County, who planned to use it for road graveling over the course of the following year. The Master held that the landowner was not an "owner" within the meaning of the *BLA*, finding the work done by the respondent was for the County and not for the landowner.

Sustainable Developments Commercial Services Inc. v Budget Landscaping & Contracting Ltd., 2020 ABQB 391 at paras 3, 7 **[Tab 6]**

36. While Shankowski arguably obtains a "benefit" from the work done on the Shankowski Land to compete the 2020 supply of the Bonnyville Contract that benefit arises directly from the Shankowski Royalty Agreement and does not in any way flow from the Bonnyville Contract. A mere benefit is not sufficient to satisfy the "owner" requirement in the *BLA*. In this regard, the case law addressing builders' liens in the landlord-tenant and landowner-home builder contexts are helpful. In both situations, where the landlord/landowner has no active participation in work done by the tenant/homebuilder on the land, there can be no lien claim against the landlord/landowner's interest in the property. An agreement with a home builder or a landlord without more is not enough to find an implied request within the meaning of the *BLA*.

K & Fung Canada Ltd. v N.V. Reykdal & Associates Ltd., 1998 ABCA 178 at paras 7-8, 10 **[Tab 7]**

Bengert CA, supra at paras 27-29 **[Tab 5]**

Royal Trust Corp. of Canada v Bengert Construction Ltd., 1986 CarswellAlta 257, at para 17 **[Tab 8]**

Georgetown Townhouse GP Ltd. v Crystal Waters Plumbing Company Inc., 2018 ABQB 617 at paras 1-3 **[Tab 9]**

37. Here there is no evidence Shankowski was actively involved in any of the work done on the Shankowski Land or directed either RBEE or J.R. Paine in doing the work necessary to complete the supply of the 2020 Bonnyville Contract. Rather, the only connection between Shankowski and the extraction, crushing and testing of the aggregate from his land by JMB, RBEE and J.R. Paine is the Shankowski Royalty Agreement, which agreement is wholly unconnected to the Bonnyville Contract and any work done to fulfill the terms of that contract. Thus, Shankowski is not an "owner" under the *BLA*, with the result that the Shankowski Liens are invalid.

There was no "Improvement" on or in the Shankowski Land

38. Even if Shankowski is an "owner" under the *BLA*, central to the issue of whether or not a registered builders' lien can be said to be valid, is whether or not the work forming the basis for the lien has effected an "improvement" to the land. The definition of improvement in the *BLA* is exclusive, not inclusive. In Alberta, in order for work to have "improved" land, one or more of the activities listed in the opening words of the section (i.e. constructed, erected, etc.) must have occurred and the work product must be both "affixed to" the land and "intended to be or become part of the land". Absent any of these factors, the work is not an improvement and, consequently, not lienable.

Rahco, supra at paras 42, 64 **[Tab 1]**

39. In this case, the aggregate excavated, crushed and tested was not affixed to the Shankowski Land and there was no intention that the aggregate be or become part of the Shankowski Land. In fact, it was the opposite; the express purpose of the work performed on the Shankowski Land was to remove the aggregate from the land, so it could be processed and hauled to the MD of Bonnyville yard in satisfaction of the Bonnyville Contract.

40. "Improvement" must be considered from the perspective of the overall project. The overall project in this case is that governed by the Bonnyville Contract, which required JMB supply aggregate crushed to specification to the MD of Bonnyville for use in road construction. Thus, in determining whether there was an improvement to the Shankowski Land, the focus must be on whether the work done by RBEE and J.R. Paine was directly connected to an "improvement" as defined by the overall project (road construction), such that it can be considered "work on or in respect of an improvement." Given the "improvement" is the construction of roads by the MD of Bonnyville, the only land that could be subject to the improvement would be land in which the MD of Bonnyville had an interest, not the Shankowski Land.

Davidson Well Drilling Limited (Re), 2016 ABQB 416 at paras 79, 81-82 **[Tab 10]**

41. Further, the case law establishes that adding value to the land by irrigating or mining the land is not sufficient, in and of itself, to cause something to be an improvement. There must be further evidence that there is an improvement to land; there must be something affixed to the land and an intention that it be or become part of the land. In this case, nothing was affixed to the Shankowski Land or intended to be or become part of the land. Rather, aggregate was removed from the land with the intention that it be used on unrelated land for the purpose of road construction by the MD of Bonnyville.

Rahco, *supra* at para 63 **[Tab 1]**

42. This Honourable Court considered a chain of contracts similar to those in this case, where one party was to supply aggregate for a project and held a license to extract aggregate from the lands of a third party unconnected to the project. While the Court was not asked to consider whether a valid lien could be maintained on the land from which the aggregate was extracted, it did note as follows:

> Although NDV reaped the financial benefits, given the exclusive lease of the gravel pit granted to HRP, the gravel pit was not improved: nothing was constructed at the gravel pit. The off-site work performed using the rental equipment resulted in gravel and sand that was used in constructing the Hangingstone Project, and directly contributed to the actual physical construction of the improvement. […]
>
> It is clear that the removal of gravel did not improve the gravel pit. […]

Northern Dynasty Ventures Inc. v Japan Canada Oil Sands Limited, 2020 ABQB 275 at paras 10, 12 **[Tab 11]**

43. This is the situation here. Shankowski merely granted a license to JMB to enter the Shankowski Land and extract aggregate, which aggregate was used to complete the 2020 supply of the Bonnyville Contract. There was nothing constructed on the Shankowski Land. Based on the above, JMB asserts the Shankowski Liens are invalid and should be discharged from title to the Shankowski Land.

V. CONCLUSION

44. As neither Havener, nor Shankowski qualify as an "owner" under the *BLA* and there is no "improvement" to the Havener Land or the Shankowski Land as required by the *BLA*, the Havener Liens, the Additional RBEE Lien Claim and the Shankowski Liens are invalid and ought to be discharged from title.

All of which is respectfully submitted this 13th day of October, 2020.

GOWLING WLG (CANADA) LLP

Tom Cumming/Caireen E. Hanert/Alison J. Gray
Counsel for the Applicant, JMB Crushing Systems Inc.

TABLE OF AUTHORITIES

1. *Rahco International Inc. v Laird Electric Ltd.*, 2006 ABQB 592
2. *Royal Bank of Canada v 1679775 Alberta Ltd.*, 2019 ABQB 139
3. *Beloit Canada Ltd. v Fundy Forest Industries Ltd.*, 1981 CanLII 2865 (NB CA)
4. *Builders' Lien Act*, RSA 2000, c B-7
5. *Royal Trust Corp. of Canada v Bengert Construction Ltd.*, 1988 ABCA 58
6. *Sustainable Developments Commercial Services Inc. v Budget Landscaping & Contracting Ltd.*, 2020 ABQB 391
7. *K & Fung Canada Ltd. v N.V. Reykdal & Associates Ltd.*, 1998 ABCA 178
8. *Royal Trust Corp. of Canada v Bengert Construction Ltd.*, 1986 CarswellAlta 257
9. *Georgetown Townhouse GP Ltd. v Crystal Waters Plumbing Company Inc.*, 2018 ABQB 617
10. *Davidson Well Drilling Limited (Re)*, 2016 ABQB 416
11. *Northern Dynasty Ventures Inc. v Japan Canada Oil Sands Limited*, 2020 ABQB 275

Tab 1

Court of Queen's Bench of Alberta

Citation: Rahco International Inc. v. Laird Electric Ltd., 2006 ABQB 592

Date: 20060728
Docket: 0601 03273
Registry: Calgary

2006 ABQB 592 (CanLII)

Between:

Rahco International Inc.

Plaintiff

- and -

Laird Electric Ltd.

Defendant

Reasons for Judgment
of
J. B. Hanebury, Master in Chambers

---

[1] This application has implications for subcontractors who do work on, or supply materials to, large pieces of mining equipment at the Alberta tar sands projects. Laird Electric Ltd. entered into a contract with Rahco International Inc. to assemble and do the electrical connections for several large pieces of mining equipment located at the Suncor Energy Inc. tar sands near Fort McMurray. The equipment is huge and had to be trucked in and assembled on site. Laird Electric said it was not paid for all of its work and it filed a builder's lien for $1,321,288.47 against the freehold and leasehold mineral titles to the lands where the equipment was assembled and is operating.

[2] Rahco applies to discharge the lien on the basis that the equipment Laird Electric assembled is not an "improvement to the land"as required by the *Builders' Lien Act*, R.S.A. 2000, c. B-7. The application is on a summary basis, which means that there must be no genuine issue to go to trial.

bears the onus of proving its assertions. It is similar to an application for summary judgement under rule 159 of the *Alberta Rules of Court*. See ***Carrington Homes***, page 3 and ***Dominion Bridge***, paragraph 5.

[22] Rehco relies on the recent Alberta Court of Appeal decision in ***Murphy Oil*** for the description of the test to be applied in a summary judgment application. At paragraph 25, the court found that it is up to the moving party to first adduce evidence to show that there is no genuine issue for trial. Once the moving party has met that burden, the responding party may adduce evidence to persuade the court that there remains a genuine issue to be tried. The court noted that the responding party may choose to adduce no evidence but it then bears a risk that it will be determined that it has been established by the moving party that there is no genuine issue to be tried.

[23] I agree that the application is similar to a summary judgment application and the initial burden is on Rehco to demonstrate that the lien is invalid. The burden then shifts to Laird Electric to demonstrate that there is a genuine issue for trial. The overall evidentiary burden is on Rehco to establish beyond doubt that no genuine issue for trial exists. See: ***Pioneer Exploration.***

Analysis

[24] On the facts and the case law before me, can I find that the lien is invalid and that there is no genuine issue to go to trial? As was noted by the Alberta Court of Appeal in ***Gauntlet***, when determining the validity of a builder's lien, each case is decided on its own facts. In an application to remove a lien under s. 48(1)(c) it is not surprising that there is no case law precisely on point. The situations that present themselves are often unique. However, this does not mean that a determination on an interlocutory basis can never be made. An interlocutory determination was made in ***Gauntlet***. The application of the established principles to the undisputed facts can lead to a conclusion that there is no genuine issue for trial. That is the conclusion that I have reached in this case based on the analysis that follows.

[25] I will start with a fundamental principle that is noted in more than one of the cases cited. The Supreme Court of Canada has held that, when determining the right of a lien claimant to maintain a lien, builders' lien legislation must be strictly interpreted. See: ***Clarkson Co. Ltd. et al. v. Ace Lumber Ltd. et al*** [1963] S.C.R. 110 at p. 114. Similarly, Romaine J. in ***Gauntlet***, concurred with earlier case law where it had been held that because builders' liens interfere with common law property rights, no right should be found unless the law clearly expresses it. Romaine J.'s decision was upheld on appeal.

[26] With that principle in mind, I turn to the matter at issue. Sections 6(1) and (2) of the *Builders' Lien Act* require that there be an "improvement" for there to be a valid lien. The issue is whether the mining equipment is an improvement. The answer to the first part of this issue was not in dispute. Is this large, mobile, custom-build mining equipment an improvement to the land, which is defined as a thing constructed or erected on the land? The mining equipment is a thing that was constructed or erected on the land.

2006 ABQB 592 (CanLII)

[27] The dispute between the parties arises in determining whether the equipment comes within the exception to the definition of improvement, as a thing neither affixed to the land nor intended to be or become part of the land. Rehco argues that the mining equipment in issue does not constitute an improvement. It says that because this equipment is mobile, it comes within the exception to the definition of "improvement" as it is neither affixed to the land nor intended to be or become part of the land. Rehco says that its only connection to the land is a large electrical cord which can be unplugged.

[28] The first Alberta case cited by Rehco is the 1976 Alberta Trial Division decision in ***Evergreen Irrigation Ltd.***, where the claim was for a lien in relation to a mobile irrigation system that had been delivered and set up on the lands of the defendant. The definition of "improvement" in the Act at that time was the same as the definition now.

[29] In considering what constituted an "improvement" in that case, Brennan J. examined the exception found in the concluding words of the definition of improvement: a thing that is neither affixed to the land nor intended to be or become part of the land. He found that the equipment in issue was not permanently affixed to the land, but could be and had been moved from one piece of land to another, although such movement generally required at least some disassembly of the irrigation equipment. The equipment, he held, was not an improvement as it came within the exception found in the definition. It was more in the nature of a farm implement.

[30] Rehco also relied on the 2003 Alberta decision in ***(Re) Gauntlet Energy Corp.*** At issue in that case was the entitlement to a builders' lien of the supplier of sour gas line heater separator packages to certain well sites. In that case drilling at the well sites, where the equipment had been left, did not result in producing wells. As a result the packages were moved to new well sites where they were incorporated into the production process.

[31] Romaine J. found that the separator packages were affixed to the land by being mounted to skids that there welded to metal piles driven into the muskeg. She noted that they can be, and were, moved from well site to well site. In fact, they had never been used at the first site to which they were delivered. She noted that no right to a lien should be found unless the law clearly expresses it. She determined that it was clear from the evidence that the separator packages were "not intended to be or to become part of the land in question" and found the lien invalid.

[32] The supplier appealed and argued that a drilling rig itself is an improvement and any services supplied or materials furnished preparatory to, in connection with, or for an abandonment operation create a valid lien. The supplier said that the court erred in considering the method or extent of affixation of the equipment to the land. It argued that the equipment was prima facie an improvement and the decision had important business ramifications to both it and the oil and gas industry.

2006 ABQB 592 (CanLII)

[33] Paperny, J.A. writing for the Court of Appeal, noted approvingly that the chambers judge had rejected the "bald proposition" advanced by the lien claimant that anything done to recover minerals is an improvement to the mineral interest as the word "improvement" is defined in the *Builders' Lien Act*. She agreed with the chambers judge that the decision in ***Wyo-Ben Inc. v. Wilson Mud Canada Ltd.*** (1985), 23 D.L.R. (4th) 760 (C.A.) does not stand for the proposition that a drilling well is an improvement and thus materials supplied or services rendered in connection with the well, without more, entitle a supplier of those materials or services to a builders' lien. She found that the decision of the chambers judge did not evidence an error in law and upheld it.

[34] Laird Electric relies on the 1984 Alberta case of ***V.A.W. Manufacturing*** for the proposition of whether or not a thing is capable of being disassembled and moved is not determinative of whether it is an improvement. In that decision Master Funduk found that pressure vessels that were installed as part of an ethylene glycol processing plant were part of the land, and were improvements subject to a builders' lien. The vessels were mounted on solid concrete foundations, were connected by numerous piping connections to the rest of the plant equipment and were an integral part of the processing plant. The intention was that the plant would be there for at least 10 years. Master Funduk found that the fact that the vessels could be severed from the land did not make them any less a part of the land. He pointed out that it is possible to sever a furnace in the house from the land. In coming to his conclusion that the vessels were improvements, he relied on no case law.

[35] This is the Alberta case law relied upon by the parties. In considering whether the mining equipment is neither affixed to the land nor intended to be or become part of the land, the parties also relied on case law from British Columbia and Ontario. Those two provinces define "improvement" differently in their builders' lien legislation and, therefore, reliance on their jurisprudence must be undertaken with caution.

[36] In British Columbia the *Builders' Lien Act*, 1979 R.S.B.C. c. 40, defined improvement as including:

> anything made, constructed, erected, built, altered, repaired, or added to, in on or under land, and attached to it or intended to become a part of it, and also any clearing, excavating, digging, drilling, tunnelling, filling, grading or ditching of, in, on or under land.

[37] This definition was considered by the British Columbia Court of Appeal in 1988 in the case of ***Boomars Plumbing.*** In ***Boomars,*** the lien claimant supplied work and material to erect a 120 unit motel. The original intention of the owner of the motel was to clean up, renovate and install housing units that had been used in a construction camp. He planned to create a short-term facility and eventually move the units to a new location. However, the City of Prince Rupert required extensive replacement of electrical and plumbing installations, including the removal of gas heating and the installation of electrical baseboard heating; the gyprocking of interior walls; the installation of underground sewer and water lines; the construction of

2006 ABQB 592 (CanLII)

additional washroom facilities; and a new fire alarm system. The building owner had a three year lease on the lands where the buildings were located, with an option to renew and an option to purchase. The land lease provided that upon its termination the lessee may remove all of the buildings. Under the lease the buildings were not considered to be attached to or to form part of the lands.

2006 ABQB 592 (CanLII)

[38] The buildings were put on a foundation which consisted of wooden cribbing which in turn rested on concrete blocks. The cribbing was not bolted nor welded together, it stayed in place by its own weight and it was not fastened to the concrete blocks. It was the kind of foundation usually employed under temporary structures such as construction camps. The modular units were connected to the concrete base by their own weight and could be dismantled and moved. Moving them would require the disconnecting of the plumbing and electrical connections, the sawing of fascia boards and the taking apart of each 9 unit building into individual units. This would result in some damage to each unit.

[39] The Court of Appeal first noted that the purpose of the *Builders' Lien Act* is to prevent owners from getting the labour and capital of others without compensating them. The definition of improvement, the court said, is an inclusive rather than an exclusive definition. It noted that such a definition can extend the ordinary meaning of the word but cannot take away from it. The ordinary definition of improvement is "a valuable addition made to property (usually real estate) or an amelioration in its condition, amounting to more than mere repairs or replacement, costing labour or capital and intended to enhance its value, beauty or utility or to adapt it for new or further purposes."

[40] The court found that the ordinary meaning of improvement is not significantly different, if at all, from the definition in the statute, at least in relation to structures. The court then considered whether the buildings were "attached to or intended to become a part" of the land. The court found that the buildings were connected to the land by their own weight on the foundation and by electrical and plumbing connections. The buildings enhanced the value and utility of the land, which had previously been undeveloped. Furthermore, while the buildings were of the kind normally seen as temporary, there was a permanency to the buildings in light of the work ultimately undertaken to install them and the difficulty and damage that would be incurred in moving them. The intention was that they stay in place so long as the project was economically viable. The buildings were found to be improvements within the meaning of the legislation and work on them could support a valid lien claim.

[41] The next British Columbia case referred to is ***Deal S.r.l.***, a 2001 decision of the Court of Appeal. In that case concrete moulds were manufactured in one location, transported to another, installed in a shed and bolted to footings. They were intended to be in place for the duration of the project and to be removed thereafter. Relying on the ***Boomars*** decision, the Court of Appeal held that the moulds were "erected" or "built" on the land and attached to it either by a bolted connection to the floor or piles, or by their own weight. Furthermore, the moulds were intended to be in place at least for the duration of the project, which was a time sufficient to satisfy the requirements of the definition that there be an intention to make them part of the land.

[42] In both of these British Columbia decisions the court found the structures in issue to be improvements. The definition of improvement in British Columbia is inclusive, rather than exclusive, and the court in these two cases has relied on an expansive approach to the interpretation of that definition when determining to uphold the lien. This contrasts with Alberta, where the definition is exclusionary and the court has held that the rights of lienholders should be interpreted strictly. Therefore these cases can be distinguished. However, it is useful to note that despite this inclusionary wording, the courts in British Columbia upheld the liens only after considering the nature of the attachment of the structure or equipment to the land and the intention that the attachment have some degree of permanency.

[43] The Ontario case referred to is ***Kennedy Electric***, a 2006 decision of three judges of the Ontario Court of Justice. In the Ontario *Construction Lien Act*, 1983 S.O. c. 6, “improvement” is defined as “any alteration, addition or repair to, or any construction, erection or installation on, any land, and includes the demolition or removal of any building, structure or works or any parts thereof, and ‘improved’ had a corresponding meaning”. Land is defined to include “any building, structure or works affixed to the land, or an appurtenance to any of them, but does not include the improvement”.

[44] In this case Kennedy and its subcontractors were hired to assemble, off-site, the components of a large assembly line for the manufacture of truck frames. They were then to pack, ship and reinstall the assembly line in the plant facilities owned by Dana. . The contract for the assembly line had a total price of more than 44 million dollars. The issue before the court was whether the services performed by Kennedy constituted an “improvement” to the land and could, therefore, support a lien.

[45] Once installed, the line covered about 100,000 square feet of space, was 20 feet tall and weighed approximately half a million tons. The assembly line sat on the floor and was fastened to it by two to three thousand anchor bolts from six to eight inches in length. The evidence demonstrated that the line could be readily disconnected by shearing the bolts off flush with the floor.

[46] The trial judge found that the work performed by Kennedy was exclusively related to the assembly line and not to the building in which it was housed. The judge held that the assembly line installation represented the installation of manufacturing equipment in a building and did not constitute an improvement or part of an improvement to the land.. The majority of the court upheld the trial judge and said that the rights of a lien claimant should be strictly interpreted.

[47] The trial judge found that the definition of “improvement” in the Ontario legislation is both exhaustive and restrictive. He also concluded that the definition of “improvement” in the British Columbia *Builders’ Lien Act*, R.S.B.C. 1979, c. 40 is an expansive definition and the British Columbia cases of ***Boomars Plumbing*** *(supra)* and ***Deal S.r.l.*** *(supra)* were therefore distinguishable.

2006 ABQB 592 (CanLII)

[48] The trial judge considered two other British Columbia decisions: ***Spears Sales & Services Ltd. v. Westpine Fisheries Ltd. et al*** (1985), 17 C.L.R. 197 and ***Chubb Security Safes v. Larken Industries Ltd.*** [1990] B.C.J. No. 26, both of which found that equipment designed and used for the operations of the business within the structure, but not integral to the structure, was not an improvement to land

[49] The trial judge in ***Kennedy*** found that the assembly line was not part of an improvement nor a freestanding improvement on its own. Although the word “portable” did not appear in any of the contract documents, those documents made it clear that the assembly line was, by its nature and design, a fully portable line. He said that it was designed like a giant meccano set that could be put together for a test run and then disassembled, moved, and reassembled. He noted that a similar line had been moved in the past. If one were to disassemble the $44.372 million assembly line, no “improvement” would remain at the plant. The assembly line, he said, is “all about machinery and equipment and has nothing to do with ‘improvements’ to the land and/or the buildings in the ...plant”. As a result, the liens were invalid.

[50] The definition of “improvement” and “land” considered in ***Kennedy*** does not refer to any intention for the equipment to be or become part of the land. The definition is based on a structure or work being “affixed” to the land. The court found that equipment that was attached to the floor of a building with thousands of bolts was not “affixed” to the land because it could, and might, be moved elsewhere. As a result, while intention is not a specific consideration in the Ontario legislation, it appears it was considered as part of the consideration of the meaning of “affixed”.

[51] The final case for consideration is a 1981 decision from the New Brunswick Court of Appeal, ***Beloit Canada Ltd. v. Fundy Forest Industries Ltd.*** Under the legislation in place in that province “improvement” was defined to include “anything constructed, erected, built, placed, dug or drilled on or in land except a thing that is not attached to the realty nor intended to be or become part thereof”. It is the only case that relies on a definition of improvement similar to that used in Alberta.

[52] In that case a supplier claimed a lien for the furnishing of a corrugating paper machine. The machine weighed two and a half million tons and cost over two million dollars. The supplier was not paid in full and filed a lien against the lands where the paper-mill had been erected. The evidence disclosed that Fundy Forest Industries had acquired land and designed a building specifically to house the custom-designed paper-making machine. At issue was whether the building and the machine were an improvement to the land or if the building was something designed and erected to house and protect the machine and provide a working area in which the machine can be utilized.

[53] The court in that case began by adopting the principle that, in determining whether a lien claimant is someone to whom a lien is given by the legislation, builders’ lien legislation should be given a strict interpretation. The court found that the building that housed the equipment was an improvement to the land.

2006 ABQB 592 (CanLII)

[54] As a result of that finding, the question then became: Was the paper-making machine "material to be used in an improvement"? To be so, it must be incorporated in and become part of the improvement, or be consumed in the construction of the improvement. The court found that the question of whether there is an intention to erect or place something on land, to be or become part of that land is not relevant to a determination of whether materials are used in an improvement. That intention is only relevant when determining if something is itself an improvement. The court held that the paper machine was sold as a paper-making machine and not as a component of the building. There was no evidence that it was intended that it form or become a component of the building which was itself the improvement. The building was merely the location for the machine and the concrete foundation was the required support. The court found the machine to be, essentially, equipment, not something that formed or became part of the improvement, the building in which it was housed.

2006 ABQB 592 (CanLII)

[55] The cases from British Columbia, Ontario and New Brunswick, while dealing with differing fact situations and, mostly, different legislation, are of assistance in relation to the fundamental principles to be considered in determining if something is an improvement to land.

[56] In all of these cases a two step analysis was taken, either explicitly or implicitly. The first question was whether the structure or equipment in issue was attached, or affixed to the land? In all of these cases it was attached by way of bolts, various connections or its own weight. However, in no case did the analysis stop there. Mere attachment was not enough. In each case the courts looked further. In the British Columbia cases cited by the parties, the court, relying on an expansive definition of the definition of improvement, looked beyond the mere attachment of the structure to the land. The court also considered the degree of permanence of the attachment, both physically and from a time perspective. This permanence was required for the court to determine that the structures were improvements.

[57] In ***Kennedy***, the Ontario case, the British Columbia cases it cited, and the New Brunswick case of ***Fundy Forest Industries*** the courts considered the nature and purpose of the equipment in issue. Was it truly an improvement or part of an improvement to the land or was it more in the nature of equipment used to run a business; equipment that could be moved to run a business elsewhere? In each case the court found the equipment could be assembled, disassembled and moved to another plant. It was manufacturing equipment and was not an improvement to the land.

[58] In all of these cases a mere attachment to the land was not sufficient to render equipment or a structure an improvement to the land.

[59] I turn to the three Alberta cases cited by the parties, two of which are binding upon me. In ***V.A.W.*** it appears that the court agreed with the argument of the lien claimant that the pressure vessels were an improvement because they were heavy and inter-connected with other equipment. As that case did not consider the case law and its facts are different than those in this case, it is not significant to the determination to be made in this case.

2006 ABQB 592 (CanLII)

[60] Of more assistance are the cases of ***Evergreen Irrigation*** and ***Gauntlet.*** In both of those cases the equipment was stationery, was interconnected with other equipment and thereby attached to the land. In both cases the equipment required some disassembly or unbolting to be moved. However, in both instances it could be and was moved, and this mobility indicated that there was no clear intention to make it part of the land.

[61] In ***Evergreen*** the irrigation system improved the usefulness of the land, but the court found it was not attached to the land as it could be disconnected and moved. It found the system was not an improvement and was more in the nature of a farm implement.

[62] In ***Gauntlet*** the court rejected the argument that anything done to recover minerals is an improvement under the *Builders' Lien Act.* The court then looked at the nature of the equipment and the permanence of its attachment to the land, both physically and in practice, to find that the equipment was not an improvement to the land. In ***Evergreen*** and ***Gauntlet*** it was difficult for the lienholder to prove an intention for the equipment to be or become part of the land as the equipment had actually been moved from the lands before the court considered the matter.

[63] From this case law it is clear that adding value to the land by irrigating the land or mining the land is not sufficient, in and of itself, to cause something to be an improvement. The court looks further for evidence that the equipment is an improvement to the land. Therefore, the fact that the equipment in this case is used to mine the lands is not enough to claim that it is an improvement to the land. It must be affixed to the land and there must be an intention that it be or become part of the land.

[64] Is this mining equipment affixed to the land? Before answering this question I note that I am required to construe the Act strictly when determining that lien claimants are entitled to a lien. The definition of "improvement" in the Alberta legislation is exclusive, not inclusive.

[65] There was no evidence given of any intention to move the equipment off the Suncor site. The evidence is that the mobile conveyor was custom-designed for the tar sands project, was assembled in California, broken down and trucked to the site in over 60 containers, and then re-assembled on the site and moved to its present location. In its present location it moves around the tar sands site, but obviously cannot be driven down the road to another tar sands project.

[66] However, within the site, the mining equipment is mobile. It moves as part of the nature of its part in the operation of the mining undertaking. The mobile conveyor moves by way of its own tractors and its connection to the power source. The mobile conveyor does not rest on the land; it is not immobile; it is only attached by a lengthy power cord. It could be readily disconnected from this power source and re-connected to another power source, if one were available. The hopper sits on top of the mobile conveyor, so moves with it. The transfer conveyor is moved by way of separate tractors; it is not attached to the land other than by the power it receives from the cable. It rests on the land under its own weight, however it only does

so until it is moved again. This equipment is not connected to the land as the equipment was in ***Evergreen*** and ***Gauntlet*** This equipment must be moveable to carry out its ongoing functions.

[67] Mobile mining equipment requires a source of power and the power cable is the only way the equipment is attached to the land. At the end of that cable it can, does and must move. An electric cable connecting mobile equipment to an electrical substation is not a sufficient physical connection to the land to satisfy the requirement that the equipment be affixed to the land. The equipment is not affixed to the land; it is only tethered.

[68] Even if the equipment were affixed to the land, the equipment is not intended to be or become part of the land. It is mobile mining equipment and, as earlier noted, Laird Electric cannot rely on the argument that anything done to mine a mineral in the land improves the land. Looking more broadly at the case law cited, the law has generally differentiated between equipment to carry out a business function, and equipment that is an improvement to the land or is incorporated into an improvement to the land. This distinction has often been made on the basis of the potential mobility of the business equipment, even when, as in ***Kennedy***, the equipment is enormous and attached by thousands of bolts. While the mining equipment in this case is not readily movable off the Suncor site, it was assembled, disassembled, moved, reassembled, moved and then connected to a power source to allow it to move around the site. The equipment in issue in this case has been moved to and around the site and is itself designed to be movable to carry out the business of mining. It is mining equipment. It is not an "improvement" to the land.

[69] Laird Electric argued that it would be unconscionable to allow Rahco to claim that the lien should be removed, as Rahco's contract with Laird Electric indicates that the *Builders' Lien Act* applies. I have some sympathy with Laird Electric's argument. Unfortunately, Laird Electric is either entitled to the protection of the Act or it is not. I note that other jurisdictions, such as the Yukon, the Northwest Territories and Nova Scotia, have enacted specific legislation to protect those who provide services to mines. While Alberta has given lienholders the right to lien mineral titles, it has not extended the same protection as those jurisdictions have to the providers of services to mines.

[70] In conclusion, I find that Rehco met the burden upon it and established that the lien should be removed. Laird Electric has not demonstrated that there is a genuine issue to be tried. The lien will be discharged. Rehco shall have its costs of this application.

Heard on the 20th day of April, 2006.
Dated at the City of Calgary, Alberta this 28th day of July, 2006.

2006 ABQB 592 (CanLII)

J. B. Hanebury
M.C.C.Q.B.A.

Appearances:

Jamie Flanagan
(McLennan Ross LLP)
for the Applicant

Geoffrey Edgar & Mr. Kickham
(Miller Thomson LLP)
for the Respondent

2006 ABQB 592 (CanLII)

Tab 2

2019 ABQB 139
Alberta Court of Queen's Bench

Royal Bank of Canada v. 1679775 Alberta Ltd.

2019 CarswellAlta 352, 2019 ABQB 139, [2019] A.W.L.D. 2414, [2019] A.W.L.D. 2416, 305 A.C.W.S. (3d) 532, 87 Alta. L.R. (6th) 379, 91 C.L.R. (4th) 192

Royal Bank of Canada (Plaintiff) and 1679775 Alberta Ltd, Reid-Built Homes Ltd, Reid Worldwide Corporation, Builder's Direct Supply Ltd, Reid Built Homes Calgary Ltd, Reid Investments Ltd, Reid Capital Corp and Emilie Reid (Defendants)

Georgetown Townhouse GP Ltd (Plaintiff) and Crystal Waters Plumbing Company Inc, R and R Bruno Enterprises Ltd, Kidco Construction Ltd, Siena Flooring Inc, Spindle, Stairs & Railings 2002 Ltd, Rob's Drywall Services Ltd, 840307 Alberta Ltd, operating as Wildwoord Cabinets, Double R Building Products Ltd, WM Schmidt Mechanical Contractors Ltd, Lehigh Hanson Materials Limited operating as Inland Concrete, Lehigh Hanson Manson Materials Limited, E2 Construction Ltd, Gienow Canada Inc, doing business as Ply Gem, High Caliber Construction Inc, TBA Cleaning Services Ltd, Signature Fan Company Ltd, Scotty's Rentals and Landscaping Ltd, Majestic Electric Inc, Prairie Pipe Sales Ltd, 789072 Alberta Ltd and RKG Developments Ltd operating as Lenbeth Weeping Tile Calgary and Watt Consulting Group Ltd. (Defendants)

Robert A. Graesser J.

Heard: October 3, November 30, 2018
Judgment: February 27, 2019
Docket: Edmonton, Calgary 1703-21274, 1701-15571

Counsel: Dean Hitesman, Nicholas Williams, for Royal Bank of Canada Limited
Michael McCabe, Q.C., for Melcor Developments Ltd. and RBC
Howard Gorman, Q.C., Aditya Badami, Samantha Jenkins, for Alvarez and Marsal Canada Inc.
Glen M. Hickerson, for Crystal Waters Plumbing Company Inc. et al
Jeff Wreschner, for Georgetown Townhouse GP Ltd.
John Regush, for La Vita Lands Inc.
Allan Garber, for BACA Construction 2013
Anthony Di Lello, for Rob's Drywall Services Ltd. and Prattco Excavating Ltd.
Halley Carcasole, for Davidson Enman Lumber Ltd.
Michelle Andresen, for Diversified Mechanical Ltd.
Peter Ridout, Joel Pagkatipunan (Student-at-law), for R and R Bruno Enterprises Ltd.

Subject: Contracts; Corporate and Commercial; Insolvency

Related Abridgment Classifications

Construction law
IV Construction and builders' liens
IV.3 Owner
IV.3.b Requirement of privity and consent
Construction law
IV Construction and builders' liens
IV.9 Priorities
IV.9.a General principles

WestlawNext. CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

21 Reid-Built had commenced construction on some of the lots, so Georgetown ended up keeping what Reid-Built had paid as a down-payment as well as any lot improvements that remained on Georgetown's lands. There was no evidence as to any ultimate benefit to Georgetown by virtue of getting the lots back with some improvements on them.

22 In the builders' liens before me (but for those in *Georgetown*) the Developers were ultimately paid what was owed to them for the lots sold by the Receiver to other home builders. None of those Developers got any lots back or received the benefit of any improvements constructed on their lots. Any improvements were presumably valued in the price for the lots received by the Receiver so Reid-Built (or at least Reid-Built's secured creditors) may have received some value for the work performed by the lien claimants.

23 Georgetown did not wait for the Receiver to bring its application for declaratory relief regarding the various builders' liens. Instead, Georgetown applied to have the builders' liens filed against its lots discharged under section 48 of the *BLA*. Liens against its lots were discharged on payment of the face amount of the liens plus an amount for security for costs into court. In the proceedings before Master Prowse, Georgetown sought a declaration that the builders' liens filed against its lots were invalid as it was not an owner within the meaning of the *BLA*. Master Prowse agreed, and the application before me is the builders' lien claimants' appeal from that decision.

Issues

24 There are a number of issues arising on the remaining applications. With respect to the Receiver's application regarding the definition of "owner" in the *BLA*, there are several issues:

1. Are any of the Developers "owners" within the meaning of section 1(j) of the *BLA*?

2. Are any of the builders' liens filed against the Developers' interests in various lots invalid because they did not properly describe the interests in land to be liened?

3. Are any of the builders' liens filed against the Developers' interests in various lots invalid because they did not specify the estate or interest in the land being charged by the builders' liens?

4. If there are deficiencies or irregularities in any of the filed builders' liens, can they be cured under the provisions of section 37 of the *BLA*?

25 With respect to the *Georgetown* appeal:

1. What is the applicable standard of review from Master Prowse's decision?

2. Is Georgetown an owner within the meaning of section 1(j) of the *BLA*?

Case law

26 The case law relating to the matters on these applications is relatively sparse. The *BLA* is somewhat unique legislation in Canada, such that decisions from other provinces on their builders' liens or mechanics' liens are not particularly helpful (save for a few significant cases). All parties have essentially referred to the same body of case law, relying on the cases helpful to their positions and distinguishing those that are unhelpful.

27 As a starting point, builders' liens are entirely statutory. There was no body of common law giving a material supplier, builder, or worker a charge against the real estate they supplied materials to or worked on. As with income tax legislation, these statutory exceptions to common law rights have been construed narrowly and not expansively: *K. & Fung Canada Ltd. v. N.V. Reykdal & Associates Ltd.*, 1998 ABCA 178 (Alta. C.A.) *(CanLII)*, leave to appeal dismissed, [1998] S.C.C.A. No. 349 (S.C.C.) (hereinafter "*Fung*") at para 5. That case cites *Ace Lumber Ltd. v. Clarkson Co.*, [1963] S.C.R. 110 (S.C.C.), 1963 CanLII 4.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

28 Various provinces have treated builders' lien rights and remedies differently in their legislative provisions. It is not surprising that the legislation gives an interest in land to someone who deals directly with the owner of the lands that they improved at the owner's request. It is more challenging to give proprietary remedies to claimants who did not deal directly with the owner, but rather a contractor or subcontractor whose interest in the improvements is tenuous at best.

29 The *BLA* provides a mechanism for owners to protect themselves from builders' lien claims filed by claimants other than their direct contracting parties. Essentially, owners are generally protected if they retain 10 percent from payments made to the parties they contract with directly. Once substantial completion of the work has occurred, they have trust obligations with respect to payment of further amounts to such parties.

30 Alberta has limited trust provisions. Other provinces like Ontario have much more onerous ones, which arise at the commencement of the project. Alberta protects mortgagees who have advanced mortgage funds in good faith and prior to the registration of any builders' liens. Other jurisdictions protect lien claimants for the increase in value to the property resulting from the improvements they constructed.

31 The reality of the Alberta provisions is that those who are looking to the lands they have improved as security for payment are behind mortgagees in priority, and the mortgagees get the benefit of the value of any improvements made to the lands after any mortgage advances and before the filing of any builders' liens. Liens attach only to the owner's equity in the lands.

32 Beyond that, with the limitations on recoveries against the land in the event the owner has maintained proper holdbacks, and the ultimate limitation on recovery by subcontractors, material suppliers (other than those who supply directly to the owner) and those who provide labour (other than directly to the owner), the *BLA* is all too frequently an ineffective remedy for project creditors.

33 This reality has led to claimants seeking to attach the interests of landlords and mortgagees in the property. The seminal case in this area is *Northern Electric Co. v. Manufacturers Life Insurance Co.* (1976), [1977] 2 S.C.R. 762 (S.C.C.), 1976 CanLII 203 (hereinafter "*Northern Electric*"). In that case, a lien claimant succeeded in establishing that the mortgagee of the property was an "owner" within the meaning of the applicable lien legislation, allowing the claimant to take priority ahead of the first mortgagee.

34 That decision turned on the definition of "owner" under the Nova Scotia *Mechanics' Lien Act* of the time. That definition is virtually identical to the definition of owner in section 1(j) of the *BLA*.

35 The Nova Scotia Act provided:

> (d) "owner" extends to any person, body corporate or politic, including a municipal corporation and a railway company, having any estate or interest in the land upon or in respect of which the work or service is done, or materials are placed or furnished, at whose request and
>
> > (i) upon whose credit; or
> >
> > (ii) on whose behalf; or
> >
> > (iii) with whose privity and consent; or
> >
> > (iv) for whose direct benefit;
>
> work, or service is performed or materials are placed or furnished, and all persons claiming under him or them whose rights are acquired after the work or service in respect of which the lien is claimed is commenced or the materials furnished have been commenced to be furnished...

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

36 *Northern Electric* turned on the finding that Manulife, as mortgagee, was more than a mere mortgagee on the property. It had, in effect, entered into a joint venture arrangement with the developer of the property (who had gone into bankruptcy leaving a slew of unpaid creditors, including the mechanics' lien claimants). Manulife had acquired the fee simple interest in the property from the developer, and then leased the property back to the developer under a long term head-lease. The project was financed by a mortgage against the developer's leasehold estate. At the expiry of the lease, the property reverted to Manulife as owner.

37 Martland J, speaking for the majority in the Supreme Court of Canada, held at page 770:

> In my opinion, the work herein can properly be said to have been done also on the respondent's behalf, if not also for its direct benefit. It may be said that it was also done on behalf of Metropolitan and for its direct benefit, but, if so, this does not preclude a similar finding in respect of the respondent, having regard to the arrangement between it and Metropolitan. The outright purchase by the respondent of the land on which the apartment building was to be built, the fact that title to the building would belong to the respondent no less than the title to the land, without any revestment right in Metropolitan, and the fact that, to the knowledge of the respondent, Metropolitan was to act as contractor on the project which was to proceed according to plans and specifications approved by the respondent and under the latter's financial control, are significant indications to me that the work was being done and the materials furnished more on behalf of the respondent than on behalf of Metropolitan, and more for its direct benefit than for the direct benefit of Metropolitan.

38 He continued at page 774:

> I cannot agree with the submission that Metropolitan was merely borrowing money to enable it to put up a building of its own, and that the respondent was not advancing money for the construction of a building for it by Metropolitan. The title position and the rent payment provisions are against any such submission. Whose building was it if not the respondent's, subject to possession and use by Metropolitan for a limited period, by way of being able to realize some pecuniary advantage from its original ownership of the land and from its exertions as contractor? The letters of commitment are clear enough on this point since they associate the obligation to construct the building with the transfer to the respondent of the land upon which the building is to be constructed, and they provide that the construction will be paid for by the respondent. This is the substance of the overall arrangement, and the security aspect of the transaction, involving a mortgage of the leasehold, cannot be allowed to mask that substance. I am not at all persuaded that the true character of the transaction between the parties can be founded upon a consideration of only the mortgage of the leasehold, with its commonplace provision that any advances thereon are in the discretion of the mortgagee.

39 In that case, Metropolitan had acted as general contractor for the construction of the improvements on the lands.

40 There have been numerous attempts in Alberta to find mortgagees and landlords to be "owners" under the *BLA* and thus liable for builders' liens registered against their interests in the land. Few such claims have been successful.

41 The Alberta Court of Appeal has considered these issues in a number of cases. Three are the most significant: *Acera Developments Inc. v. Sterling Homes Ltd.*, 2010 ABCA 198 (Alta. C.A.) (hereinafter ("*Acera*"), *Royal Trust Corp. of Canada v. Bengert Construction Ltd.*, 1988 ABCA 58 (Alta. C.A.), *sub nom Gypsum Drywall (Northern) Ltd v Coyes*, (hereinafter "*Bengert*"), and *Fung*.

42 The challenge for the builders' lien claimants here is to demonstrate that the Developers fall within the *BLA*'s definition of "owner," or put another way, for the Receiver to demonstrate that none of the Developers Reid-Built dealt with fall within that definition.

43 The case law is found within *Acera*, *Bengert* and *Fung*, as well as subsequent decisions such as my decision in *Westpoint Capital Corp. v. Solomon Spruce Ridge Inc.*, 2017 ABQB 254 (Alta. Q.B.), *Arres Capital Inc. v. Graywood Mews Development Corp.*, 2011 ABQB 411 (Alta. Q.B. [In Chambers]), and Master Prowse's decision in *Georgetown*.

BLA framework

WestlawNext. CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

44 To begin the analysis, it is important to look at the structure of the *BLA*. "Owner" is defined in section 1(j):

(j) "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;

"Contractor" is defined in section 1(b):

(b) "contractor" means a person contracting with or employed directly by an owner or the owner's agent to do work on or to furnish materials for an improvement, but does not include a labourer;

"Subcontractor" is defined in section 1(n):

(n) "subcontractor" means a person other than

(i) a labourer,

(ii) a person engaged only in furnishing materials, or

(iii) a person engaged only in the performance of services,

who is not a contractor but is contracted with or employed under a contract...

45 Builders' liens are created by section 6(1):

6(1) Subject to subsection (2), a person who

(a) does or causes to be done any work on or in respect of an improvement, or

(b) furnishes any material to be used in or in respect of an improvement,

for an owner, contractor or subcontractor has, for so much of the price of the work or material as remains due to the person, a lien on the estate or interest of the owner in the land in respect of which the improvement is being made.

46 Section 6(2) relates to work with respect to mines and minerals, so has no application here.

47 Section 25 limits the owner's liability:

25 An owner is not liable under this Act for more than

(a) the total of the major lien fund and the minor lien fund, or

(b) the major lien fund, where a minor lien fund does not arise under section 23.

48 The "major lien fund" is described in section 1(h):

(h) "major lien fund" means

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

(i) where a certificate of substantial performance is not issued, the amount required to be retained under section 18(1) or (1.1) plus any amount payable under the contract

(A) that is over and above the 10% referred to in section 18(1) or (1.1), and

(B) that has not been paid by the owner in good faith while there is no lien registered;

(ii) where a certificate of substantial performance is issued, the amount required to be retained under section 18(1) or (1.1) plus any amount payable under the contract

(A) that is over and above the 10% referred to in section 18(1) or (1.1), and

(B) that, with respect to any work done or materials furnished before the date of issue of the certificate of substantial performance, has not been paid by the owner in good faith while there is no lien registered...

49 "Minor lien fund" is described in section 1(i), but only arises after a certificate of substantial performance has been issued.

50 There is no indication in the evidence that a certificate of substantial performance was ever issued with respect to any of the work done for Reid-Built on any of the liened properties, so I will not deal with any minor lien fund obligations.

51 Section 4 defines the "value of the work done":

4 For the purposes of this Act, the value of the work actually done and materials actually furnished shall be calculated on the basis of

(a) the contract price, or

(b) the actual value of the work done and materials furnished, if there is not a specific contract price.

52 The mechanics of the major lien fund is out in section 18:

18(1) Irrespective of whether a contract provides for instalment payments or payment on completion of the contract, an owner who is liable on a contract under which a lien may arise shall, when making payment on the contract, retain an amount equal to 10% of the value of the work actually done and materials actually furnished for a period of 45 days from

(a) the date of issue of a certificate of substantial performance of the contract, in a case where a certificate of substantial performance is issued, or

(b) the date of completion of the contract, in a case where a certificate of substantial performance is not issued.

. . .

(2) In addition to the amount retained under subsection (1) or (1.1), the owner shall also retain, during any time while a lien is registered, any amount payable under the contract that has not been paid under the contract that is over and above the 10% referred to in subsection (1) or (1.1).

(3) Except as provided in section 13(1), when a lien is claimed by a person other than the contractor, it does not attach so as to make the major lien fund liable for a sum greater than the total of

(a) 10% of the value of the work actually done or materials actually furnished by the contractor or subcontractor for whom and at whose request the work was done or the materials were supplied giving rise to the claim of lien, and

(b) any additional sum due and owing but unpaid to that contractor or subcontractor for work done or materials furnished.

WestlawNext. CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

53 Simply stated, the structure of the *BLA* is to give a contractor a lien for the full value of the work done by the contractor, determined under the contract (if the contract specifies a contract price) or by *quantum meruit* if the contract does not specify a price (section 4). Being a contractor requires contracting with the owner, or being employed directly by the owner.

54 The lien funds are aimed at protecting subcontractors, sub-subcontractors, labourers and materialmen, all of whom are not "contractors." These are the notional funds established to protect those who have dealt with contractors or subcontractors in the event they are not paid by the party who contracted with them.

55 The owner is not actually required to set aside funds to be available to lien claimants. Rather, it is a notional amount based on 10 percent of the value of the work performed under the contract between the owner and the contractor, and calculated with reference to the value of the work done by the contractor (for those claiming through the contractor). For those claiming through a subcontractor, the notional fund is based on 10 percent of the value of the work done by the subcontractor.

56 In reality, the scheme is more complicated, as the lien funds are increased by the value of any monies owed but unpaid to the respective contractor or subcontractor, and they are also increased by the amount of any payments made in the face of a registered builders' lien.

57 Essentially, an owner can limit its potential liability to everyone other than a "contractor" to 10 percent of the value of the work done under the contract with the contractor, as long as the owner does not make any payments to the contractor or anyone under the contractor in the face of a lien.

58 The "worst case scenario" for an owner who has made payments on account to the contractor but has not made payments in the face of builders' liens is to be liable for 110 percent of the contractor price or the value of the work done.

59 Where the contractor fails on a project and leaves a host of unpaid subcontractors and suppliers, it is often little solace to the unpaid parties when they share only 10 percent of the value of the work done under the contract between the owner and the contractor.

60 Here, none of the builders' lien claimants contracted with any of the Developers. Reid-Built was acting as its own general contractor with respect to the work done on the subject lots, and all of the claimants appear to have contracted directly with Reid-Built. None of the builders' lien claimants are "contractors" within the meaning of the *BLA*.

61 Reid-Built was more than a general contractor, as it had an interest in the lots themselves. Its equitable interest as purchaser is a lienable interest in the lots, despite Reid-Built not having filed any caveats to protect its purchaser's interest. Thus any of the claimants who contracted directly with Reid-Built would have a 100 percent lien for the value of work done by them, as they attached to Reid-Built's interest in the lots. As noted above, that does not get any of the lien claimants anywhere, as the Royal Bank's interest under its security against Reid-Built crystallized before any builders' liens were filed and thus takes priority over the liens. Despite the Receiver having realized on Reid-Built's interest in many of the lots, the information before me indicates that there will be nothing left over for creditors other than the Royal Bank and creditors with superior claims to those of the Royal Bank.

62 It is a different story if the lien claimants can succeed against the Developers.

63 The lien claims against the Developers are not expressly contemplated by the *BLA*. Reid-Built itself was an "owner" and was building houses on the lots to its own account. It alone would benefit from any profit on sales to third-party house buyers. It alone contracted with the third-party house buyers. And it alone contracted with the trades and material suppliers. So in the conventional sense, Reid-Built was the owner of the lots and the general contractor for all house building on the lots. It was solely responsible to purchasers for completion of the houses and performance of the house purchase agreements. And it was solely responsible for payment to the trades and material suppliers that contracted with it.

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

64 There was no payment due to Reid-Built from any of the Developers, so there was no practical ability for a Developer to make any holdback from Reid-Built to protect themselves (if they needed any protection) against default by Reid-Built to its trade creditors. Under section 25 of the *BLA*, it is difficult to see how any claims against the Developers could be quantified.

65 Section 25 does not distinguish between or among "owners." But how does that relate to a Developer's interest in the lots? These are questions unanswered by the *BLA*, although as discussed below, the Supreme Court has held that the absence of a specific remedy in the provincial legislation and difficulties in quantifying liens against non-contracting parties do not affect the ability of a lien claimant to obtain a remedy from *any* "owner."

Analysis

1. Are any of the Developers "owners"?

66 It is clear that for this provision to apply, a Developer must be found to have made a request (express or implied) for work to be done on its lands *and* that one of the criteria in section 1(j) be met. That requires that the Developer be found to have done one of the following:

(a) agreed to pay for the improvement;

(b) contracted for the work as principal;

(c) consented to the work in some contractual way; or

(d) directly benefited from the work.

67 *Acera* is the most recent Alberta Court of Appeal decision on this point. It is important to understand the underlying facts in that case.

68 Acera was the owner of a large parcel of land in Cochrane, Alberta. It was in the process of subdividing the land into a number of individual lots. Before the subdivision process was complete, Acera agreed to sell a number of the lots to Sterling Homes Ltd., a home builder.

69 The lot purchase agreement required Sterling to pay some $2.5 million down, with the balance of some $10 million to be paid at a later date, including when individual lots were sold by Sterling to third party home buyers.

70 Despite the fact that the subdivision process was not complete and no individual lots existed other than on unregistered plans, Sterling began construction on a number of four-plexes on the land. Filing the subdivision plan was a condition precedent to the agreement, and the agreement provided various remedies in the event the subdivision plan was not registered. It was silent on remedies for improvements constructed by Sterling before subdivision.

71 Architectural and construction guidelines had been finalized before the plan was to be registered and Sterling submitted some initial plans to Acera for approval. During this pre-plan registration period, Acera facilitated Sterling's applications for building permits and Acera's staff visited the site daily. Acera itself built underground services, developed and paved the roadways, and installed hydrants and streetlights in anticipation of the filing of the plan.

72 During this period, Acera continuously represented to Sterling that the subdivision plan process was proceeding and that the plan would be registered soon. Ultimately, Sterling stopped work and filed a builders' lien for the value of the work that it had done on the four-plexes.

73 Berger JA, writing for the majority, described the issues at paragraph 23 of the decision:

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

[23] The critical question here is whether Acera is an "owner" within the meaning of subsec. 1(j) of the *Act*. The relevant inquiry is whether Acera requested that work be done or material be furnished for an improvement to the lands in question and whether the work done and the material furnished by Sterling accrued to the "direct benefit" of Acera.

74 Acera's participation in the construction process was described in paragraphs 24-27 of the decision:

[24] The Appellant points to the architectural and construction guidelines issued by the Respondent which set out detailed requirements for the design of the residential units and which gave Acera control over that design. Sterling was also required to comply with TRC being a low impact development.

[25] The homes to be constructed by Sterling had to be approved by Acera or its consultant, in which case an approval form was issued. The Appellant also points to Acera's role in facilitating Sterling and other home builders obtaining building permits for their respective homes.

[26] In the result, Sterling obtained building permits for twelve homes. The building permit applications included an "architectural approval form" issued by Acera's consultant and by a "building grade form" issued by Acera's engineering consultant. The Appellant maintains that it was always contemplated by Acera that the home builders would build on the lands prior to the subdivision being registered and, accordingly, prior to the home builder getting a transfer of the lots.

[27] It is clear on this record that Sterling has excavated, laid the foundations, framed the structure, completed some of the rough-in plumbing and electrical work, and brought the homes to various stages of construction. The value of the work performed to date by the Appellant is $1,750,000.

75 At paragraph 32 Berger JA noted:

[32] It was always contemplated by Acera that the homebuilders would build on the lands prior to the subdivision being registered.

76 He concluded on the request issue at paragraph 36:

...the construction proceeded prior to subdivision at the owner's request. Indeed, the liened party who was actively involved in the supervision of the construction was fully aware that the construction was proceeding prior to subdivision approval. The lien claimant was contractually bound to construct improvements to a specific standard and scope. Indeed, Acera's architectural and construction guidelines required that Acera approve the construction plans, elevations, finished grades, finishing materials and colours, final grade slips, setbacks, foundation designs, auxiliary buildings and fencing, and landscaping. All such plans were approved prior to construction. The construction was inspected by Acera as work progressed. In my opinion, that is sufficient to conclude that the homes were constructed at the request of the liened party.

77 Having found a "request," Berger JA went on to consider whether Acera had received a direct benefit. He concluded at paragraphs 37-39:

[37] It remains, accordingly, to consider whether the work done and the material furnished by Sterling accrued to the "direct benefit" of Acera. Acera allowed Sterling to improve its lands. In law, the improvements become attached to the land and are owned by the owner of the freehold. Until the subdivision plan is registered Acera is prohibited from selling the lots, so it must be taken to have invited Sterling to improve the lands "for its [Acera's] direct benefit". Acera owns the freehold, therefore it owns the improvements, therefore it is directly benefitted. Having allowed Sterling in as a tenant-at-will it cannot argue the improvements were done against its will, i.e. that they were "not requested". Paragraph (iv) of the definition of "owner" is satisfied.

[38] Acera has failed to transfer the lots in accordance with the lot purchase agreement. Accordingly, Sterling cannot sell the homes to interested third parties. It follows that Acera has directly gained the value of the improvements to the lands and will continue to hold that increase in value to its benefit as long as it retains title to the lands. In other words, were it

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

> not for Sterling's lien, Acera would keep the benefit of the improvements. Therefore, until such time as Sterling is able to acquire title to the homes, the direct benefit from the entirety of the work accrues to Acera.
>
> [39] In addition, the contractual arrangement whereby Sterling would build homes in advance of acquiring title to the land included, as I have found, the implied request by Acera of Sterling to do just that. All of this, as I have indicated, took place under the watchful eye and subject to the stringent building requirements imposed by Acera. It is apparent, by way of illustration, that strict adherence to Acera's architectural and construction guidelines were intended to facilitate and enhance the development of Acera's lands. In that sense, mindful that it was anticipated that construction would begin before sub-division approval and transfer of the lots was obtained, such construction was of direct benefit to Acera.

78 Berger JA noted that while the lien was declared valid, the quantum of the lien was undetermined. That issue was left for trial.

79 *Acera* followed two previous Court of Appeal decisions where similar claims failed. *Bengert* involved a priority fight between a purchaser and a builders' lien claimant. Bengert Construction Company was a home builder. It had arrangements with a developer to purchase a lot, but had not yet acquired title. Bengert contracted with the Coyes to build a house for them on the lot. The Coyes paid a significant down payment and filed a purchaser's caveat against title to the lot. Bengert then acquired the lot and obtained a mortgage. Bengert began construction, paying for the costs from further mortgage advances. The Coyes had no control over the mortgage advances and had no means to ensure that the subtrades were being paid as construction proceeded.

80 Before completion, Bengert went broke. Unpaid subtrades filed builders' liens. Following foreclosure proceedings on the mortgage, there was a surplus. The Coyes and lien claimants disputed priority of access to the funds.

81 The Court of Appeal noted at paragraph 25:

> [25] In this case, the Coyes' participation in the construction activities was little more than to choose a house plan. They had such a minimal part in design that their contract does not even specify any extras to be added to it. The contract does not empower them to inspect during construction or to have any involvement with sub-trades. The builder had obtained the mortgage and financed construction from it so that Mr. and Mrs. Coyes were unable to control the cash flow into the project to ensure that no builders' liens would be outstanding. Moreover the form of contract describes the Coyes as interim purchasers, which was borne out by the provision for a closing when the house was completed at which time most of the purchase price would be paid by cash and the assumption of the builders' mortgage. Only then would title be transferred.

82 It concluded that the "essential contract" in the case was for the purchase of a completed home. The Court of Appeal held that the Coyes were not "owners" within the meaning of the *BLA*, finding that the Coyes' participation in the construction process was merely passive and consensual (at paragraph 26).

83 At paragraph 27, the Court noted:

> [27] The task before the court in each case of this kind, where the contract with a builder is relied upon as constituting a request, is to determine, as a finding of fact, the essential purpose of the contract as it can be determined from all the factors in evidence. For this reason cases decided on a different set of facts are not particularly helpful in reaching a conclusion.

84 In *Fung*, an unpaid electrical contractor sought to lien the landlord's interest in the property when the tenant failed to pay for improvements done to its restaurant. The case turned on the Court of Appeal's consideration of the extent to which the landlord had participated in the construction of the restaurant improvements.

85 The Court of Appeal noted at paragraph 8:

> [8] Whether or not active participation is established is a question of fact. The learned Master held as follows:
>
> > ".....the applicant (sic) participation in the substantial renovations consisted of:

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

(a) approving concept plans and;

(b) approving the selection of paint for the exterior of the building.

The applicant did not select the general contractor, did not prepare a set of plans nor approve a set of construction plans, did not control funding for the construction, did not provide any on-site supervision or inspection; did not receive any participation rent, in summary there is not sufficient evidence that the landlord actively participated to the extent that the court ought to find that the applicant made an implied request of the respondents to do work or provide materials."

86 The tenant was given a significant allowance by the landlord to construct improvements to the premises, and the landlord reserved the right to approve "the Tenant's conceptual drawings and specifications for the finishing of the Premises, storefront design and signage design." There was no evidence that the landlord had actually done so, and the tenant was not required to construct the improvements.

87 The Court of Appeal noted at paragraph 10:

There is no question that the Landlord intended an arrangement whereby considerable control might have been exercised over tenant's improvements. And had that intended participation materialized, it might well have satisfied the test.

88 There, the Court of Appeal confirmed the Master's decision holding that there had been no request by the landlord to the contractor to have the work performed.

89 *Fung* approved a decision by McDonald J (as he then was), *Suss Woodcraft Ltd. v. Abbey Glen Property Corp.*, [1975] 5 W.W.R. 57, 1975 CarswellAlta 48 (Alta. T.D.) (hereinafter "*Suss Woodcraft*"), which in turn relied on *John A. Marshall Brick Co. v. York Farmers Colonization Co.* [1916 CarswellOnt 285 (Ont. C.A.)], 1916 CanLII 521, aff'd, (1917), 54 S.C.R. 569 (S.C.C.), 1917 CanLII 596 (hereinafter "*Marshall Brick*"). In *Marshall Brick*, the Supreme Court stated at page 581:

While it is difficult if not impossible to assign to each of the three words 'request', 'privity' and 'consent' a meaning which will not to some extent overlap that of either of the others, after carefully reading all the authorities cited I accept as settled law the view enunciated in *Graham v. Williams* (1885), 8 O.R. 478, affirmed 9 O.R. 458 (C.A.), and approved in *Gearing v. Robinson* (1900), 27 O.A.R. 364, at page 371, that 'privity and consent' involves "'something in the nature of a direct dealing between the contractor and the persons whose interest is sought to be charged ... Mere knowledge of, or mere consent to, the work being done is not sufficient.'"

90 In *Suss Woodcraft*, it is important to note that the respondent landlord/fee simple owner had conceded that there had been an "implied request" that the work be done by Suss Woodcraft. The facts as found by McDonald J made it clear that there were direct dealings between the tenant's contractor and the landlord relating to the plans and the building permit, and that the landlord had played a role in supervising and monitoring the construction. The case turned on "privity and consent" and "direct benefit." The landlord had for the purposes of the application admitted that it had made a "request," so that was not in issue.

91 *Fung* points out the difficulty noted in *Marshall Brick* in distinguishing between "direct dealings" for the purpose of determining if there had been a "request" and "direct dealings" for the purpose of finding "privity and consent." If privity and consent is found, I cannot imagine circumstances where a "request" would not be found, or at least an implied request. But just because there has been a request does not mean there has been privity and consent. Request needs to be considered separately from privity and consent, and "direct dealings" are more important for privity and consent than they are for request.

92 However, *Suss Woodcraft* has certainly been considered in subsequent cases in the context of "request" and it is an important case in this area. It is more important with respect to "privity and consent" and "direct benefit" than it is to "request," and I will deal with it further when discussing those issues.

93 *Bengert* required an analysis as to the "true nature" of the contract, where the contract with a builder is relied upon as constituting a request. That instructs the master or chambers judge to determine "as a finding of fact, the essential purpose of the

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

contract as it can be determined from all the factors in evidence" (at paragraph 27). In that case, the "true nature of the contract" was that it was a contract between the ultimate purchaser and the vendor for a completed home. Since the purchaser had played no role in the construction process, no "request" was found.

94 *Fung* confirmed that *Bengert* "governs the determination of whether a request, expressed or implied, that materials be furnished or that the work be done is made out" (at para 17). It notes that "whether or not active participation is established is a question of fact" (at para 8).

95 The Court in *Fung* stated at paragraph 10:

> There is no question that the Landlord intended an arrangement whereby considerable control might have been exercised over tenant's improvements. And had that intended participation materialized it might well have satisfied the test.

96 It upheld the findings below that the landlord had not actively participated in the renovation project and, as such, that there had been no "request" by the registered owner (at para 14). The lien was struck.

97 The keys to the *Acera* decision are found in paragraphs 35 and 37. In paragraph 35, the majority found that there had been an implied request by Acera that Sterling begin to build homes on the unsubdivided lots. Berger JA stated:

> [35] In my opinion, by its course of conduct, Acera impliedly requested that the work be performed. Here the lien claimant entered into an agreement with the liened party to build according to plans approved by the liened party. It is not a condition precedent that there be a direct communication amounting to an express request between the liened party and the builder, but something more than mere knowledge or consent must exist.

98 At paragraph 37, the majority found that Sterling's construction activities had been for the direct benefit of Acera:

> [37] It remains, accordingly, to consider whether the work done and the material furnished by Sterling accrued to the "direct benefit" of Acera. Acera allowed Sterling to improve its lands. In law, the improvements become attached to the land and are owned by the owner of the freehold. Until the subdivision plan is registered Acera is prohibited from selling the lots, so it must be taken to have invited Sterling to improve the lands "for its [Acera's] direct benefit". Acera owns the freehold, therefore it owns the improvements, therefore it is directly benefitted. Having allowed Sterling in as a tenant-at-will it cannot argue the improvements were done against its will, i.e. that they were "not requested". Paragraph (iv) of the definition of "owner" is satisfied.

99 Berger JA continued at paragraph 39:

> [39] In that sense, mindful that it was anticipated that construction would begin before sub-division approval and transfer of the lots was obtained, such construction was of direct benefit to Acera.

100 Martin JA in separate but concurring reasons would have directed the trial of an issue as to whether Acera had been unjustly enriched and whether Sterling was entitled to a restitutionary remedy. Restitutionary remedies have progressed significantly since builders' lien remedies were enacted decades ago, so there are arguably more potential remedies for unpaid contractors and subcontractors now than before.

101 This analysis of the binding case law leads me to now consider the three key issues: Was Reid-Built the Developers' contractor? Was there a request within the meaning of the *BLA*? If so, are any of the other conditions to a finding of "owner" satisfied?

a. Was Reid-Built the "contractor" of any of the Developers?

102 This argument flows from *Northern Electric*, where the Supreme Court concluded that Manufacturers Life was not only an "owner" for the purposes of the Nova Scotia *Mechanics' Lien Act*, but that Metropolitan, the fee simple owner who contracted with the various trades (including Northern Electric) was essentially Manufacturers Life's contractor.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

103 The contracts between Reid-Built and the Developers were not construction contracts. As discussed above, unless Reid-Built defaulted on its obligations after building something on one of the lots, the Developers got no benefit from the construction that they were paying Reid-Built for. They got the same price for the lot whether Reid-Built had constructed something or not. The contracts between the parties were lot purchase agreements, not construction contracts. The Developers did not ask Reid-Built to build anything; they had no power under the contract to require Reid-Built to build anything. If Reid-Built wanted to build something before paying the full price for a lot, Reid-Built had to get the developer's approval for the plans and specifications. The Developers had extensive rights under the lot purchase agreements to inspect any work being constructed, but there is no evidence any of them ever did so.

104 I cannot see that Reid-Built could or should be considered to be the Developers' contractor.

b. Request

105 *Northern Electric* requires the trier of fact to determine the true nature of the contract in question. Here, that contract is the lot purchase agreement between Reid-Built and the various Developers.

106 As noted in *Marshall Brick* at page 581, "it is difficult if not impossible to assign to each of the three words 'request', 'privity' and 'consent' a meaning which will not to some extent overlap that of either of the others."

107 I am satisfied that there is no material difference in the terms of the various lot purchase agreements relevant to the determination of this issue. In all cases, the agreement governed how and when Reid-Built would acquire title to the lots it had agreed to purchase from the developer, and when Reid-Built would pay for the lots. In all cases, the Developers retained control over some aspects of construction of houses on the lots by Reid-Built, including approval of plans and specifications and architectural controls.

108 In all cases, where construction activities by Reid-Built took place on various lots, the Developers had approved plans and specifications. Beyond that, there is no evidence of any involvement by any of the Developers during the construction process itself, such as by supervising the work, inspecting the work, or having any dealings of any kind with any of Reid-Built's contractors or suppliers.

109 Reid-Built acted as its own general contractor. So long as Reid-Built fulfilled its contractual obligations to the Developers, the Developers would receive exactly the same price for a lot whether Reid-Built had built on it or not. It was Reid-Built that benefited from the payment arrangements relating to construction: it did not have to pay the full price for a lot until it had sold the lot to a purchaser, or when final payment for the lots came due regardless of the state of construction.

110 This case is somewhat unique, at least in Alberta. In all cases, Reid-Built's contractors, who are the lien claimants here, are themselves like general contractors in that they contracted directly with Reid-Built. Reid-Built was itself the "owner" of the various lots, at least in equity. Reid-Built was not a contractor building houses for the registered owners, the Developers. It was building show homes for its own account or for purchasers from it, and it was solely liable for payment to the various contractors working for it. Reid-Built had no right to receive any payment from the Developers.

111 *Vis-a-vis* Reid-Built, this case is very similar to *Acera*. Theoretically, Reid-Built might have liened the properties in the event that any of the Developers terminated the lot purchase agreements and purported to have the value of any improvements forfeited to them. But it is not Reid-Built advancing any claims.

112 There are several reasons why the facts in *Acera* are unique in the case law. There, Sterling began construction on lots that it had a conditional right to purchase. The condition precedent to purchase was subdivision of the lands owned by Acera. Satisfaction of the condition precedent was solely in Acera's control. Acera was contractually obliged with Sterling to obtain subdivision approval and complete the subdivision. Until subdivision was completed, Acera, as registered owner of the lands, was the only party who could directly benefit from the value of any improvements to those lands. Construction was encouraged by Acera, if not specifically requested. Acera cooperated fully with Sterling with obtaining building permits and approving

WestlawNext. CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

plans and specifications. Its failure to complete subdivision could hardly (at least in equity) allow it to benefit from its default in fulfilling its obligation to subdivide.

113 I do not think that *Acera* should be seen as altering in any way the law set out in *Bengert* and *Fung*. It does not purport to do so, and in fact relies on *Bengert* and distinguishes *Fung* on its facts (on the issue of request). On first glance, it appears in *Acera* that there was not much more than the developer approving the builder's plans and specifications. But there was clearly more than just that. Acera did exercise some of the contractual powers over the builder such as inspections, and the contractual imperative to build was stronger in *Acera*, as were exhortations for Sterling to do so by Acera.

114 *Acera* is, on its facts, distinguishable from this case. In *Acera*, a key fact finding was that Acera expected that Sterling *would* commence construction before it acquired title to any lots. Acera expected Sterling to commence construction before the subdivision plan had been registered, so Sterling effectively could not obtain title before it commenced construction.

115 There is no evidence here that any of the Developers expected or required Reid-Built to commence construction on any lot before it was paid for and transferred to Reid-Built. The lot purchase agreements allowed Reid-Built to build on a lot before taking title, but that was up to Reid-Built. Reid-Built could also obtain title to a lot by paying for it without any construction having occurred on a lot.

116 The *Acera* fact findings also emphasize the greater control exercised by Acera and the greater involvement by Acera in the construction activities than is the case here.

117 In *Bird Construction Co. v. Ownix Developments Ltd.*, [1984] 2 S.C.R. 199 (S.C.C.), the facts were somewhat similar to those in *Northern Electric*. Phoenix Assurance wanted to build a head office, and entered into a complicated arrangement with Ownix Developments Limited whereby a Phoenix subsidiary would acquire the lands necessary for the office building, lease the lands to Ownix on a long-term lease, and then sublease the building back from Ownix. Ownix mortgaged its leasehold interest, and the rent was sufficient to pay off the mortgage. At the end of the lease, the building would revert to the Phoenix subsidiary.

118 Ownix contracted with Bird Construction for the construction of the building, but went bankrupt during the course of construction, leaving Bird Construction unpaid. Bird Construction liened the interests of Ownix and Phoenix.

119 Under the terms of the agreement with Ownix, Phoenix had the right to alter plans, and to inspect and supervise construction. The Supreme Court of Canada held at page 215:

> It should be noted that it is difficult to examine the factual complexities of the transactions with which this appeal is concerned without concluding that both PUK and PCDA, in a factual sense, requested that the work be done. PUK, the parent, owns all the issued and outstanding shares of PCDA. PUK entered into these arrangements for the sole purpose of establishing a suitable head office facility in Toronto for its wholly-owned subsidiary. PUK was the guiding entrepreneur in these operations, and PCDA the immediate occupant and ultimate owner of the building. It would be legalism in its purest form to conclude that either company had not requested the work, in the sense of s. 1 of the Act.

120 Thus, the Supreme Court concluded that Phoenix had "requested" the work for the purposes of the Ontario *Mechanics' Lien Act*.

121 The Supreme Court reached a similar conclusion in *Cipriani v. Hamilton (City)* (1976), [1977] 1 S.C.R. 169 (S.C.C.), where Laskin CJ (for a unanimous court) stated at page 173:

> Schroeder J.A. in the Ontario Court of Appeal, looking to the substance of the transactions between the City, the Commission and McDougall, construed the interrelationship as one where the Commission became the general contractor for the City and, as such, proceeded to carry out its contract through another general contractor. In my opinion, this is a proper analysis, recognizing the fact that the Commission was being the City's banker. The City was and remained the "owner" within s. 1(*d*) so as to make its land lienable under s. 5, and it is idle formalism to contend that the work was not done at its request. I do not regard *Marshall Brick Co. v. York Farmers Colonization Co*. as standing in the way of this

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

> conclusion. That case turned largely on the words "privity and consent" which were then conjunctive under the statute and they are now disjunctive. If the submission is that direct dealing is required before a request can be found, I am unable to accept such a limitation under the present *Mechanics' Lien Act*.

122 It is clear that there was no direct request by any of the Developers that Reid-Built construct any improvements on the lots. The Developers consented to Reid-Built doing so, and facilitated Reid-Built in doing so by approving plans and specifications.

123 The contractual provisions involved here should not, in my view, be interpreted as impliedly "requesting" Reid-Built to commence construction.

124 Essentially, what the lien claimants suggest here is that the Developers are guarantors of Reid-Built. Because Reid-Built constructed improvements on lots being purchased by Reid-Built but not yet conveyed to it, any builders' lien obligations owed by Reid-Built to its contractors or suppliers are jointly owed by the Developers.

125 That, in my view is an interpretation of the *BLA* that goes far beyond the narrow approach mandated in the early case law.

126 The facts here do not demonstrate that any of the Developers exercised any of their supervision or inspection rights under the lot purchase agreements. While they could have been involved in the construction activities, they did not do so other than by approving plans and specifications. The Developers had no dealings at all with the lien claimants. While direct dealings are only one factor to be considered and are not conclusive one way or the other, the absence of direct dealings and the absence of any significant involvement by the Developers is telling. The lien claimants worked for Reid-Built, took all of their direction from Reid-Built, and until Reid-Built went into receivership, looked solely to Reid-Built for payment.

127 I note here that the "request" required under section 1(j) of the *BLA* does not require that the imputed owner have made or be deemed to have made a request of all lien claimants. If the lien claimants are contractors or subcontractors or material suppliers who provided work on an improvement for someone whom an owner had requested work or materials from, that is sufficient to satisfy that part of the test for anyone claiming under a contractor or someone else who directly contracted with the owner. That is clear from *Northern Electric*. Manufacturers Life was liable for Northern Electric's mechanics' lien because Manufacturers Life was held to have requested Metropolitan to construct a building for Manufacturers Life. Northern Electric was a contractor or subcontractor for Metropolitan.

128 It is not fatal to the lien claimants' claims that none of them had any direct dealings with the Developers, or that the Developers made no express requests of work from them. It would have been sufficient had the Developers been found to have requested, expressly or impliedly, Reid-Built to construct the improvements on the lots.

129 Ultimately, the facts here do not bring the Developers within any of the cases, including *Acera*, where a developer or other stranger to the construction contract made an express or implied request that improvements be constructed on its lands.

130 As a result, I conclude that none of the Developers made a request of Reid-Built to construct improvements on the lots within the meaning of section 1(j) of the *BLA*.

131 This finding effectively precludes any of the Developers from being found to be "owners." However, if I am wrong in this analysis, I need to deal with the other elements of the *BLA*'s definition of "owner," such as the issues of privity and consent and direct benefit.

c. Privity and consent

132 The case law is clear that the finding of a request does not equate to a finding that there is privity and consent under section 1(j)(iii). Any reading of the legislation leads to the conclusion that they are different requirements. That is not to say that there are not significant similarities.

133 As noted in *Marshall Brick* at 581:

WestlawNext. CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

While it is difficult if not impossible to assign to each of the three words 'request', 'privity' and 'consent' a meaning which will not to some extent overlap that of either of the others, ... I accept as settled law ... that 'privity and consent' involves

something in the nature of a direct dealing between the contractor and the persons whose interest is sought to be charged ... Mere knowledge of, or mere consent to, the work being done is not sufficient.

134 The leading Alberta case on privity and consent is *Suss Woodcraft*. There, McDonald J stated at paragraphs 17-21:

[17] ... The question here is whether there was "something in the nature of a direct dealing" between the plaintiff and the defendant. The plaintiff contends that that "something" is to be found in the facts that:

(a) The defendant approved the plans,

(b) The plaintiff provided plans to the defendant,

(c) The defendant obtained the building permit,

(d) The defendant's representative discussed with Mr. Suss the fact that the defendant would apply for the building permit with the plans Mr. Suss had delivered,

(e) The plaintiff delivered to the defendant a copy of a page from the contract between the plaintiff and the tenant,

(f) The plaintiff paid the defendant the cost of the building permit, and

(g) During the construction period the defendant's representative (Mr. Yacyk) and his assistants expressed concern regularly with what the plaintiff was doing (e.g., by giving instructions directly to the plaintiff in respect of fireproofing, and by specifying that the general contractor was to cut the floor where the front doors were to be installed).

[18] I find all these facts except (c) to exist.

[19] I consider that these facts, whether including (c) or not, do not constitute "something in the nature of a direct dealing." Consequently I find that, while there was consent, there was not "privity and consent." In reaching that conclusion I recognize that the test to be applied does not require direct contractual relations between the owner and the lien claimant, and I realize that the facts of *Orr v. Robertson* are similar. However, on the facts of the latter case as reported it appears to me that something in the nature of direct dealing was afforded particularly by the fact that the head tenant ordered the contractor to do certain of the work. In the present case that did not occur.

135 The decision in *Suss Woodcraft* ultimately turned on the fact that Suss Woodcraft had not registered extra-provincially in Alberta. It was found to have had no capacity to file a builders' lien, so its claim was dismissed.

136 There is no doubt here that there were direct dealings between the Developers and Reid-Built. The direct dealings were limited to the lot purchase agreement itself and the obtaining of the Developers' approval of plans and specifications for the houses to be built. The Developers were simply not involved in the improvements, other than knowing about them and consenting to them by way of approving plans and specifications. They could have been more involved because of the terms of the lot purchase agreements, but they were not.

137 The direct dealings between Reid-Built and the Developers were not, on the facts before me, sufficient to constitute "privity and consent" as contemplated in section 1(j)(iii) of the *BLA* so as to make the Developers "owners." It cannot be said that Reid-Built was in effect the Developers' contractor or that "privity and consent" existed with respect to the construction of the houses.

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

138 As discussed above, it is not necessary for each of the lien claimants to be able to establish that it had direct dealings with the Developer. It would have been sufficient if the contractor for whom a lien claimant worked (Reid-Built) had such sufficient direct dealings, as in *Northern Electric* and *Cipriani v. Hamilton (City)*.

139 As a result, it has not been established that privity and consent existed so as to make the Developers "owners" for the purpose of the *BLA*.

d. Direct benefit

140 *Northern Electric* remains the main binding precedent from the Supreme Court in this area. The majority found that the construction activities were for the direct benefit of Manufacturer's Life as they would share in the gross revenues from the developed property over the 80-year period of the lease with Metropolitan Projects Limited.

141 No authority has been provided to me, and I am not aware of any other authority, suggesting that a reversionary right to improvements at the end of a lease or on termination of the lease by the landlord for tenant default, without more, is a "direct benefit" to the landlord.

142 *Northern Electric* found a direct benefit because the chambers judge and the Supreme Court concluded that the development was as much for Manufacturers Life's benefit as for the developer, Metropolitan. In *Cipriani v. Hamilton (City)* the Supreme Court concluded that the Ontario Water Services Commission acted as Hamilton's contractor (and banker) such that Hamilton became an owner and was liable for liens filed by contractors and suppliers working for the Commission. In *Bird Construction Co. v. Ownix Developments Ltd.*, the Supreme Court concluded that the improvements were for the direct benefit of Phoenix and its subsidiary because the construction was in effect for Phoenix's head office.

143 Before *Acera*, *Suss Woodcraft* was the leading Alberta case on "direct benefit." There, McDonald J (as he then was) found a direct benefit because of the participation rent the landlord was entitled to, not the landlord's reversionary interest in the improvements at the end of the lease. McDonald J considered the effect of the reversion at the end of the term, as well as the potential forfeiture of the improvements to the landlord in the event the tenant defaulted under the lease during the term. However, those comments (as well as the comments by the trial judge in *Northern Electric* referred to in *Suss Woodcraft*) do not hold that the reversion, or the possibility of forfeiture because of the landlord's default, constitute by themselves direct benefit.

144 McDonald J considered that issue at paragraphs 20-21:

> **(b) Was there "direct benefit"?**
>
> [20] It is submitted by the plaintiff that the defendant is an "owner" within the meaning of s. 2 of the Act because the work done and the material furnished by the plaintiff were for the "direct benefit" of the defendant. The plaintiff points to the fact that in the lease between the defendant and the tenant, cl. 9.03 governs the surrender of the premises on the expiration of the lease or the sooner determination of the term, and provides in particular as follows:
>
>> ".... all alterations, improvements and fixtures (other than the fixtures in the nature of trade or tenant's fixtures) upon the leased premises and which in any manner are or shall be attached to the floors, wall or ceiling, or any linoleum or other floor covering which may be cemented or otherwise affixed to the floor of the leased premises, shall remain upon the leased premises and become the property of the landlord at the expiration or sooner determination of this lease".
>
> [21] The plaintiff submits that the effect of the reversionary interest created by cl. 9.03 is that the landlord had a direct benefit from the work done and materials supplied.

145 McDonald J reviewed the case law and concluded at paragraph 26:

> [26] Despite those cases, I consider that the reasoning of *O Hearn Co. Ct. J. in Northern Electric Co. Ltd. v. Metropolitan Projects Ltd.*, supra, is correct. Adapting it to the present case: the lease here provides not only for rent but for rent equal

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

> to a specified percentage of the gross sales if that share exceeds the basic rent. (The landlord thus stands to benefit directly from the improvements, for without them the store will not attract customers and there will be lower or no sales.) When the reversion falls in, the improvements will remain on the property, pursuant to cl. 9.03. The tenant has the right to remove only trade fixtures at the expiration of the lease, and those only if he has paid the rent and performed his covenants. As in Northern Electric, the lease is subject to forfeiture for many reasons, such as bankruptcy or insolvency, and in such event the landlord would keep the improvements. (In my opinion it matters not that the improvements are trade fixtures which may last less than the full term, or, as in Northern Electric, a building.)

146 To put McDonald J's decision into the proper context, it should be noted that the Supreme Court of Canada had effectively restored O'Hearn J's decision by the time of McDonald J's decision.

147 All three of the Supreme Court cases, *Northern Electric*, *Cipriani v. Hamilton (City)* and *Bird Construction Co. v. Ownix Developments Ltd.*, make it clear that there must be some *immediate* benefit for there to be a "direct benefit." A request may be inferred from the immediate benefit that makes it clear that the improvement is really being constructed at least partly for the imputed owner.

148 That cannot be said to be the case here. The true nature of the arrangement between Reid-Built and the Developers was a sale of lots to Reid-Built. There was no intention at the time of the making of the contract that a developer would have any interest in the improvements being constructed on the lots.

149 It would, in my view, be inappropriate to find a "direct benefit" from a reversionary interest that would only materialize 80 years hence, or from a speculative contingent interest based on a possible future default by a tenant.

150 The same principles apply to the possibility of a forfeiture arising from a purchaser's default.

151 It is undoubtedly true that the Developers would benefit by the fact of any construction activities taking place on their developments, in that potential purchasers might want to buy homes under construction, or see the potential of the development. Other house builders might want to acquire lots from the Developers and greater demand might result for their lots. That in turn might speed up their cash flow and ability to realize on their investment. However, those are not, in my view, the sort of "direct benefits" contemplated by the *BLA*. Those are "indirect" benefits. There is no interest in the lots retained by the Developers after the close of the purchase by Reid-Built, and the Developers get the same price from Reid-Built whether the lots have been built on or not.

152 The Developers' situation is no different than a landlord benefitting from a tenant occupying premises and getting rent from an operating tenant, and the fact that other space in the landlord's building might be leased to other tenants who might be attracted to the building by successful operations of existing tenants.

153 In *Acera*, the Alberta Court of Appeal concluded that Acera had received a direct benefit from Sterling's construction activities. That was because from the time the construction began on the lands, only Acera owned the lands and had a legal interest in the lands. Because the lands were not subdivided, no one could derive an enforceable interest in the lots until the subdivision was effected.

154 In my view, *Acera* should not be read as concluding that an after-the-fact benefit (as opposed to an initially intended benefit) is sufficient to constitute a "direct benefit." The inevitability of a landlord's reversionary interest in tenant improvements has not by itself been found to be a direct benefit so as to make a landlord an owner. More is required for that. *Acera* did not purport to vary existing law in the area.

155 In this case, the benefits suggested by the lienholders are, in my view, intangible benefits and not direct benefits. It was never intended that the Developers would obtain any direct benefit from the improvements themselves. They might obtain intangible benefits from the fact that homebuilders were buying lots on their subdivision and actually constructing homes there, but that is not a "direct" benefit.

WestlawNext. CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

156 It is true that the Developers stood to potentially benefit if, after they entered into lot purchase agreements with Reid-Built, subtrades constructed improvements on the lots being sold (and those improvements actually added value to the lots), then Reid-Built defaulted in its obligations under the lot purchase agreements, Reid-Built was then unable to cure any such defaults and, finally, the lots were then forfeited or foreclosed by the Developers against Reid-Built. However, that possibility is far too speculative and dependent on too many contingencies to be considered to be a "direct benefit" to the Developers.

157 There is, in any event, no evidence that any of the Developers received any benefit from the improvements constructed by or for Reid-Built, so this argument is somewhat moot.

158 As a result, I find that even if there had been a "request" by any of the Developers that Reid-Built improve the lots, none of the Developers received a "direct benefit" as contemplated by section 1(j)(iv) of the *BLA*.

2. Are any of the builders' liens filed against the Developers' interests in various lots invalid because they did not properly describe the interests in land to be liened?

159 The leading case in this area is *LT Interior & Drywall Ltd. v. Sota Centre Inc.*, 2003 ABQB 552 (Alta. Q.B.) (hereinafter "*LT Interior*"). That decision makes it clear that a builders' lien claimant must describe in the builders' lien the nature of the interest in land the lien claimant intends to attach with the lien (see section 34(2)(a)(iii)). The curative provision in the *BLA*, section 37, allows the Court to cure a defective lien, *provided* the lien was in substantial compliance with section 34 *and* the party whose interest is sought to be charged has suffered no prejudice. *LT Interior* is clear that failure to describe the interest to be charged in any way (as opposed to a misnomer) is not substantial compliance.

160 In *LT Interior*, the work was done for the tenant. The defendant was the landlord and registered owner of the property. Greckol J (as she then was) described the facts:

> [23] The Defendants note that the Statement of Lien was registered against the fee simple interest of the registered owner, 924745 Alberta, but not against Sota Holdings' leasehold interest. Further, the Statement of Lien identifies Sota Centre as the party for whom the work or materials were provided and does not state that the work was requested by 924745 Alberta.

161 The lien was declared invalid.

162 I considered *LT Interior* in *Westpoint Capital Corp. v. Solomon Spruce Ridge Inc.*, 2017 ABQB 254 (Alta. Q.B.). In that case, a lien claimant sought to attach the mortgagee's interest in the property on which work had been performed. The builders' lien purported to attach the interest of the registered owner, for whom the claimant claimed to have done the work.

163 I stated at paragraphs 112 and 113:

> [112] I find the logic and reasoning in *LT Interior & Drywall Ltd. v Sota Center Inc.*, 2003 ABQB 552 (CanLII), and *Arres Capital Inc. v Greywood Mews Development Corp.*, 2011 ABQB 411 (CanLII), compelling. The failure to specifically name Westpoint in its lien and to specifically register a builder's lien claim against Westpoint's interest in the lands is fatal to Solomon's claim against Westpoint or its interest in the lands.
>
> [113] I am also satisfied that the problem here is not one that can be remedied under s 37 of the *Builder's Lien Act*.

164 Here, some of the builders' liens describe Reid-Built as the "owner." They do not name the developer specifically, although in all cases the developer is the registered owner of the lands.

165 The builders' liens registered in this fashion would be validly registered against Reid-Built's unregistered and uncaveated interest in the applicable lots. As regards the interest of the developer as owner, failing to describe the developer as "owner" fails to comply with section 34, and any builders' lien so filed does not substantially comply with section 34.

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

Tab 3

New Brunswick Court of Appeal

Citation: Beloit Canada Ltd. v. Fundy Forest Industries Ltd.*
Date: 1981-08-18

Hughes C.J.N.B., Limerick and Stratton JJ.A.

Counsel:
William L. Hoyt, Q.C., and *Eugene J. Mockler,* for appellant.
David T. Hashey, Q.C., and *A. G. Dickson,* for respondent.

1981 CanLII 2865 (NB CA)

[1] HUGHES C.J.N.B.:—I have examined the factums filed on behalf of the parties to this appeal and have considered the submissions of counsel advanced on the hearing of the appeal.

[2] I have also had the advantage of perusing the reasons prepared for delivery by my brothers Limerick and Stratton and have nothing to add to the analysis of the relevant provisions of the *Mechanics' Lien Act,* R.S.N.B. 1952, c. 142 [now R.S.N.B. 1973, c. M-6], made by them. In my opinion the result is unfortunate but under the present wording of the Act I am unable to conclude that it creates a lien upon the estate or interest of the owner of land in favour of a person who sells and installs in a pulp mill located on the land a paper-making machine such as was sold and installed by the appellant in the respondent's paper-mill. I therefore concur with the conclusion reached by the other members of the Court that the appeal must fail and I agree with the disposition of the appeal and of the cross-appeal which they have made.

[3] LIMERICK J.A.:—The respondent Fundy Forest Industries Ltd. (hereinafter referred to as "Fundy") relying on a guarantee by the Province of New Brunswick of a bond issue floated by Fundy in the amount of $5,000,000, purchased land in New Brunswick, erected a building thereon for the purpose of housing therein a corrugating paper machine and purchased and had installed therein a paper-making machine, the whole comprising what is commonly called a paper-mill.

[4] The appellant (hereinafter called "Beloit") is the vendor to Fundy of the corrugating paper machine which weighed approximately 2,500,000 pounds and cost $2,371,198. On April 16, 1971, when 60% of the purchase price had been paid according to the terms of the contract of sale, the appellant duly filed a claim for a mechanics' lien for the balance of the purchase price claimed due and brought this action claiming the balance owing and a lien on the lands on which the paper-mill was erected. The admitted balance due on the purchase price without any addition for interest is $875,226. Interest in the amount of $880,601.33 is claimed to July 31, 1978, and thereafter at 10¾% per annum.

[5] Three issues were determined by the trial Judge [28 N.B.R. (2d) 656.] He held that the delivery to and installation of the paper-making machine in the premises of Fundy was not an

---

* Leave to appeal to the Supreme Court of Canada (Martland, Ritchie and Dickson JJ.) refused November 2, 1981.

improvement to land nor was it material used in an improvement to land.

[6] He also held that the mortgage by Fundy to the Province of New Brunswick registered after Beloit's lien, if any, arose, and prior to such lien being filed, under which mortgage advances were made to Fundy, took priority to any lien which might have arisen to the extent of the amount of such advances made prior to the filing of the lien and he further found that interest was payable as claimed as having been included in the contract price.

[7] From the first two findings Beloit appealed and Fundy has appealed from the finding that interest is payable.

[8] In the argument submitted by the appellant it relied on decisions of various Courts relating to what are fixtures, or chattels real under real property law and landlord and tenant law. No case so similar in facts to the matter under consideration as to be persuasive of any opinion, has been brought or has come to my attention. The only conclusion which I come to from Canadian as well as from United States law is that each case must be decided on the wording of the applicable statute and on the facts of the case being considered.

[9] The evidence discloses that Fundy acquired land suitable in size and location for the particular purpose of locating on it a paper-mill of a specified design and capacity. It erected on the land a building specifically designed to house a custom-designed paper-making machine and purchased the machine.

[10] Are the building and the machine to be considered an improvement to the land or is the building only to be regarded as something designed and erected to house and protect the machine as well as to provide a working area in which the machine can be utilized — and if so, is the land also an incidental acquisition, a place on which the machine and building can be located?

[11] The applicable provisions of the *Mechanics' Lien Act,* R.S.N.B. 1952, c. 142 [now R.S.N.B. 1973, c. M-6], as amended to 1970, are as follows:

> 1. In this Act, unless the context otherwise requires,
>
> • • • • •
>
> (*b*) "contractor" means a person contracting with, or employed directly by, the owner or his agent to do work upon or to furnish material *for* an improvement, but does not include a labourer;
>
> • • • • •
>
> (*e*) *"improvement" includes anything* constructed, erected, built, placed, dug or drilled on or in land except *a thing that is not attached to the realty nor intended to be or become part thereof;*
>
> • • • • •

1981 CanLII 2865 (NB CA)

3(1) *A person who*

• • • • •

(*b*) *furnished any material to be used in an improvement;*

for an owner, contractor, or sub-contractor has, subject as herein otherwise provided, a lien for wages or for the price of the work or material, as the case may be, or for so much thereof as remains owing to him, upon the estate or interest of the owner in the land in respect of which the improvement is being made, as such estate or interest exists at the time the lien arises, or at any time during its existence.

• • • • •

8(2) Upon filing of the claim of lien, the lien subject to subsection (3) has priority over all claims under conveyance, mortgages and other charges, and agreements for sale of land, registered or unregistered, made by the owner after the lien arises, [am. 1965, c. 27, s. 2(a)]

(3) *A conveyance, mortgage or other charge,* and an agreement for sale of land, *registered after a lien arises but before the filing of the claim of lien, has priority over the lien to the extent of any payments or advances made thereunder in good faith before the filing of the claim of lien.* [rep. & sub. 1965, c. 27, s. 5]

(Emphasis mine.)

[12] I concur with the trial Judge and find no error in applying the reasoning of Mr. Justice Ritchie who, when speaking for the Court in *Clarkson Co. Ltd. et al. v. Ace Lumber Ltd. et al.* (1963), 36 D.L.R. (2d) 554 at p. 558, [1963] S.C.R. 110 at p. 114, 4 C.B.R. (N.S.) 116, adopted the statement of Kelly J.A. [33 D.L.R. (2d) 70 at p. 711, [1962] O.R. 748] that:

". . . while the statute may merit a liberal interpretation with respect to the rights it confers upon those to whom it applies, it must be given a strict interpretation in determining whether any lien-claimant is a person to whom a lien is given by it..."

[13] Section 3(1)(*b*) provides that a person who furnishes any material to be used in an improvement has a lien for the price of the material. Reading the Act as a whole one must give a somewhat restricted meaning to the words "material to be used in an improvement". In this case there can be no question that the building in which the paper machine is installed is an improvement to the land. Literally, giving a liberal interpretation to the section, a chair is material to be used in the building or improvement. The strict and proper interpretation to be given to the provision, however, is that the use of the material furnished is that it be incorporated in and become part of the improvement. This is corroborated by s. 1(*b*) which uses the words "material for an improvement". The material supplied must not, by itself, constitute an improvement — it must be incorporated in and form a component of an improvement. It must, in the case before us, become a component of the building or at least be consumed in the construction of the building.

1981 CanLII 2865 (NB CA)

[14] In *Giroday Sawmills Ltd. v. Roberts et al.,* [1953] 2 D.L.R. 737 (B.C.C.A.), it was stated that the claimant must prove that the material he supplied and delivered at the site was so delivered with the intention and expectation of it being used in the construction at that site.

[15] This case though not directly applicable to the determination as to whether the machinery in the case under consideration in this Court is "material to be used in an improvement" is indicative of the view that the intention of the parties as to the use to which the material furnished is to be put is relevant in the determination as to the right of a claimant to a lien.

[16] In *Clarkson Co. Ltd. et al. v. Ace Lumber Ltd., supra,* it was held by unanimous decision of the Supreme Court that no lien could be acquired for the rental or the use of tools, machinery, or appliances furnished or rented for the purpose of facilitating the work where they remained the property of the contractor and are not consumed in their use. They are not to be considered as being used in an improvement. We should not, therefore, give a large and liberal interpretation to the words "to be used in an improvement".

[17] The matter is not to be determined by whether landlord and tenant law defines machinery as a landlord's fixture or tenant's fixture but whether it is a component of the building or improvement.

[18] The definition of "improvement" provides no assistance in determining whether a lien arises in this case, as the claim of the appellant is that the machine is a component of the paper-mill which is an improvement. The definition refers to the improvement as a whole not to the determination of what may constitute a component thereof or material to be used therein.

[19] The trial Judge referred to the decision of Stevenson J. in *Dobbelsteyn Electric Ltd. et al. v. Whittaker Textiles* (*Marysville*) *Ltd.* (1976), 14 N.B.R. (2d) 584, wherein it was found that other heavy manufacturing machinery was not part of the realty, the trial Judge stating "they were not intended to be or become part thereof.

[20] The intention of having something erected or placed on land being or becoming part of the land is referrable to improvements themselves and is not referable to the consideration as to whether or not this machinery is material to be used in an improvement. That is a matter which must stand or fall on the interpretation of s. 3(1)(*b*) of the Act. The section reads "to be used" and not "to be used or has been used". The words "to be" implies an intended future use: see *Giroday Sawmills Ltd.* case, *supra.* To support a claim for a lien the material furnished must be purchased for use in the construction of a specific improvement.

[21] The paper machine was sold as a paper-making machine and not as a component of the building. There is no evidence submitted that the machine was furnished by Beloit with the intention that it form or become a component of the building. To Beloit the building was merely the location in which to install the machine and the concrete foundation on which the sole plate was installed was simply the required support which Fundy was obligated to supply for the machine.

[22] I also have difficulty in believing that Fundy regarded the purchase of the machine as being something to be used as a component of an improvement. To Fundy the machine was

1981 CanLII 2865 (NB CA)

something which would produce their earnings and the land and building were necessary accessories to house and protect the machine.

[23] The trial Judge [at p. 661] referred to the definition [s. 1] of "building materials" as contained in the *Conditional Sales Act,* R.S.N.B. 1952, c. 34, s. 1 [now R.S.N.B. 1973, c. C-15]:

> "(*c*) *"building materials" includes* goods that become so incorporated or built into a building that their removal therefrom would necessarily involve the removal or destruction of some other part of the building and thereby cause substantial damage to the building apart from the value of the goods removed; but does not include goods that are severable from the land merely by unscrewing, unbolting, unclamping, uncoupling, or by some other method of disconnection; *and does not include machinery installed in a building for use in the carrying on of an industry, where the only substantial damage, apart from the value of the machinery removed, that would necessarily be caused to the building in removing the machinery therefrom, is that arising from the removal or destruction of the bed or casing on or in which the machinery is set and the making or enlargement of an opening in the walls of the building sufficient for the removal of the machinery;"*

(Italics added.)

[24] That definition is expressly stated to be applicable "in this Act", *viz.,* the *Conditional Sales Act* and is not applicable to the *Mechanics' Lien Act* which must be interpreted in accord with the language to be found in that Act. The fact that the vendor might have availed itself of a remedy under the *Conditional Sales Act* does not prevent it from claiming another remedy which may be provided by law or by statute, at least, to that point in time when an election may be made as to what remedy will be enforced.

[25] The charging section, which creates the lien, vests it in a person who furnished material to be used in an improvement. There cannot be a lien unless there is a common intention by the owner, contractor or subcontractor and by the supplier of the material that it will be used as a component of the improvement or consumed in the creation of the improvement. No such intention has been established.

[26] It is, therefore, not necessary to consider the second and third grounds of appeal.

[27] The appeal is dismissed with costs of the appeal to the respondent. The cross-appeal is dismissed without costs.

[28] STRATTON J.A.:—This appeal raises the question whether a large machine installed in a building which was constructed to house it was "material to be used in an improvement" within the meaning of s. 3 of the *Mechanics' Lien Act,* R.S.N.B. 1952, c. 142 [now R.S.N.B. 1973, c. M-6], as that Act read in 1971.

[29] Fundy Forest Industries Ltd., with the financial assistance of the Province of New Brunswick, purchased lands at St. George in Charlotte County and constructed thereon a paper-mill. A portion of the funds required for the project was raised by the issue of first

1981 CanLII 2865 (NB CA)

Tab 4

Province of Alberta

BUILDERS' LIEN ACT

Revised Statutes of Alberta 2000
Chapter B-7

Current as of July 1, 2012

Office Consolidation

© Published by Alberta Queen's Printer

Alberta Queen's Printer
7th Floor, Park Plaza
10611 - 98 Avenue
Edmonton, AB T5K 2P7
Phone: 780-427-4952
Fax: 780-452-0668

E-mail: qp@gov.ab.ca
Shop on-line at www.qp.alberta.ca

Copyright and Permission Statement

Alberta Queen's Printer holds copyright on behalf of the Government of Alberta in right of Her Majesty the Queen for all Government of Alberta legislation. Alberta Queen's Printer permits any person to reproduce Alberta's statutes and regulations without seeking permission and without charge, provided due diligence is exercised to ensure the accuracy of the materials produced, and Crown copyright is acknowledged in the following format:

© Alberta Queen's Printer, 20__.*

*The year of first publication of the legal materials is to be completed.

Note

All persons making use of this consolidation are reminded that it has no legislative sanction, that amendments have been embodied for convenience of reference only. The official Statutes and Regulations should be consulted for all purposes of interpreting and applying the law.

Regulations

The following is a list of the regulations made under the *Builders' Lien Act* that are filed as Alberta Regulations under the Regulations Act

	Alta. Reg.	*Amendments*
Builders' Lien Act		
Builders' Lien Forms	51/2002	*108/2004, 217/2009, 164/2010, 227/2011, 130/2012, 124/2015*

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Alberta, enacts as follows:

Definitions

1 In this Act,

(a) "certificate of substantial performance" means a certificate of substantial performance issued under section 19;

(b) "contractor" means a person contracting with or employed directly by an owner or the owner's agent to do work on or to furnish materials for an improvement, but does not include a labourer;

(c) "court" means the Court of Queen's Bench;

(d) "improvement" means anything constructed, erected, built, placed, dug or drilled, or intended to be constructed, erected, built, placed, dug or drilled, on or in land except a thing that is neither affixed to the land nor intended to be or become part of the land;

(e) "labourer" means a person employed for wages in any kind of labour whether employed under a contract of service or not;

(f) "lienholder" means a person who has a lien arising under this Act;

(g) "lien fund" means, as the case may be, the major lien fund, the minor lien fund or both the major lien fund and the minor lien fund;

(h) "major lien fund" means

(i) where a certificate of substantial performance is not issued, the amount required to be retained under section 18(1) or (1.1) plus any amount payable under the contract

(A) that is over and above the 10% referred to in section 18(1) or (1.1), and

(B) that has not been paid by the owner in good faith while there is no lien registered;

(ii) where a certificate of substantial performance is issued, the amount required to be retained under

section 18(1) or (1.1) plus any amount payable under the contract

(A) that is over and above the 10% referred to in section 18(1) or (1.1), and

(B) that, with respect to any work done or materials furnished before the date of issue of the certificate of substantial performance, has not been paid by the owner in good faith while there is no lien registered;

(i) "minor lien fund" means the amount required to be retained under section 23(1) or (1.1) plus any amount payable under the contract

(i) that is over and above the 10% referred to in section 23(1) or (1.1), and

(ii) that, with respect to any work done or materials furnished on and after the date of issue of a certificate of substantial performance, has not been paid by the owner in good faith while there is no lien registered;

(j) "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;

(k) "prescribed" means prescribed by the regulations;

(l) "registered lienholder" means a lienholder who has registered a statement of lien in the appropriate land titles office and includes a lienholder who has registered a statement of lien that has been removed pursuant to section 27 or 48(1);

(a) the work under a contract or a subcontract or a substantial part of it is ready for use or is being used for the purpose intended, and

(b) the work under a contract or a subcontract cannot be completed expeditiously for reasons beyond the control of the contractor or the subcontractor,

the value of the work to be completed or materials to be furnished is to be deducted from the contract price in determining substantial performance.

1985 c14 s3

Valuation of work done

4 For the purposes of this Act, the value of the work actually done and materials actually furnished shall be calculated on the basis of

(a) the contract price, or

(b) the actual value of the work done and materials furnished, if there is not a specific contract price.

1985 c14 s3

Creation and Extent of Lien

Waiver prohibited

5 An agreement by any person that this Act does not apply or that the remedies provided by it are not to be available for the person's benefit is against public policy and void.

RSA 1980 cB-12 s3

Creation of lien

6(1) Subject to subsection (2), a person who

(a) does or causes to be done any work on or in respect of an improvement, or

(b) furnishes any material to be used in or in respect of an improvement,

for an owner, contractor or subcontractor has, for so much of the price of the work or material as remains due to the person, a lien on the estate or interest of the owner in the land in respect of which the improvement is being made.

(2) When work is done or materials are furnished

Tab 5

1988 ABCA 58
Alberta Court of Appeal

Royal Trust Corp. of Canada v. Bengert Construction Ltd.

1988 CarswellAlta 39, 1988 ABCA 58, [1988] 4 W.W.R. 308, [1988] A.W.L.D. 732, [1988] C.L.D. 766, [1988] A.J. No. 277, 48 R.P.R. 116, 50 D.L.R. (4th) 335, 58 Alta. L.R. (2d) 97, 85 A.R. 210, 9 A.C.W.S. (3d) 397

GYPSUM DRYWALL (NORTHERN) LTD. et al. v. COYES and COYES

Laycraft C.J.A., Belzil and Stratton JJ.A.

Judgment: March 24, 1988
Docket: Calgary Appeal No. 19029

Counsel: *A.S. Rudakoff*, for appellants.
J.P. St. Pierre, for respondents.

Subject: Property; Contracts; Corporate and Commercial
Headnote
Construction Law --- Construction and builders' liens — Owner — What constituting request for work
Construction Law --- Construction and builders' liens — Owner — Under agreement of purchase and sale
Builders' liens — Priorities — Purchaser's lien — Builders' Lien Act not specifically including purchaser's lien as interest over which subsequently registered builders' lien will take priority — Priority between purchaser's and builders' liens to be determined by general rules of priority.
Builders' liens — Owners — Definition — Purchasers buying lot and house to be built on it under agreement for sale — Purchasers making advances stipulated under contract but otherwise having no role in construction of house — Purchasers not being owners within meaning of Builders' Lien Act — Facts not supporting finding of implied request by purchasers to those supplying work and materials to house.
Real property — Registration of interest in land — Priority of registered instruments — Builders' Lien Act not specifically including purchaser's lien as interest over which subsequently registered builders' lien will take priority — Priority between purchasers' and builders' liens to be determined by general rules of priority.
The plaintiffs entered into an agreement with a construction company for the purchase of a lot and a home to be built on the lot. The construction company subsequently acquired title to the land, obtained a mortgage which was registered against title, and work began. Shortly before the house was completed the construction company went bankrupt. The plaintiffs registered caveats against the property claiming an interest under their agreement for sale and claiming a purchaser's lien for the $14,700 they had paid in advances under the contract. Builders' liens were subsequently registered against the property. Following foreclosure of the mortgage and sale of the property the plaintiffs applied for an order for payment of $14,700 plus costs in priority to all builders' lien claims. The master's decision that the lien claimants took priority was reversed on appeal and the lien claimants appealed.
Held:
Appeal dismissed.
The plaintiffs were not the "owners" of the property within the meaning of s. 1(*g*) of the Builders' Lien Act. The contract was essentially for the sale of a completed house, and the plaintiffs' role in the construction of the house was passive, although an agreement alone may be sufficient to support the inference of an implied request. The plaintiffs had a minimal part in design, and the contract did not empower them to inspect during construction, or to have any involvement with subtrades. The builder obtained financing and the plaintiffs could not control cash flow to ensure liens did not arise. Therefore, the facts did not support a finding of an implied request by the plaintiffs in this case. As between the competing interests, the plaintiffs' purchaser's lien took priority over the builders' liens. Section 9(1) of the Builders' Lien Act, which specifies those interests over which a

WestlawNext. CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

subsequently registered builders' lien will take priority, does not include a purchaser's lien and, accordingly, the general rules of priority apply.

Appeal from decision of Virtue J., 49 Alta. L.R. (2d) 79, 24 C.L.R. 280, 75 A.R. 281, upholding priority of purchaser's lien over builders' liens.

The judgment of the court was delivered by *Laycraft C.J.A.*:

1 The dispute in this case arises from the bankruptcy of a building contractor during the construction of a house. Following foreclosure and sale of the property a surplus remains to be distributed after the mortgage lender was paid out. The issue now to be determined is whether the purchasers of the lot and a home to be built on it are entitled to recover the amount of their purchaser's lien, which they protected by caveat, in priority to builders' liens registered subsequently to the caveat. In master's chambers, Master Dalgleish gave priority to the builders' liens. On appeal in Court of Queen's Bench chambers [49 Alta. L.R. (2d) 79, 24 C.L.R. 280, 75 A.R. 281], Mr. Justice Virtue allowed the appeal and held that the purchasers' lien had priority. I respectfully agree with the conclusion reached by Mr. Justice Virtue and would dismiss the appeal.

I

2 The evidence in Queen's Bench (adduced by way of an agreed statement of facts) discloses that on 11th October 1985 Mr. Coyes entered into an agreement with Bengert Construction Ltd. The agreement was contained on a printed form in which blank spaces for amounts and dates had been filled in by handwriting. The document is entitled "OFFER TO PURCHASE AND INTERIM AGREEMENT". Despite the indication by its title that the document is an offer, Mr. Coyes, described as "purchaser", agrees in the opening words "to purchase the lot and home municipally described as __________". Clause 1 then provides for payment:

> 1. The total purchase price of the said lot and home including extras and credits, as set out in the attached Schedule "A" on page 2, is *$127,500* to be paid to BENGERT CONSTRUCTION LTD. AS FOLLOWS:

```
Total    $5,700      herewith, as deposit;
         ------
         $9,000      as balance on deposit to be paid upon
         ------
                     approval of Purchaser(s) mortgage
                     application;
         $72,000     (more or less) by assumption (or
         -------
                     arrangement) of mortgage having monthly
                     payments of $__________ (principal,
                     interest and __________) included;
         $40,800     (more or less) being the balance of the
         -------
                     purchase price by a cash payment 15 days
                     after the Purchaser has been notified that
                     Bengert Construction Ltd. has received
                     a final or semi-final inspection by the
                     mortgage company or 5 days before the
                     purchaser takes possession of said premises
                     whichever is sooner.
Total    $127,500
         --------
```

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

> Provided, however, should the net mortgage proceeds of such mortgage be less than the sum hereinbefore agreed to be assigned to BENGERT CONSTRUCTION LTD., the Purchaser shall forthwith, on demand, pay to BENGERT CONSTRUCTION LTD. the amount necessary to make up such deficiency.

3 Clause 2 states that the purchase price includes taxes to the date of possession and the preparation and registration of a transfer. Clause 3 provides:

> 3. BENGERT CONSTRUCTION LTD. agrees to construct a house on the said lot according to house plan model *Maria*, to be built complete to House Plan specifications and shall include such extras as are listed on the said attached Schedule. If the house is essentially complete or under construction when purchased, it is sold on an as is basis, excepting completion of unfinished work in accordance with House Plan Specifications and such extras as are listed on the said attached Schedule.

4 The remaining clauses deal with the date of possession, for additional payment if a retaining wall is required, for the "vendor" to have the risk until possession date and for "extras" (of which none were specified). Near its end the document reverts to wording appropriate to an offer and states "if my offer is not accepted the deposit shall be returned forthwith ..." Mr. Coyes signed the document as purchaser. A salesman employed by Bengert signed that "Bengert hereby accepts this offer, subject to the purchaser being approved by the mortgagee". Though only Mr. Coyes is shown as a party to the agreement, the case has proceeded on the basis that Mrs. Coyes is also a party and I will assume that to be so.

5 On the date of this agreement, Bengert was not the registered owner of the property, but had apparently made arrangements with another company, described as the "developer", to obtain title. The price to it of the lot alone was $38,000. Bengert received title on 21st March 1986. On the same day a mortgage from Bengert to a mortgage lender was registered against the property. Presumably, Mr. and Mrs. Coyes had been approved by the mortgage lender to assume the mortgage when construction was complete and title to the property was transferred to them. Meanwhile, construction was financed by periodic payments directly from the mortgage lender to Bengert. The evidence does not disclose that Mr. and Mrs. Coyes had any control over the mortgage advances nor any means to ensure that the subtrades were being paid as construction proceeded.

6 Mr. and Mrs. Coyes duly made the second payment of $9,000 and construction commenced. Work went on and materials were delivered until 13th April when the house was nearly completed. At some date, not disclosed in the evidence, Bengert went into bankruptcy. On 14th April Mr. and Mrs. Coyes registered two caveats against the property claiming an interest under their agreement for sale, and claiming a purchaser's lien for the $14,700 which they had paid. In the next few days, a number of builders' liens were registered. The appellant, Gypsum Drywall, represents all holders of builders' liens in these proceedings.

7 The mortgage was foreclosed by order in master's chambers on 21st August 1986 and thereafter the property was sold in a court-supervised sale. After the mortgage was paid out there remained in court $21,316.60 with interest. Mr. and Mrs. Coyes then applied for an order that $14,700 plus solicitor and client costs be paid to them in priority to all claims under builders' liens.

8 In master's chambers, Master Dalgleish decided, without written reasons, that the builders' liens had priority over the purchasers' lien. In Court of Queen's Bench, Mr. Justice Virtue heard extensive argument on the agreed facts and delivered written reasons for judgment. He defined two issues:

9 1. Whether Mr. and Mrs. Coyes were "owner(s)" of the property within the meaning of the Builders' Lien Act, R.S.A. 1980, c. B-12.

10 2. If they are not "owners", what is the relative priority of their interest "vis-à-vis the Builders' Liens which have been registered"?

11 On the first issue he had defined, Mr. Justice Virtue reviewed the extensive case law on this subject, including *Phoenix Assur. Co. of Can. v. Bird Const. Co.*; *Yarwood v. Ownix Dev. Ltd.*, [1984] 2 S.C.R. 199, 8 C.L.R. 242, 33 R.P.R. 221, 11 D.L.R (4th) 1, 5 O.A.C. 109, 54 N.R. 109, and concluded that Mr. and Mrs. Coyes were not owners within the meaning of s. 1(*g*) of the Act. He held that there is not in this case any evidence "from which it can be inferred that the real request for the work or materials came from the party whose interest is sought to be charged with the lien" [at p. 85].

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

12 On the second issue he had defined, Mr. Justice Virtue concluded that Mr. and Mrs. Coyes were entitled to priority for their purchaser's lien by s. 16(5) of the Land Titles Act. He held that, though, by s. 8 of the Builders' Lien Act, the lien arises when work is begun or the first material is furnished, a purchaser's lien is not among the interests over which a builders' lien is given priority under s. 9(1). Accordingly he allowed the appeal and directed that the purchasers' lien and costs had priority over the builders' liens.

II

13 By s. 4 of the Builders' Lien Act the person who does work or supplies material in respect of an improvement "for an owner" has a builders' lien for it. The definition of "owner" is contained in s. 1(*g*) of the Act which provides:

(*g*) "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 him whose rights are acquired after the commencement of the work or the furnishing of the material.

14 Wording similar to this appears in many of the Canadian statutes on this subject and has been considered in many decided cases. The section applicable in the 1892 case, *Reggin v. Manes* (1892), 22 O.R. 443 (Ch. Div.), for example, is identical to the Alberta section though arranged somewhat differently. In Alberta the section appeared in the first Mechanics' Lien Act enacted after Alberta became a province (S.A. 1906, c. 21). It was derived from the Mechanics' Lien Ordinance of the North-West Territories (Ordinance No. 6 of 1884).

15 To bring the person sought to be charged within the definition of owner, the lien claimant must establish three elements. First it must be shown that the person has "an estate or interest" in the land, secondly that he has requested, expressly or impliedly, that the materials be furnished or the work done and finally at least one of the remaining elements must be present: the work must have been done or the materials furnished on his credit, on his behalf, with his privity and consent or for his direct benefit.

16 The first element is clearly present in this case; indeed this was conceded by counsel. By the interim agreement with Bengert and their payment of $14,700, Mr. and Mrs. Coyes acquired an equitable interest in the land. They thus have the "estate or interest" which the section requires.

17 Most of the argument on this appeal was directed to the second element of the definition to determine whether a request from Mr. and Mrs. Coyes could be inferred from the circumstances of this case. The word "request", in the context in which it appears in the section, has a somewhat elusive meaning. As Anglin J. observed in *Marshall Brick Co. v. York Farmers Colonization Co.* (1916), 54 S.C.R. 569, 36 D.L.R. 420 [Ont.], any meaning assigned to the word "request" overlaps to some extent with the subparagraphs in the concluding portion of the definition.

18 Whether there is a "request" in a given case is a question of fact. The request may be express or implied from the circumstances of the case. Admittedly Mr. and Mrs. Coyes made no direct or express request in this case, nor does the evidence disclose that they had any dealings with, or control over any of the subtrades or materials suppliers. It was urged, however, that an agreement with a builder, without more, is an implied request within the meaning of the section. It was said that this proposition is established by a long line of cases commencing with *Reggin v. Manes*, supra, and expressed in *Trustee of Watt Milling Co. v. Jackson*, [1951] O.W.N. 841 (H.C.).

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

19 In *Reggin v. Manes*, two builders, who had purchased building lots, entered into an agreement with Dr. Hearn, by a part of which they were to construct certain buildings for him on the lots. Ferguson J. held Dr. Hearn to be an "owner". At p. 446 he said:

> Then looking at the "tender," as it is called, for the work, the plans of the same, what is said of the specifications, the manner in which the work was done, the conduct of the parties from the beginning of it in respect of the work, and the advances made by Dr. Hearn, for which, or some of which, he took temporary security, there can, I think, be no doubt that the work was done for him at his request and upon his credit and under a contract with him from the commencement. I think it is plain that Dr. Hearn was the "owner", and Manes and Booth the "contractors."

20 *Trustee of Watt Milling Co. v. Jackson*, supra, was decided in master's chambers in 1934 by Assistant Master Lennox but was not then reported. It was published in 1951 with the note that "It has been frequently consulted since its delivery, and is now published for that reason." Master Lennox adopted the headnote in *Reggin v. Manes*, which stated:

> An agreement to purchase property, under which buildings are to be erected thereon by the seller, and which has been acted on by the parties ... constitutes the person agreeing to buy an "owner" within (the Act).

21 From this headnote Master Lennox reached the conclusion that the contract alone makes the buyer an owner without any further involvement, and, presumably, regardless of its terms. Of the purchaser in the *Watt* case (at p. 843) he said: "it would be just the same if she had immediately [after signing the contract] gone abroad and shown no further interest."

22 In my view this proposition, stated as a rule of law applicable to all cases, is not correct. It converts into a rule of law that which is really a question of fact. All of the factors in each case must be weighed to determine the question of fact. Depending on its terms, an agreement may be sufficient to found the implication, but no rule can be stated that any agreement with a builder will be sufficient. Moreover, the headnote does not accurately reflect the decision in *Reggin*. Dr. Hearn's involvement there was much greater than merely signing a contract.

23 It was urged that a rule similar to that in the *Watt* decision may be derived from *Orr v. Robertson* (1915), 34 O.L.R. 147, 23 D.L.R. 17 (C.A.). In that case, Tyrrell sublet his land to Hyland, who agreed to erect a building on it. In brief reasons the Ontario Court of Appeal held, to quote the headnote, that "the taking ... of an agreement to build was a 'request'" from Tyrrell and made him an owner. Subsequently, however, the court felt it necessary to explain this decision. When the *Marshall* case, supra, was in the Ontario Court of Appeal (38 O.L.R. 542, *(*sub nom. *Marshall Brick Co. v. Irving)* 28 D.L.R. 464), Riddell J. reviewed his decision in *Orr v. Robertson* and said:

> We thought that there was no need of a personal request by Tyrrell to the contractor, but that the exaction by him of a contract that Hyland should build was, in the circumstances of the case, a sufficient implied request, i.e., taken in connection with the signing by him of the plan, the taking out by him of the building permit, &c. The language, "even if Tyrrell took no further nor other part in the matter," refers to such acts of interference as rendered him personally liable, which had been the subject of our consideration immediately before, and not to the circumstances already spoken of. We did not, and did not intend to, lay down any general rule — and the generality of the language employed must be restricted.

24 In *MacDonald v. MacDonald-Rowe Woodworking Co.* (1964), 49 M.P.R. 91, 39 D.L.R. (2d) 63 (P.E.I. S.C. in banco), Campbell C.J. reviewed a number of cases and, in my respectful view, correctly summarized their effect. At p. 98 he said:

> Analysis of the above-cited cases leads us to a reasonably clear appreciation of the concept "request" in s. 1(j): — it must be decided on the facts of each individual case; it does not necessarily involve a direct communication by alleged owner to contractor; it does involve something more than mere knowledge or consent.
>
> In ordinary language the word "request" indicates the idea of an active or positive proposal, as contrasted with mere passivity or acquiescence. Webster groups it as a synonym with "ask" and "solicit", synonyms which agree in meaning "to seek to obtain by making one's wants or desires known". "Request", he says, has a suggestion of greater courtesy and formality in the manner of asking.

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

25 The Supreme Court of Canada has considered the definition of "owner" in similar words in other statutes in three cases since 1976: *City of Hamilton v. Cipriani*, [1977] 1 S.C.R. 169, 67 D.L.R. (3d) 1, 9 N.R. 83; *Nor. Elec. Co. v. Mfr. Ins. Co.*, [1977] 2 S.C.R. 762, 79 D.L.R. (3d) 336, 18 N.S.R. (2d) 32, 12 N.R. 216; and *Phoenix Assur. Co. v. Bird Const. Co.*, supra. None of these cases, in my opinion, stands for the proposition that contracting with a builder, of itself, brings one within the definition of "owner". In all of those cases, there was an active participation by the entity eventually held to have made a "request" and so to be within the definition of "owner".

26 The position of many new home buyers is aptly stated by Mr. E. Mirth, of the Alberta bar, in a paper delivered to the Alberta branch of the Canadian Bar Association and reproduced in the association's papers for 1986 at p. 488:

> ... one must ... *quaere* the application of the Act to an "interim" purchaser: — one who acquires an interest under an "interim" agreement for sale and who expects to have little or no involvement in the project until it is completed. It is not uncommon for a new-home buyer to tie a property up with an "interim" purchase with no further significant involvement until closing after house completion. The buyer, in his own mind at least, is buying a completed house; not a lot with construction to be done thereon. Often his "interim" says little more about what construction is to be done (and how) than to say that a house of a certain type is to be built. There are no progress payments, and often the buyer simply assumes the builder's mortgage (which finances construction) on closing and possession. From the buyer's perspective he is on closing buying a completed house and lot by cash (or cash and mortgage assumption). Especially where the builder has or places permanent financing to be assumed on closing, the "interim agreement" seems closer in character to an option than to an agreement for sale. The deal has a distinct and separate level of closing once the house is built. The buyer swaps his full price payment for title to a completed house.

27 In this case, the Coyes' participation in the construction activities was little more than to choose a house plan. They had such a minimal part in design that their contract does not even specify any extras to be added to it. The contract does not empower them to inspect during construction or to have any involvement with subtrades. The builder had obtained the mortgage and financed construction from it so that Mr. and Mrs. Coyes were unable to control the cash flow into the project to ensure that no builders' liens would be outstanding. Moreover the form of contract describes the Coyes as interim purchasers, which was borne out by the provision for a closing when the house was completed at which time most of the purchase price would be paid by cash and the assumption of the builder's mortgage. Only then would title be transferred.

28 All of these factors lead to the conclusion that the essential contract in this case is for the sale of a completed house. I respectfully agree with Mr. Justice Virtue that these facts do not lead to a finding of an implied request by the Coyes to the persons who supplied work and materials to the house. The Coyes' role was passive and no more than the "mere knowledge or consent" referred to in *MacDonald v. MacDonald-Rowe*, supra. I agree with his conclusion that the Coyes were not "owners" within the meaning of s. 1(*g*) of the Builders' Lien Act.

29 The task before the court in each case of this kind, where the contract with a builder is relied upon as constituting a request, is to determine, as a finding of fact, the essential purpose of the contract as it can be determined from all the factors in evidence. For this reason cases decided on a different set of facts are not particularly helpful in reaching a conclusion. The appellant cited the decision of the Saskatchewan Court of Appeal in *Arrow Plumbing & Heating (1978) Ltd. v. Enercon Bldg. Corp.*, [1987] 1 W.W.R. 724, 53 Sask. R. 108 (C.A.). In that case, as here, the home buyer entered a contract with a builder who had title to the building lot throughout. On this point, the case turns on the finding by Bayda C.J.S. at pp. 728-29 that "the essential purpose of the contract between the respondents [the buyers] and Enercon [the builder] was that Enercon would commission the work to be done on the property for the respondents". Applying the same test to a different set of facts he has reached a different conclusion than was reached in this case.

III

30 The remaining point is to determine the priority between the purchasers' lien and the builders' liens registered subsequently to it. Mr. and Mrs. Coyes claim priority for their purchaser's lien under s. 16(5) of the Land Titles Act on the ground of prior

WestlawNext. CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

registration. By that section, priority between "mortgagees, transferees and others" is determined by the time of registration. The builders' lien holders, on the other hand, point out that, by s. 8 of the Builders' Lien Act, their liens arose in each case when the work was begun or the first material was furnished.

31 The applicable sections are as follows:

32 The Land Titles Act, R.S.A. 1980, c. L-5:

> 16 ...
>
> (5) For purposes of priority between mortgagees, transferees and others, the serial number assigned to the instrument or caveat shall determine the priority of the instrument or caveat filed or registered.

33 The Builders' Lien Act, R.S.A. 1980, c. B-12:

> 8 The lien created by this Act arises when the work is begun or the first material is furnished.
>
> 9(1) A lien has priority over all judgments, executions, assignments, attachments, garnishments and receiving orders recovered, issued or made after the lien arises.

34 In my view the purchasers' lien has priority in this case. Section 9(1) of the Builders' Lien Act (quoted above) gives a builders' lien priority over "judgments, executions, assignments, attachments ... and receiving orders recovered, issued or made" after the lien arises even though the lien may not then be registered. A purchaser's lien, however, is not among the interests specified as losing a priority gained by time of registration to a builders' lien which had arisen but not been registered. The list of interests specified in s. 9(1) as exceptions to the general rules of priority cannot be extended beyond those specifically mentioned.

35 Accordingly, I would dismiss the appeal, with costs to the respondents.

Appeal dismissed.

End of Document Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

Tab 6

Court of Queen's Bench of Alberta

Citation: Sustainable Developments Commercial Services Inc v Budget Landscaping & Contracting Ltd, 2020 ABQB 391

Date: 20200707
Docket: 2003 09136
Registry: Edmonton

2020 ABQB 391 (CanLII)

Between:

Sustainable Developments Commercial Services Inc

Applicant

- and -

Budget Landscaping & Contracting Ltd

Respondent

Endorsement
of
Brian W. Summers, Master in Chambers

---

[1] The application by Sustainable Developments Commercial Services Inc ("Sustainable") to discharge the builder's lien ("Budget Lien") registered by the Respondent Budget Landscaping & Contracting Ltd ("Budget") against the title to land owned by Victor Kochan is granted.

[2] Sustainable asserts two bases upon which the Budget Lien ought to be struck: firstly, that the work done by Budget was not an "improvement" to the lands; and secondly, that Victor Kochan is not an "owner" within the meaning of the *Builders' Lien Act.* I agree with both of those assertions.

[3] With respect to the first point, the work done by Budget was to haul aggregate to Victor Kochan's land. This work was done by Budget under and pursuant to a prime contract between the County of Vermilion and Sustainable and a subcontract between Sustainable and Budget. Both of these contracts are in evidence. Those contracts indicate that the work was to load aggregate at the Bykowski 3 Pit, haul it to the Kochan Stockpile site and stockpile the aggregate there. The evidence of Sustainable's officer James Green goes further to say that the aggregate material was for the purpose of a temporary stockpile to be utilized for road graveling over the course of the following year. Counsel for Budget argues that this information is hearsay (from the County) and that it is inadmissible under Rule 13.18(3) of the *Rules of Court* because

Sustainable's application is not interlocutory, but final. That is, if Sustainable's application is granted, the Budget Lien will be struck.

[4] I accept that Mr. Green's evidence that the aggregate would be used by the County of Vermilion over the course of the year for the county roads is hearsay. However, there is other evidence from Sustainable that the stockpiling of aggregate for the County on the Kochan lands was not an improvement to those lands. Firstly, the contracts make it clear that the aggregate was being stockpiled on the Kochan lands for the benefit of the County of Vermilion. Mr. Green also put into evidence the lease between Mr. Kochan and the County. That lease agreement is entitled "Lease Agreement for Stockpile Site". The lease states the County is the owner of the aggregate material on the Stockpiling Site and its employees and agents may access the site for the purpose of inspecting, removing or adding materials during the term of the lease. The lease also indicates that the County is responsible for the reclamation of the Stockpile Site. Clearly, the aggregate delivered by Budget to the lands at the request of the County of Vermilion was not an improvement to the Kochan lands.

2020 ABQB 391 (CanLII)

[5] When Mr. Green was cross examined by counsel for Budget he was pressed to admit that his information was corporate. He readily acknowledged that his information was information of the corporation of which he was the representative and a director. I find that Mr. Green's evidence on behalf of the corporation that the aggregate was being stockpiled on the Kochan lands for the County of Vermilion; that the County was the owner of the aggregate at all times and was responsible for reclamation of the lands under the lease is sufficient to prove that the stockpiling of aggregate was not an improvement to the Kochan lands.

[6] Furthermore, Budget has tendered no evidence that the stockpiling of aggregate on the Kochan lands was intended as or in fact constituted an improvement to those lands.

[7] With respect to Sustainable's second assertion, I agree that Victor Kochan was not an owner within the meaning of the *Builders' Lien Act.* The work by Budget forming the basis of the lien claim was for the County of Vermilion, not for Mr. Kochan. There is absolutely no evidence or any suggestion whatsoever that it was for the benefit of Mr. Kochan. No notice was served upon Mr. Kochan pursuant to section 15. The fact that the County of Vermilion had not registered a caveat with respect to its leasehold interest does not give Budget the right to lien Mr. Kochan's fee simple title. The Budget Lien should have indicated that it was against the County of Vermilion's leasehold estate.

[8] Sustainable is entitled to costs under Column 3 of Schedule "C" of *Alberta Rules of Court*. Since I called upon the parties to provide written argument on the issue of whether Budget could lien the fee simple interest of Mr. Kochan, the sum of $500 shall be added to the amount otherwise payable under item 7.

Heard on the 23rd day of June, 2020.
Dated at the City of Edmonton, Alberta this 6th day of July, 2020.

Brian W. Summers
M.C.Q.B.A.

Appearances:

Robyn L. Graham
Bryan & Company LLP
for the Applicant

Peter Alexander
Smith Thompson Law LLP
for the Respondent

2020 ABQB 391 (CanLII)

Tab 7

K & Fung Canada Ltd. v. N.V. Reykdal & Associates Ltd., 1998 ABCA 178

Date: 19980512
Docket: 97-17305

1998 ABCA 178 (CanLII)

IN THE COURT OF APPEAL OF ALBERTA

THE COURT:

THE HONOURABLE MR. JUSTICE BRACCO
THE HONOURABLE MADAM JUSTICE HUNT
THE HONOURABLE MR. JUSTICE BERGER

BETWEEN:

K & FUNG CANADA LIMITED

Respondent (Applicant)

\- and -

N.V. REYKDAL & ASSOCIATES LTD and
571582 ALBERTA LTD., carrying on business
under the firm name and style of
Wagner Electrical Contractors

Appellants (Respondents)

Appeal from the Order of
THE HONOURABLE MR. JUSTICE PROWSE
Dated the 15th day of July, A.D. 1997
Filed the 13th day of August, A.D. 1997
(IN CHAMBERS)

MEMORANDUM OF JUDGMENT

COUNSEL:

D.W. McGrath
For the Respondent (Applicant)

W.D. Goodfellow, Q.C.
For the Appellants (Respondents)

1998 ABCA 178 (CanLII)

MEMORANDUM OF JUDGMENT

THE COURT:

[1] This is an appeal from the order of Prowse, J. dated July 15, 1997 upholding the decision of Master Laycock directing that the Appellant's builders lien against the estate of the Respondent be discharged.

[2] The issue is whether, in all of the circumstances of this case, the Respondent is an "owner" pursuant to s.1(g) of the ***Builders Lien Act***. In particular, the question to be decided is whether the Respondent, either expressly or impliedly, requested the work and materials which are the subject of the lien.

[3] The Respondent was the registered owner of restaurant premises in Calgary. A lease agreement was entered into between the Respondent and the operators of the restaurant, No Name Café, which provided that the tenant would upgrade the premises. The Lessee contracted with the Appellant to effect the leasehold improvements.

[4] The Appellant was not paid and filed a builders lien. The Respondent successfully applied before the learned Master to have the lien removed from title. On appeal, Prowse, J. upheld the Master.

ANALYSIS

[5] The ***Builders Lien Act*** constitutes an abrogation of the common law in that it creates, in certain specified circumstances, a charge upon a person's land which would not exist but for the ***Act***: ***Morguard Investments Limited v. Hamilton's Floorcoverings (1982) Ltd.*** (1986), 49 Alta. L.R. (2d) 88 (Alta. Q.B.) at pp. 90-91, relying upon ***Clarkson Co. et al. v. Ace Lumber Ltd.***, [1963] S.C.R. 110.

[6] The learned Master in Chambers and the learned Justice of the Court of Queen's Bench sitting in appeal, relied upon ***Royal Trust Corp. of Canada v. Bengert Construction Ltd.*** (1988), 58 Alta. L.R. (2d) 97 at p. 102 to decide the issue against the Appellant. To bring the Landlord within the classification of an "owner", the Appellant was required to prove that the Respondent:

(a) had an "estate or interest" in the lands;

(b) had requested, expressly or impliedly, that the materials be furnished or that the work be done; and

1998 ABCA 178 (CanLII)

1998 ABCA 178 (CanLII)

> (c) at least one of the remaining elements must be present: the work must have been done or materials furnished; (i) on its credit; (ii) on its behalf; (iii) with its privity and consent; or (iv) for its direct benefit.

[7] ***Royal Trust Corp. of Canada v. Bengert Construction Ltd. (supra)*** governs the determination of whether a request, expressed or implied, that materials be furnished or that the work be done is made out. This Court said at p. 104:

> "In MacDonald v. MacDonald-Rowe Woodworking Co. (1964), 49 M.P.R. 91, 39 D.L.R. (2d) 63 (P.E.I. S.C. in banco), Campbell C.J. reviewed a number of cases and, in my respectful view, correctly summarized their effect. At p. 98 he said:
>
>> Analysis of the above-cited cases leads us to a reasonably clear appreciation of the concept 'request' in s.1(j): - it must be decided on the facts of each individual case; it does not necessarily involve a direct communication by alleged owner to contractor, it does involve something more than mere knowledge or consent.
>>
>> In ordinary language the word 'request' indicates the idea of an active or positive proposal, as contrasted with mere passivity or acquiescence. Webster groups it as a synonym with 'ask' and 'solicit', synonyms which agree in meaning 'to seek to obtain by making one's wants or desires known.' 'Request', he says, has a suggestion of greater courtesy and formality in the manner of asking.'
>
> The Supreme Court of Canada has considered the definition of 'owner' in similar words in other statutes in three cases since 1976: *City of Hamilton v. Cipriani* [1977] 1 S.C.R. 169, 67 D.L.R. (3d) 1, 9 N.R. 83; *Nor. Elec. Co. v. Mfr. Ins. Co.*, [1977] 2 S.C.R. 762, 79 D.L.R. (3d) 336, 18 N.S.R. (2d) 32, 12 N.R. 216; and *Phoenix Assur. Co. v. Bird Const. Co., supra*. None of these cases, in my opinion, stands for the proposition that contracting with a builder, of itself, brings one within the

1998 ABCA 178 (CanLII)

> definition of 'owner'. In all of those cases, there was an **active participation** by the entity eventually held to have made a "request" and so to be within the definition of 'owner'." [Emphasis added]

[8] Whether or not active participation is established is a question of fact. The learned Master held as follows:

> ".....the applicant (sic) participation in the substantial renovations consisted of:
>
> (a) approving concept plans and;
>
> (b) approving the selection of paint for the exterior of the building.
>
> The applicant did not select the general contractor, did not prepare a set of plans nor approve a set of construction plans, did not control funding for the construction, did not provide any on-site supervision or inspection; did not receive any participation rent, in summary there is not sufficient evidence that the landlord actively participated to the extent that the court ought to find that the applicant made an implied request of the respondents to do work or provide materials."

[9] The Lessor's written offer to lease was accepted by the Lessee on January 24, 1996. Schedule "B" provided that the premises were accepted on an "as is" basis (A.B. 313). There were four conditions precedent (A.B. 410):

> a) Tenant is satisfied as to its ability to procure all necessary building and operating permits and licenses for use, signage and occupation of the Premises;
>
> b) the approval of the terms and conditions of this letter by the Board of Directors of No Name Café.
>
> c) the approval by the Landlord of the Tenant's conceptual drawings and specifications for the

1998 ABCA 178 (CanLII)

finishing of the Premises, storefront design and signage design.

d) the Tenant shall supply to the Landlord concurrently with the submission of this Offer to Lease such information, including financial information, as the Landlord may require to satisfy itself of the financial soundness of the Lessee and its ability to meet and continue to meet its obligations under the Lease. Should the Landlord not give its written approval of said financial information within seven (7) business days of acceptance hereof, at the Lessor's election this Offer to Lease shall be null and void.

[10] Our review of the record reveals no overriding or palpable error on the part of the adjudicators below. There is no question that the Landlord intended an arrangement whereby considerable control might have been exercised over tenant's improvements. And had that intended participation materialized, it might well have satisfied the test.

[11] But negotiations, as the exchange of correspondence confirms, eroded the initial requirement of $400,000 in tenant's improvements to $187,500 which, in any event, only had to be spent by the tenant on **operations or improvements at the location of the restaurant**. This erosion is evidenced by the letter from Argon Group Ltd on behalf of the Lessor dated 2 February, 1996 (A.B. 426) and that of MacKimmie Matthews on behalf of the Lessee dated 7 February, 1996 (A.B. 427).

[12] The Argon Group letter confirms the Lessor's position as follows:

"The Lessor requires the following to satisfy their concerns:

A. List of investors detailing existing contributions and amounts committed but not yet received.
B. Full disclosure on what trust conditions are in place on cash held by lawyer and Lessor's satisfaction of same.
C. Lessor requires verification that $200,000 cash is in place and will be irrevocably used in the premises at 6712 Macleod Trail.

> D. Verification that additional financing is in place or readily available to provide a total of $400,000 for the improvement and operations of the restaurant."

1998 ABCA 178 (CanLII)

[13] The Lessee's response is, in part, as follows:

> "....we confirm that the funds held by us in trust are subject only to the condition that they represent capital contributions to a company to be incorporated to hold the lease and operate the subject restaurant."

[14] In addition to the foregoing, there is evidence in the examinations on affidavit upon which the Master was entitled to rely to support the conclusions that the tenant was not contractually bound to construct improvements to any standard or of any specified scope (A.B. 230, lines 17-21) and that, in any event, the Respondent did not actively participate in the renovation project (A.B. 145, lines 7-14). It follows that there was no "request" by the registered owner, expressed or implied, and the lien was properly struck by the Master as confirmed in the Court of Queen's Bench.

[15] For these reasons, the appeal must be dismissed.

APPEAL HEARD ON FEBRUARY 3, 1998
JUDGMENT DATED at CALGARY, Alberta,
this Day of May
A.D. 1998

BRACCO J.A.

HUNT, J.A.

BERGER, J.A.

1998 ABCA 178 (CanLII)

Tab 8

1986 CarswellAlta 257
Alberta Court of Queen's Bench

Royal Trust Corp. of Can. v. Bengert Const. Ltd.

1986 CarswellAlta 257, [1987] A.W.L.D. 055, [1987] C.L.D. 083, 2 A.C.W.S. (3d) 238, 49 Alta. L.R. (2d) 79, 75 A.R. 281

ROYAL TRUST CORPORATION OF CANADA v. BENGERT CONSTRUCTION LTD., COYES and COYES

Virtue J.

Judgment: December 4, 1986
Docket: Calgary No. 8601-08123

Counsel: *J. St. Pierre*.
J. A. Drummond.
C. N. D. Hotzel.
J. Legg.

Subject: Contracts; Corporate and Commercial
Related Abridgment Classifications
Construction law
IV Construction and builders' liens
IV.3 Owner
IV.3.c What constituting request for work
Construction law
IV Construction and builders' liens
IV.3 Owner
IV.3.g Under agreement of purchase and sale
Headnote
Construction Law --- Construction and builders' liens — Owner — What constituting request for work
Construction Law --- Construction and builders' liens — Owner — Under agreement of purchase and sale
Builders' liens — Owners — Definition — Purchasers of house from contractor not being "owners" as defined by Builders' Lien Act — Purchasers having interest in land but not requesting lienholders' services — Purchasers' lien having priority over subsequent builders' liens.
Builders' liens — Priorities — Purchasers' liens — House contractor going bankrupt — Materials and services supplied prior to registration of purchasers' caveat but builders' liens registered after caveat — Purchasers not being owners — Section 9(1) of Builders' Lien Act not giving builders priority — Purchasers having priority under Land Titles Act for amount of deposit.
The purchasers executed an offer to purchase and interim agreement of a house and lot with B. Ltd., which was to construct a house according to plans and specifications. The purchasers paid a deposit and the plaintiff supplied a builders' mortgage. The purchasers filed caveats to protect their interest on 14th April 1986. Prior to the filing of the caveats, builders proceeded to supply work and materials to B. Ltd. for the house. No contracts existed between the purchasers and the builders. The builders registered liens for the work done and materials supplied prior to April 1986, but the liens were registered after the purchasers' caveats. B. Ltd. went into bankruptcy. The plaintiff foreclosed on the mortgage, the house was sold and the bank paid out on its mortgage. The remaining moneys were paid into court pending resolution of the matter of priority between the purchasers and the lienholders. A master's order determined that the lienholders had priority for any liens filed prior to 21st August 1986. The purchasers appealed.
Held:

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

imposed upon "owners" by that Act. Secondly, if the appellants are not "owners", what is the relative priority of their interest vis-à-vis the builders' liens which have been registered?

Are the appellants owners under the Builders' Lien Act?

10 The term "owner" is defined in s. 1(*g*) of the Builders' Lien Act as follows:

> (*g*) "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 him whose rights are acquired after the commencement of the work or the furnishing of the material.

11 Section 1(*g*) comprises three elements, all of which must be proven by the lien claimants. First of all, it is necessary to show that the appellants have "an estate or interest in land". Secondly, it must be established that the work was done and materials furnished at the appellants' request, either express or implied, and finally, that such work was done and materials furnished on the credit or on behalf, or with the privity and consent, or for the direct benefit of the appellants.

12 The interim agreement between the appellants and respondents gives the appellants "an estate or interest" in the land sufficient to satisfy the first element of s. 1(*g*) (*Phoenix Assur. Co. of Can. v. Bird Const. Co.; Yarwood v. Ownix Dev. Ltd.*, [1984] 2 S.C.R. 199 at 213, 8 C.L.R. 242, 33 R.P.R. 221, 11 D.L.R. (4th) 1, 5 O.A.C. 109, 54 N.R. 109).

13 Whether or not the appellants can be said to have made a "request" for work or materials is a question of fact (*Triple Five Corp. v. Nordel Dev. Corp.* (1985), 37 Alta. L.R. (2d) 33, 11 C.L.R. 261, 60 A.R. 241 (M.C.); *MacDonald-Rowe Woodworking Co. v. MacDonald* (1963), 49 M.P.R. 91, 39 D.L.R. (2d) 63 (P.E.I.C.A.)). In the latter case, the Prince Edward Island Supreme Court discussed "request" as used in s. 1(*j*) of the Prince Edward Island Builders' Lien Act, which is identical to s. 1(*g*) of the Alberta Act. After analyzing several cases, the court found at p. 98:

> Analysis of the above-cited cases leads us to a reasonably clear appreciation of the concept "request" in s. 1(j): — it must be decided on the facts of each individual case; it does not necessarily involve a direct communication by alleged owner to contractor; it does involve something more than mere knowledge or consent.
>
> In ordinary language the word "request" indicates the idea of an active or positive proposal, as contrasted with mere passivity or acquiescence. Webster groups it as a synonym with "ask" and "solicit", synonyms which agree in meaning "to seek to obtain by making one's wants or desires known". "Request", he says, has a suggestion of greater courtesy and formality in the manner of asking.

14 In *Beaver Lumber Co. v. Korotky and Tsbrey*, [1927] 1 W.W.R. 945 (Sask. Dist. Ct.), Ross D.C.J. considered the word "request" as it was used in s. 2(6) of the Mechanics' Lien Act, R.S.S. 1920, c. 206, and at p. 948 he stated:

> ... the whole section is governed by the word "request," and while it is not necessary that there should be evidence of a direct request, yet there must be circumstances from which a request can be implied.

15 In the case of *Reggin v. Manes* (1892), 22 O.R. 443 (Ch. Div.), Ferguson J. considered certain factors in implying a request. At p. 446 he states:

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

> Then looking at the "tender", as it is called, for the work, the plans of the same, what is said of the specifications, the manner in which the work was done, the conduct of the parties from the beginning of it in respect of the work, and the advances made by Dr. Hearn, for which, or some of which, he took temporary security, there can, I think, be no doubt that the work was done for him at his request...

16 In *Phoenix Assur. v. Bird Const.*, supra, Estey J. reviews the types of circumstances from which a request may be implied. In that case Estey J. examined the overall arrangements between the parties which resulted in the work being done and concluded that, although the construction contract for the work was made between Ownix and Bird, nevertheless Phoenix made the request. The learned Justice states at pp. 215-16:

> Consequently, I conclude, as did the Divisional Court and the Court of Appeal below, that Phoenix did make "the request" that the work for which the lien claim (other than third party space tenants' improvements) was made be done by Bird. The request was made in a strict factual sense by Ownix who, of course, entered into the construction contract with Bird in the performance of its role under the development contract between Ownix and Phoenix. That agreement stipulated that:
>
>> The building shall be constructed by the Developer at its expense in accordance with detailed drawings, elevations and specifications (including materials to be used) which must first be approved by Phoenix Canada ...

17 From these cases I conclude that in order to show an indirect request sufficient to constitute a party an owner under s. 1(*g*) of the Builders' Lien Act, there must be evidence of some arrangement from which it can be inferred that the real request for the work or materials came from the party whose interest is sought to be charged with the lien. This might include evidence of a right to some degree of control over the way in which the work will be done, or the selection of the materials to be used, or control of the financing of the building project, or some active participation in the building process or some other matter from which an indirect request might be inferred. In my view the evidence must go beyond showing mere knowledge, acquiescence, consent or a mere benefit derived from the building project. In my opinion no such evidence exists here and no request within the meaning of s. 1(*g*) of the Builders' Lien Act has been demonstrated.

18 C. E. Mirth, in a paper presented to the Alberta branch of the Canadian Bar Association during the 1986 mid-winter meeting entitled "Builders' Liens: Priorities" 463 at p. 488 distinguishes *Reggins v. Manes*, supra, and similar cases from cases such as this one:

> Notwithstanding these decisions, one must still quere the application of the Act to an "interim" purchaser: — one who acquires an interest under an "interim" agreement for sale and who expects to have little or no involvement in the project until it is completed. It is not uncommon for a new-home buyer to tie a property up with an "interim" purchase with no further significant involvement until closing after house completion. The buyer, in his own mind at least, is buying a completed house; not a lot with construction to be done thereon. Often his "interim" says little more about what construction is to be done (and how) than to say that a house of a certain type is to be built. There are no progress payments, and often the buyer simply assumes the builder's mortgage (which finances construction) on closing and possession. From the buyer's perspective he is *on closing* buying a completed house and lot by cash (or cash and mortgage assumption).

19 This aptly described the situation in the case before me.

20 The agreement between the appellants and Bengert is an interim agreement which contemplates transferring the full purchase price for a completed house and lot. This is not, in my view, a case of two contracts: one for the sale of the lot and the other for the construction as was found to be in the case in *Consol. Concrete Ltd. v. Leamac Indust. Devs. Ltd.* (1982), 40 A.R. 613 (M.C.).

21 As the appellants are not owners under s. 1(*g*) of the Builders' Lien Act, they are not subject to the requirements of that Act.

Priorities between builders' liens and purchasers

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

Tab 9

Court of Queen's Bench of Alberta

Citation: Georgetown Townhouse GP Ltd v Crystal Waters Plumbing Company Inc, 2018 ABQB 617

Date: 20180820
Docket: 1701 15571
Registry: Calgary

2018 ABQB 617 (CanLII)

Between:

Georgetown Townhouse GP Ltd.

Applicant

- and -

Crystal Waters Plumbing Company Inc.; R. and R. Bruno Enterprises Ltd.; Kidco Construction Ltd.; Siena Flooring Inc.; Spindle, Stairs & Railings 2002 Ltd., Rob's Drywall Services Ltd.; 840307 Alberta Ltd. operating as Wildwoord Cabinets; Double R Building Products Ltd.; WM. Schmidt Mechanical Contractors Ltd.; Lehigh Hanson Materials Limited operating as Inland Concrete; Lehigh Hanson Manson Materials Limited; E2 Construction Ltd.; Gienow Canada Inc. doing business as Ply Gem; High Caliber Construction Inc.; TBA Cleaning Services Ltd.; Signature Fan Company Ltd.; Scotty's Rentals And Landscaping Ltd.; Majestic Electric Inc.; Prairie Pipe Sales Ltd.; 789072 Alberta Ltd.; R.K.G. Developments Ltd.; And Prairie Pipe Sales Ltd., 789072 Alberta Ltd.; And R.K.G Developments Ltd. operating as Lenbeth Weeping Tile Calgary And Watt Consulting Group Ltd.

Respondents

Reasons for Decision
of
J.T. Prowse, Master in Chambers

---

[1] This case involves an often litigated issue: can a registered owner of land, who knows that work is being done on the land, defeat the liens of unpaid contractors on the basis that the it is not an 'owner' for the purposes of section 1(j) of the *Builders' Lien Act* (the "BLA") where it does not expressly request the work nor agree to pay the contractor for it.

[2] Section 1(j) of the BLA defines an owner as follows:

> "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;

[3] There are three common categories of cases where this issue arises:

> (i) a landlord (registered owner of land) disavows liens placed on its land by unpaid contractors of a tenant,
>
> (ii) a purchaser who agrees to buy land upon which a building is to be built, and later takes a transfer of the land after the structure has been built, disavows liens subsequently placed on his/her land by unpaid contractors of the builder,
>
> (iii) a developer/vendor (registered owner of land) who agrees to sell land, and allows the purchaser to build on the land prior to completion of the sale, disavows liens placed on its land by unpaid contractors of the purchaser.

[4] This case involves category (iii) but I will briefly discuss the other two categories. Typically, mere knowledge by the registered owner that the work is being done is not sufficient to constitute 'express or implied' consent so as to make the registered owner an 'owner' for the purposes of section 1(j) of the BLA. Rather, the registered owner must become actively involved in the building process to be held to have given express or implied consent.

(i) a landlord (registered owner of land) disavows liens placed on its land by unpaid contractors of a tenant,

[5] There is a well-developed body of case law on what degree of participation by a landlord is sufficient to make the landlord's title lienable notwithstanding that the tenant's contractor did not serve the landlord with a notice under section 15(1) of the BLA, which states:

> 15(1) When the estate on which a lien attaches is a freehold estate for a life or lives or a leasehold estate then, if the person doing the work or furnishing the material gives to the person holding the fee simple, or that person's agent, notice in writing of the work to be done or materials to be furnished, the lien also attaches to the estate in fee simple unless the person holding that estate, or that person's agent, within 5 days after the receipt of the notice, gives notice that the person holding that estate will not be responsible for the doing of the work or the furnishing of the materials. (emphasis added)

[6] In my decision in ***Labbe-Leech Interiors Ltd. v TRL Real Estate Syndicate (07) Ltd.***, 2009 ABQB 653, 2009 CarswellAlta 1898 (Alta. Q.B.), I listed chronologically and summarized eight of those earlier decisions issued between 1977 and 2001, including ***K.& Fung Canada Ltd.***

2018 ABQB 617 (CanLII)

v N.V. Reykdal & Associates Ltd., 1998 ABCA 178, 1998 CarswellAlta 417, and ***Lightning World Ltd. v Help-U-Build Ltd.***, 1998 ABQB 930, 1998 CarswellAlta 1010.

[7] In my view, it is better to consider cases specifically decided under category (iii), as discussed below, rather than to deal with landlord – tenant case law.

> **(ii) a purchaser who agrees to buy land upon which a building is to be built, and later takes a transfer of the land after the structure has been built, disavows liens subsequently placed on his/her land by unpaid contractors of the builder,**

[8] There are also a number of cases dealing with this situation.

[9] The leading case is ***Royal Trust Corp. of Canada v Bengert Construction Ltd.***, 1988 ABCA 581, 1988 CarswellAlta 39, where the plaintiffs entered into an agreement with a builder for the purchase of a lot and a home to be built on the lot. When the builder failed and foreclosure ensued, surplus funds were paid into court where a contest arose between the plaintiffs and the lienholders. The Court of Appeal held that the plaintiffs were not 'owners' of the property within the meaning of section 1(j) of the BLA, and their purchasers' lien took priority to the builders' liens.

[10] A similar result occurred subsequently in ***Permasteel v Semon***, 2000 ABQB 275, [2000] A.J. No. 523, where the purchaser 676 agreed to purchase the land from Semon with a building to be built, and Semon hired Permasteel to construct the building. After the building was completed and the land transferred to 676, Permasteel (who had not been paid in full by Semon) filed a builders lien. 676 argued, successfully, that it was not an 'owner' under the BLA, and its title was not subject to Permasteel's lien.

[11] Unsuccessful attempts were made, in two related decisions, by a party named the Gemba Group to assert that it was merely a purchaser of buildings to be built by Karmis, and therefore not subject to builders' liens. However, in each case, it was found that Gemba was in fact a joint venturer with Karmis, and hence an 'owner' under the BLA. See ***Con-Forte Contracting Limited Partnership v Eagle Hill Developments Ltd.***, 2012 ABQB 724, 2012 CarswellAlta 2246, and ***MCAP Service Corp. v Anthony Plaza II ULC***, 2013 ABQB 41, 2013 CarswellAlta 97.

[12] Again, in my view it is better to consider cases specifically decided under category (iii), as discussed below, rather than to deal with cases involving purchasers who agree to buy land with a building to be erected on the land and then conveyed to them.

> **(iii) a developer/vendor (registered owner of land) who agrees to sell land, and allows the purchaser to build on the land prior to completion of the sale, disavows liens placed on its land by unpaid contractors of the purchaser.**

[13] This is the category of cases directly relevant to this application. Georgetown is a developer/owner who agreed to sell the 48 lots in question to 167 (doing business as ReidBuilt Homes). Georgetown says that its interest in the land cannot be liened by contractors and sub-contractors of 167.

[14] The key factual component is the degree to which Georgetown became involved in 167's building activities. In the end it appears that, while Georgetown reserved to itself (in its contract

2018 ABQB 617 (CanLII)

with 167) the authority to become quite involved in the building process, Georgetown did not exercise that authority to any significant extent.

[15] The contract between Georgetown and 167 allowed 167 to occupy the land and build houses upon payment of the first two installments, constituting 15% of the lot purchase price.

[16] The goal for 167 was to complete and sell individual houses (and pay Georgetown in full for such lots on conveyance to the purchaser) so that, when the remaining 85% became due in 603 days, most or all of that 85% would already have been paid from the sale of individual completed houses.

[17] In the contract, it was provided that Georgetown had the right to approve the style and colours of the homes to be constructed. There is no evidence that Georgetown was ever asked for that approval or gave that approval.

[18] The contract further provided that 167 would not apply for a building permit for a house until it had first obtained Georgetown's approval for the plans for the house. There is no evidence that Georgetown was ever asked for or gave that approval, notwithstanding the 167 must have obtained building permits for the few houses which it built.

[19] The contract also provided that 167 was to provide utility servicing within the lot boundaries but only with contractors approved by Georgetown, and the work was to be supervised by Georgetown's engineers. There is no evidence that Georgetown approved the contractors used by 167 to install utilities within the lot lines, or that Georgetown's engineers supervised that work.

[20] The contract provided that167 was to keep the lots with an orderly and tidy appearance to the satisfaction of Georgetown, but there is no evidence that Georgetown ever directed 167 to tidy up their lots.

[21] The contract provided that Georgetown was to provide marketing support to 167 for the sale of homes on the lots, but the only evidence in that regard is that Georgetown set up and maintained a website for the subdivision indicating that the single family dwellings in the subdivision were to be constructed by ReidBuilt Homes (167).

[22] Finally, the contract provided that Georgetown's approval was required for 167's onsite signage and advertising, but there is no evidence that such approval was ever sought or given.

[23] The lienholders argue that it is the expected arrangement at the outset that should count. In other words, the fact that Georgetown signed a contract giving them the authority to become extensively involved in the building process is what matters, not what in fact happened.

[24] I disagree. While Georgetown's contractual authority is a relevant factor to consider, to me it is not as significant as what in fact happened.

[25] For example, if a contract was silent as to the developer's authority to become involved in the building process, but the developer in fact became extensively involved, that would be of critical importance.

[26] I note that in ***K & Fung Canada Ltd. v N.V. Reykdal & Associates Ltd.***, 1998 ABCA 178, 1998 CarswellAlta 417, which was a category (i) case, the Court was looking at the degree of involvement of the landlord in construction by the tenant and upheld the ruling that the landlord was not an 'owner' for the purposes of section 1(j) of the BLA.

2018 ABQB 617 (CanLII)

[27] The Court noted that the landlord had reserved contractual rights to become involved in the construction, but had not exercised many of those rights. The Court commented:

> 8 Whether or not active participation is established is a question of fact. The learned Master held as follows:
>
> > ....the applicant (sic) participation in the substantial renovations consisted of:
> >
> > (a) approving concept plans and;
> >
> > (b) approving the selection of paint for the exterior of the building.
> >
> > The applicant did not select the general contractor, did not prepare a set of plans nor approve a set of construction plans, did not control funding for the construction, did not provide any on-site supervision or inspection; did not receive any participation rent, in summary there is not sufficient evidence that the landlord actively participated to the extent that the court ought to find that the applicant made an implied request of the respondents to do work or provide materials. ...
>
> 10 Our review of the record reveals no overriding or palpable error on the part of the adjudicators below. There is no question that the Landlord intended an arrangement whereby considerable control might have been exercised over tenant's improvements. And had that intended participation materialized, it might well have satisfied the test.

[28] There are three cases which deal with the category (iii) situation involving developers who allow purchasers to begin building prior to conveyance to the purchaser, and I will now refer to them chronologically.

[29] In ***Stealth Enterprises Ltd. v Hoffman Dorchik***, 2000 ABQB 311, 2000 CarswellAlta 311, S & U Homes Ltd. ("S&U") was the registered owner of an apartment building. They sold the building by agreement for sale to 632766 Alberta Ltd. ("632") who intended to convert it into condominiums. In order to obtain financing to close the purchase, 632 refinished four of the apartment suites into show suites and spent other money on refreshing the lobby and improving other units. The deal collapsed and an unpaid contractor hired by 632 filed a lien against S&U's title.

[30] S&U was aware that the work was being done by 632 but had no direct dealings with 632's contractors. S&U had the following clause put into its written agreement to sell to 632:

> In the event the purchaser fails to complete on July 31, 1995 (or August 31, 1995 if extended) all work done by the purchaser shall become the property of the vendor without compensation and the vendor shall be entitled to all benefits and registrations and plans to stratify the building without compensation to the purchaser.

[31] S&U was held not to be an owner for the purposes of section 1(j) of the BLA. The Court reasoned as follows:

2018 ABQB 617 (CanLII)

> 40 In this case, there was no active participation by either [of the principals of S&U]. [One of the principals of S&U] may have directed or given approval to [the lien claimant] to carry out certain work with respect to cleaning apartments so they could be re-rented; however, that work was relatively minimal. Certainly S&U obtained a benefit from the work which was done in that some of the suites had been upgraded and the lobby was expanded and made more visually appealing. Work had been done on the exterior. But none of the renovations were carried out at their request. They could have cared less about condominiumizing this building. They had no say in what was done, they gave no directions with respect to how anything should be done. The only way in which they stood to benefit was should the transaction not proceed, they would receive, without paying for them, certain upgrades. However, they were more interested in selling the building than reaping the so called benefits.

[32] The Court of Appeal dismissed an appeal from this ruling at 2003 ABCA 58, 2003 CarswellAlta 242.

[33] The second decision of note is ***E. Gruben's Transport Ltd. v Alberta Surplus Sales Ltd.***, 2010 ABQB 244, 2010 CarswellAlta 653. In that case the owner/developer (registered owner) was Alberta Surplus Sales Ltd. who agreed to sell 3 lots totalling 150 acres to1327923 Alberta Ltd. ("132"). In the agreement for sale Alberta Surplus allowed 132 to move ahead with development prior to closing, which involved 132 doing road work in order to further subdivide the land from 3 lots into 42 lots.

[34] Gruben's was a subcontractor doing road construction work needed for the further subdivion, and when the purchase fell through Gruben' filed a lien against Alberta Surplus' land.

[35] The Court disallowed Gruben's lien, reasoning as follows:

> Alberta Surplus Sales accommodated 1327923 in its effort to have the land subdivided. Though it had a reason for itself wanting the land subdivided, and though its approval of the subdivision documents was required to effect the subdivision, it had no direct or indirect involvement in arranging for the road work to be done. Its participation in the road work was entirely passive. It did not request that work either expressly or impliedly. It was not an "owner" within the meaning of s. 1(j) of the Builders' Lien Act. Gruben's lien is invalid.

[36] The third decision on point is ***Acera Developments Inc. v Sterling Homes Ltd.***, 2010 ABCA 198, 2010 CarswellAlta 1928, a decision which cited neither the ***Stealth Enterprises*** decision nor the ***Gruben's Transport*** decision.

[37] In ***Acera***, Acera Developments Inc. was the developer/vendor (registered owner of land) who agreed to sell land to Sterling Homes Ltd. and allowed Sterling to build on the land prior to completion of the purchase, in fact, prior to finalization of the subdivision of the land.

[38] When subdivision approval of the land was refused, Stirling filed a builders' lien for the value of the work done.

[39] Dealing with the first requirement under section 1(j) of the BLA that the work done by Stirling was done at the request, express or implied, of Acera, the Court of Appeal focussed on the degree to which Acera became involved in the construction. The Court stated at para 36 of its decision:

2018 ABQB 617 (CanLII)

> ... there was, in my opinion, sufficient interaction between the builder and the developer to support the conclusion that the construction proceeded prior to subdivision at the owner's request. Indeed, the liened party who was actively involved in the supervision of the construction was fully aware that the construction was proceeding prior to subdivision approval. The lien claimant was contractually bound to construct improvements to a specific standard and scope. Indeed, Acera's architectural and construction guidelines required that Acera approve the construction plans, elevations, finished grades, finishing materials and colours, final grade slips, setbacks, foundation designs, auxiliary buildings and fencing, and landscaping. All such plans were approved prior to construction. The construction was inspected by Acera as work progressed. In my opinion, that is sufficient to conclude that the homes were constructed at the request of the liened party.

[40] Dealing with the second requirement under section 1(j) that the work done by Stirling was for the direct benefit of Acera, the Court of Appeal stated at paragraphs 37, 38, and 39 of its decision:

> 37 It remains, accordingly, to consider whether the work done and the material furnished by Sterling accrued to the "direct benefit" of Acera. Acera allowed Sterling to improve its lands. In law, the improvements become attached to the land and are owned by the owner of the freehold. Until the subdivision plan is registered Acera is prohibited from selling the lots, so it must be taken to have invited Sterling to improve the lands "for its [Acera's] direct benefit". Acera owns the freehold, therefore it owns the improvements, therefore it is directly benefitted. Having allowed Sterling in as a tenant-at-will it cannot argue the improvements were done against its will, i.e. that they were "not requested". Paragraph (iv) of the definition of "owner" is satisfied.
>
> 38 Acera has failed to transfer the lots in accordance with the lot purchase agreement. Accordingly, Sterling cannot sell the homes to interested third parties. It follows that Acera has directly gained the value of the improvements to the lands and will continue to hold that increase in value to its benefit as long as it retains title to the lands. In other words, were it not for Sterling's lien, Acera would keep the benefit of the improvements. Therefore, until such time as Sterling is able to acquire title to the homes, the direct benefit from the entirety of the work accrues to Acera.
>
> 39 In addition, the contractual arrangement whereby Sterling would build homes in advance of acquiring title to the land included, as I have found, the implied request by Acera of Sterling to do just that. All of this, as I have indicated, took place under the watchful eye and subject to the stringent building requirements imposed by Acera. It is apparent, by way of illustration, that strict adherence to Acera's architectural and construction guidelines were intended to facilitate and enhance the development of Acera's lands. In that sense, mindful that it was anticipated that construction would begin before sub-division approval and transfer of the lots was obtained, such construction was of direct benefit to Acera.

2018 ABQB 617 (CanLII)

Conclusion

[41] In my view, considering the three decisions cited above, and based on the observations contained in paragraphs 17 to 22 of this decision, it is clear that Georgetown did not become sufficiently involved in 167's construction process so as to render Georgetown an 'owner' for the purposes of section 1(j) of the BLA.

[42] Another observation I would make, but not one upon which I make my decision, is that it seems one of the factors leading to upholding the lien filed by the builder in ***Acera*** was the unfairness of the developer encouraging and participating in construction by the builder prior to subdivision taking place, and then the developer through its own default (failing to meet a municipal requirement for subdivision) not accomplishing subdivision. That is not a factor in the present case.

[43] I rule that the liens filed by the respondent lien claimants are invalid and that the $245,045.21 paid into court to discharge the liens be paid out to the solicitors for Georgetown.

Costs

[44] If the parties cannot agree on costs they may seek a ruling from me in that regard.

Heard on the 15th day of August, 2018.
Dated at the City of Calgary, Alberta this 20th day of August, 2018.

J.T. Prowse
M.C.C.Q.B.A.

Appearances:

Jeffrey Wreschner
Masuch Law LLP
for the Applicant Georgetown

Glen Hickerson
Wilson Laycraft
for the Respondent lienholders

2018 ABQB 617 (CanLII)

Tab 10

Court of Queen's Bench of Alberta

Citation: Davidson Well Drilling Limited (Re), 2016 ABQB 416

2016 ABQB 416 (CanLII)

Date: 20160725
Docket: 1303 08651
Registry: Edmonton

In Bankruptcy and Insolvency

In the matter of Davidson Well Drilling Limited

And in the Matter of Recognition of the Order of the Ontario Superior Court of Justice Dated April 16, 2013

Applicant Pricewaterhousecoopers Inc. in its Capacity as Court-Appointed Receiver of Davidson Well Drilling Limited

Respondent Bank of Montreal

Corrected judgment: A corrigendum was issued on July 26, 2016; the corrections have been made to the text and the corrigendum is appended to this judgment.

Reasons for Decision
of the
Honourable Madam Justice J.M. Ross

Introduction

[1] The Court-appointed Receiver of Davidson Well Drilling Limited [Davidson] seeks approval of its proposed distribution of lien funds. Lien claimants Century Wireline Services [Century], Clean Harbors Energy and Industrial Services Corp [Clean Harbors], 72619 Alberta Ltd (o/a Roughrider International) [Roughrider], Bruno's Trucking Ltd [Bruno's] and Acme

liens other than the issue of whether the lien period was 45 days (in which case the liens were filed out of time) or 90 days (in which case the liens were conceded to be valid).

[64] As I have found that the applicable lien period was 90 days, the Clean Harbors liens are declared valid in the claimed amounts.

Roughrider

[65] Roughrider provided site services related to repair and maintenance of Davidson's rigs and support equipment. Roughrider registered a lien in the amount of $38,525.55 on April 16, 2013. It last provided services on January 16, 2013. As the lien period is 90 days, Roughrider's lien was filed in time.

[66] The Receiver withdrew its objection to the Roughrider lien based on whether a prevenient arrangement had been established. The sole remaining issue regarding the Roughrider lien is whether its work was provided "in respect of an improvement".

[67] The equipment that Roughrider provided maintenance services to was not affixed to the lands or intended to become part of the lands. The Receiver relies on the case of ***Orban Industries Ltd v Gauntlet Energy Corporation***, 2004 ABCA 20, at paras 8 and 13 [***Orban***] for the proposition that labour and materials provided to structures that are not in themselves improvements, are not properly included in the lien.

[68] ***Orban*** is a decision of a single Justice of the Court of Appeal on a leave to appeal application. The chambers judge below held that the provision and installation of sour gas line heater/separator packages, used to extract natural gas, were not improvements. On the leave application, the issue was described as:

> …whether the chambers judge erred in determining that this equipment, its use, its method of installation and the method of affixation satisfied the definition of improvement under the *BLA*. In arriving at her conclusion that it did not, she considered the evidence before her, the purpose and use of the equipment and the specific method of affixation. She concluded, on the evidence before her, that the separator packages in this case were not intended to be or to become part of the land in question. She rejected what she called "the bald proposition" advanced by ***Orban*** that anything done to recover minerals is an improvement to the mineral interest under the *BLA*.

[69] The Appeal Justice held that the issue of whether ***Orban*** had a valid lien under the *BLA* was a question of mixed fact and law, and the standard of review was high. No sufficient error on the "fact specific" issue of whether there was an improvement was shown. The chambers justice had also not erred in law. The Appeal Justice held that the "proposition that a drilling well is an improvement and thus materials supplied or services render in connection with a well are, without more, entitled to a builder's lien" was not supported by the case law.

[70] There are important distinctions between ***Orban*** and this case. In this case it is clear that the Work constituted an improvement to the Syncrude lands. The existence of an improvement was conceded when the Receiver approved payment of liens registered within 45 days. The Receiver did not revoke this concession at the hearing. From the facts provided regarding the nature of the Work, there is no reason to question that it constituted an improvement, which includes "anything constructed, erected, built, placed, dug or drilled or intended to be

2016 ABQB 416 (CanLII)

constructed, erected, built, placed, dug or drilled, on or in land except a thing that is neither affixed to the land nor intended to be or become part of the land": *BLA* s 1(d).

[71] The connection, if any, between the separators and any improvement to the land is not clear from the decision in ***Orban***. In contrast, the connection between the equipment and rigs maintained by Roughrider, and the improvement constituted by the Work, is clear. "Roughrider supplied and rendered on-demand (continual) mechanical maintenance services for Davidson's oil and gas drilling and exploration rigs, loader and support equipment essential to exploration drilling (the "Services"). The Services supplied by Roughrider were absolutely essential to the exploration and drilling operations and improvements to the lands" (Affidavit of Laura Secord).

[72] The issue is whether this connection is sufficient to show that the Roughrider services were performed "on the improvement": *BLA* s 1(p).

[73] Roughrider relies on the Saskatchewan Court of Appeal decision in ***Grey Owl Engineering Ltd v Propak Systems Ltd***, 2015 SKCA 108, at paras 22-26:

> [22] …Cameron J.A. stated he [preferred] instead to consider whether the reconstruction of the rail line constituted an improvement to the land and then [ask] the question whether Brewster did any work upon that improvement or render any services for it…[citing *Clarkson Company v Hansen* (1983), 22 Sask R 126 (CA) (*Hansen*)]
>
> [23] This approach, which focuses on the main contract or contracts rather than its individual subcontracts and the work being done under them, has been consistently followed and applied in this jurisdiction. In *Pritchard Engineering Company v Coronach*, [1983] 30 Sask R 137 (QB), the main contract was between the owner, the town of Coronach, and Wes-Can Underground Ltd. and involved the construction of a water supply line and associated tasks within the water treatment plant. Wes-Can hired Ray's Transport Ltd. to transport equipment to the job site at Coronach and upon termination of the work to return the equipment to Saskatoon. Applying *Hansen*, Sirois J. found first that the construction work under the main contract was an "improvement" (para. 5) and second that Ray's Transport had provided services "in respect of" that improvement (para. 16). He concluded by saying, "The hauling of the equipment by Ray's Transport to a point on the improvement site was solely to enable Wes-Can Underground Ltd. to carry out its contract with the Town of Coronach."
>
> [24] Similarly, in *BWV Investments Ltd. v Saskferco Products Inc.* (1993), 114 Sask R 306 (QB), MacPherson C.J.Q.B. applied *Hansen* to uphold a claim of lien for the rental of 29 trailers located on the building site and used in the construction of the Saskferco fertilizer plant. As part of his reasoning, MacPherson C.J.Q.B. noted that neither the trailers, nor any part of them, were consumed by or integrated into the actual construction of the fertilizer plant, but that such a finding did not determine the validity of the lien (para. 14). He held that the supply of the trailers constituted a "service performed on or in respect of" the construction of the fertilizer plant (para. 24).
>
> [25] Finally, in *Royal Bank of Canada v Saskatchewan Power Corporation* (1990), 1990 CanLII 7611 (SK QB), 84 Sask R 277 (QB), counsel for the Bank

2016 ABQB 416 (CanLII)

> argued that steel poles modified and delivered by subcontractors, for use in Saskatchewan Power's transmission lines, could not be considered improvements because the poles were movable. MacLean J. rejected this argument, finding that the improvement in question was not the poles but the transmission line itself. This Court affirmed the decision in brief oral reasons (see (1990), 84 Sask R 275 (CA)). Neither the Court of Queen's Bench nor this Court referred to *Hansen*, but both Courts appear to have taken it as self-evident that the improvement was the work the owner was performing on the land and not the work performed by the various subcontractors and others contracting with them.
>
> [26] In [] *Hansen*, Cameron J.A. stated, "the principal object of this Act is to better ensure that those who contribute work and material to the improvement of real estate are paid for doing so" (para. 30). This approach to builders' lien legislation has a long provenance in this jurisdiction.

2016 ABQB 416 (CanLII)

[74] The Receiver submits that ***Grey Owl*** should be distinguished, as the Saskatchewan legislation defines "improvement" more broadly than the *BLA*.

[75] The *Builders' Lien Act*, SS 1984-85-86, c B-7.1, s 2(1)(h) provides:

> (h) "improvement" means a thing constructed, erected, built, placed, altered, repaired, improved, added to, dug or drilled or intended to be constructed, erected, built, placed, altered, repaired, improved, added to, dug or drilled on or into, land, except a thing that is not affixed to the land or intended to become part of the land and includes:
>
> > (i) landscaping, clearing, breaking, excavating, digging, drilling, tunnelling, filling, grading or ditching of, in, on or under land;
> >
> > (ii) the demolition or removal of any building, structure or works or part thereof;
> >
> > (iii) services provided by an architect, engineer or land surveyor ...

[76] I reject this proposed distinction. The *BLA* definition of "improvement" is virtually identical. The additional express inclusions under s 2(1)(h)(i) of the Saskatchewan Act do not detract from the breadth of the basic definition under both Acts. In any event, the issue is not whether the Work constituted an improvement, but whether Roughrider's services were "on the improvement" (s 1(p)). This language in the *BLA* is similar to s 22 of the Saskatchewan Act considered in ***Grey Owl***, which gave lien rights to those providing services "on or in respect of an improvement".

[77] Further, the approach in ***Grey Owl*** is fully in accord with the approach in a number of Alberta Court of Appeal cases, including ***Schlumberger***, discussed above, and ***PTI Group Inc v ANG Gathering & Processing Ltd***, 2002 ABCA 89 at para 11 [***PTI Group***], citing ***Alberta Gas Ethylene Co Ltd v Noyle***, 1979 ABCA 334, 20 AR 459 [***Alberta Gas***].

[78] In paragraphs 8-10 of ***Alberta Gas***, the Court of Appeal held:

> [8] It is apparent that the work done by Burmac was done directly upon the portable buildings and the propane supplied by Cigas was used in those buildings.

This in itself does not create the basis for a lien against the land, as there is no evidence that the portable buildings were improvements. Their description as "mobile" makes it apparent that they were "neither affixed to the land nor intended to be or become part of the land". Further, the respondents do not contend that the portables were improvements.

[9] The improvement involved in this case was the construction of a gas extraction plant. The issue is whether Burmac's work and Cigas' materials were work and materials done or used "upon or in respect of" that improvement. In essence this amounts to a determination of whether work done and materials used to provide sleeping accommodation and food services for persons who labour upon an improvement are work done and materials used "in respect of" an improvement.

[10] As I see the problem, the respondents' work and materials must be examined in relation to **the overall project**, rather than in relation to the rented chattels on which they were directly expended. This approach is in line with that taken by Darling, Co. Ct. J. in *Cigas Products Ltd. v. Tamarisk Developments Ltd. and Young* [1976] 6 W.W.R. 733. In that case the lien claimant had rented propane tanks and heaters to a general contractor for use in drying out concrete and for heating the building during construction. It also installed the equipment and supplied fuel for it. The plaintiff was not allowed a lien for the rental amount of the units, as the British Columbia Mechanics' Lien Act contains no equivalent to our s.4 (4). However, the liens in respect of the cost of the fuel and for the installation of the heating equipment were allowed. The learned County Court judge said at page 735:

> The evidence satisfies me that Cigas qualifies as a materialman suppling materials to or for the improvement, that is, the propane gas for the making of this improvement. Drying out cement and walls is a necessary part of the building procedure. Without getting technical, the chemical process, I understand on the evidence, is equivalent to its being consumed and incorporated in the course of construction. The same reasoning applies to the item of labour and materials to install the tanks, pipes and heaters. Cigas, as I find, is in the position of a subcontractor to do such work and, in a limited sense, to do such work upon and to furnish such materials as the pipes, the fittings and the blocks for the installation of the equipment. Cigas supplied its own workmen under its supervision and paid them for the installation labour. Next, the blocks, pipes and fittings are not recoverable or re-usable, but remain on the lands of the defendant Tamarisk."

[79] I conclude that both the Alberta Court of Appeal and the Saskatchewan Court of Appeal consider "improvement" from the perspective of the "overall project" involved. In other words:

(i) the "overall project" is the "improvement";

(ii) the "overall project" constitutes the "thing constructed, erected, built, placed, altered, repaired, improved, added to, dug or drilled or intended to be constructed,

2016 ABQB 416 (CanLII)

erected, built, placed, altered, repaired, improved, added to, dug or drilled on or into, land"; and

(iii) the "overall project" would also be the thing that is "affixed to the land or intended to become part of the land."

[80] To the extent that ***Orban*** is inconsistent with this approach, and I am not sure that it is inconsistent, it has less weight as the decision of a single Justice, while the other decisions cited were by full panels of the Court of Appeal.

[81] The focus is thus not whether the equipment serviced by Roughrider was an improvement affixed to the land, but whether the services provided by Roughrider were on the improvement constituted by the Work.

[82] ***PTI Group*** makes it clear that "services need not be physically performed upon the improvement to fall within the meaning of the Act. They must, however, be 'directly related to the process of construction'": para 16. "[I]t is the degree of proximate connection to the process of construction that must be evaluated": para 17. Relevant inquiries include (para 18):

a) whether the contractors, sub-contractors and owners contemplated that the services provided were necessary to expedite the construction of the improvement;

b) whether the off-site services could have been provided on the site;

c) whether the improvement could have been carried out absent such off-site services; and

d) whether in all of the circumstances, the off-site services were so essential to the construction of the improvement and so directly connected with it, that it can be said that the services in question were "primary" in nature.

[83] I am satisfied that the connection of Roughrider's services to the Work established by the evidence – essential on-demand maintenance services for equipment that was in turn essential to the drilling operations – demonstrates the required connection to the improvement. Some of the services were provided "out in the field where drilling and exploration operations were being performed". The services were requested by Davidson's field managers and site supervisors when a piece of equipment broke down. "Were it not for Roughrider's essential and timely services, Davidson's drilling and exploration work on the Sites simply would have stopped entirely" (Affidavit of Laura Secord).

[84] Roughrider's lien is declared valid in the claimed amount.

Bruno's

[85] Bruno's rented a gen set and a transformer to Davidson. Bruno's removed most of its equipment on March 8, 2013. Bruno's lien in the amount of $92,817.35 was registered on May 14, 2013. As the lien period is 90 days, Bruno's lien was filed in time.

[86] Again, the Receiver is not pursuing the argument that the lien was registered against the wrong Syncrude lease.

2016 ABQB 416 (CanLII)

Tab 11

Court of Queen's Bench of Alberta

Citation: Northern Dynasty Ventures Inc v Japan Canada Oil Sands Limited, 2020 ABQB 275

2020 ABQB 275 (CanLII)

Date: 20200420
Docket: 1403 06762
Registry: Edmonton

Between:

Northern Dynasty Ventures Inc. and Tyalta Industries Inc.

Plaintiffs

- and -

Japan Canada Oil Sands Limited formerly Japan Oil Sands Alberta Limited

Defendant

- and -

Highway Rock Products Ltd.

Third Party Defendant

Reasons for Decision
of the
Honourable Madam Justice G.D.B. Kendell

Appeal from the Decision by
L.R. Birkett Q.C., Master in Chambers

Pronounced the 22nd day of May, 2019

2020 ABQB 275 (CanLII)

Background

[1] The Appellant, Northern Dynasty Ventures Inc. ("NDV"), appeals the order of Master Birkett granted on May 22, 2019, where she ordered and declared the validity of NDV's lien in the amount of $1,260,312.75, as well as the validity of lien of the Respondent, Tyalta Industries Inc. ("Tyalta"), in the sum of $721,830.68, and directed the payment of Tyalta's pro rata share out of the lien fund. Tyalta was awarded the sum of $244,493.23.

[2] The background facts as set out in NDV's Special Brief, which were not disputed, are as follows:

> Japan Canada Oil Sands Limited, ("JACOS"), is the operator of an oil sands project known as the Hangingstone Expansion Project near Fort McMurray, Alberta ("Hangingstone Project").
>
> On or about August 28, 2013, JACOS entered into a Master Purchase Agreement with Highway Rock Products Ltd. "HRP".
>
> NDV and Tyalta were subcontractors to HRP in respect of the Master Purchase Agreement.
>
> On or about September 16, 2013, NDV entered into a written agreement with HRP (the "Gravel Contract"), whereby NDV granted HRP an exclusive license to remove sand and gravel from a gravel pit which was located approximately 30 kilometers away from the Hangingstone Project site, accessible by road a driving distance of 89 kilometers. The consideration for the Gravel Contract was payments to be made by HRP to NDV.
>
> Tyalta rented to HRP equipment used to crush and screen sand and gravel at the gravel pit.
>
> All of the gravel was provided to JACOS for its use in connection with the Hangingstone Project.
>
> The Gravel Contract was terminated by NDV due to unpaid accounts owing by HRP to NDV.
>
> NDV and Tyalta filed liens against JACOS' lease for unpaid accounts rendered to HRP.
>
> The lien fund was set in the sum of $671,684.70.
>
> $403,010.02 has been paid to NDV. The entitlement to the balance of the lien fund was the subject of the Application before Master Birkett. At all relevant times, the Tyalta equipment was located at the gravel pit and not at the Hangingstone Project site.

Standard of Review

[3] The standard of review from an appeal of a Master to a Justice is correctness, and the appeal is a hearing de novo: ***Bahcheli v Yorkton Securities Inc***, 2012 ABCA 166 at para 30.

Analysis

[4] This appeal involves the interpretation of Section 6(4) of the *Builders' Lien Act*, RSA 2000, c B-7, which provides:

> 6(4) For the purposes of this Act, a person who rents equipment to an owner, contractor or subcontractor is, while the equipment is on the contract site or in the immediate vicinity of the contract site, deemed to have performed a service and has a lien for reasonable and just rental of the equipment while it is used or is reasonably required to be available for the purpose of the work.

[5] NDV argues that Tyalta's lien is invalid because it cannot satisfy this provision. It submits that the "contract site" is the Hangingstone Project site, and argues that the gravel pit is not in the immediate vicinity of the Hangingstone Project site.

[6] Tyalta replies that: "having the rental equipment be used in the specific areas covered by a mineral lease is not required to establish lien rights. All that is necessary is a sufficient nexus to the use of the rental equipment and improvements to the estate or interest to which the lien attaches".

[7] Our Court of Appeal has set out the interpretive approach to be followed in respect of this Act, and explained that a liberal approach may be taken to determining the scope of a lien right, but a strict interpretation is placed on the procedure that is required to enforce a lien: ***Tervita Corporation v ConCreate USL (GP) Inc***, 2015 ABCA 80 at para 5; see also ***E Construction Ltd v Sprague-Rosser Contracting Co Ltd***, 2017 ABQB 99 at para 47; ***Davidson Well Drilling Limited (Re)***, 2016 ABQB 416 at para 22. Our Court of Appeal also explored the purpose of this Act in ***Maple Reinders Inc v Eagle Sheet Metal Inc***, 2007 ABCA 247 at para 22, aff'g 2006 ABQB 150.

A. Where is the Contract Site?

[8] The contract site was not defined in the Master Purchase Agreement or in the Gravel Contract.

[9] The reference to "contract site" only appears in s 6(4) of the *Builders' Lien Act*. Counsel advised that there has been no judicial consideration of "contract site" in the *Builders' Lien Act*.

[10] I find that the Hangingstone Project site is the "contract site". The Tyalta equipment was used to crush and screen gravel and sand for use in constructing the Hangingstone Project. Although NDV reaped the financial benefits, given the exclusive lease of the gravel pit granted to HRP, the gravel pit was not improved: nothing was constructed at the gravel pit. The off-site work performed using the rental equipment resulted in gravel and sand that was used in constructing the Hangingstone Project, and directly contributed to the actual physical construction of the improvement. As argued by counsel for Tyalta, the rental equipment was part of the overall project or common purpose in relation to the Hangingstone Project.

2020 ABQB 275 (CanLII)

[11] As Master Prowse found in ***MJ Limited (MJ Trucking) v Prairie Mountain Construction (2010) Inc***, 2016 ABQB 395 at para 53: "… a builders' lien under current Alberta legislation can be validly registered on land, even though the improvement was not made on that land, provided that there is a common purpose, including at least some geographical proximity, between the site where the work was done and the land upon which the lien was registered".

[12] It is clear that the removal of gravel did not improve the gravel pit. The common purpose in this case is the construction of the Hangingstone Project.

[13] It is clear on the record before me that the Hangingstone Project required gravel, which was not available on the Hangingstone Project site, and thus had to be transported to the site.

[14] I find on the facts of this case that the gravel pit and the Hangingstone Project site had some geographical proximity as set out in MJ Trucking above. However, s 6(4) of the *Builders' Lien Act* requires more that geographic proximity: it requires the equipment to be in the immediate vicinity of the contract site.

B. What is the Meaning of Immediate Vicinity?

[15] No authority was provided to establish that the immediate vicinity means the closest gravel pit available. Both "immediate" and "vicinity" are synonymous with near.

[16] I must interpret "immediate vicinity" in the context of the factual matrix.

[17] In oral submissions, NDV argued that there was another gravel pit which was 49 kilometers away from the Hangingstone project, thus closer, by road, than the gravel pit chosen. No evidence was provided that this gravel pit was suitable for Hangingstone's purpose.

[18] NDV argued that immediate vicinity in the builders' lien context was canvassed in the Ontario case of ***1508270 Ontario Ltd v Laudervest Developments Ltd***, 2007 CanLII 79364, [2007] OJ No 5434, 2007 CarswellOnt 10017 (SCJ), in reference to the *Construction Lien Act*, RSO 1990, c 30, which states at s 1(2):

> 1 (2) For the purpose of this Act, materials are supplied to an improvement when they are,
>
> > b) placed upon land designated by the owner or an agent of the owner that is in the *immediate vicinity* of the premises, but placing materials on the land so designated does not, of itself, make the land subject to a lien;

[19] In ***Laudervest Developments***, the Court found that the producer of kitchen cabinets intended to be installed in a condominium project was not entitled to a lien for cabinets which had been directed to be stored at the contractor's warehouse. Storing the cabinets at an off-site warehouse did not meet this definition.

[20] ***Laudervest Developments*** is distinguishable on its facts. This is not a case of materials stored off-site, such as lumber placed on an adjacent property. Further, the Court explained the rationale of the *Act* (at para16):

> ... When a contractor or material supplier provides work and materials are incorporated into the owner's land or placed in the owner's control, the owner receives a benefit, whether it is paid for or not. The contractor is not in a position to takeback the materials and deprive the owner of the benefit because they have

2020 ABQB 275 (CanLII)

> become part of the owner's improvement to the property. The lien remedy stands in the place of the contractor's ability to retrieve his work product and gives him a higher priority than other creditors…

[21] In that case, the cabinets never became part of the owner's improvements and there was nothing for the contractor to takeback since it retained control of the cabinets.

[22] In this case, the renting of equipment is considered 'work' under s 6(1) of the *Builders' Lien Act*. The rental equipment was used to crush, screen and extract gravel, which was used in the constructions of the Hangingstone Project, resulting in an improvement. Tyalta cannot "takeback" the rental use of the equipment or the sand and gravel that has been used in the construction of the Hangingstone Project: it has become part of the owner's land. As submitted by Tyalta in its Brief before the Master, at para 17:

> Furthermore, the BLA [*Builders' Lien Act*] distinguishes between when materials are supplied and when work is supplied. The BLA recognizes that "work" is lienable when it supplied on or in respect to an improvement (Section 6(1)(a)), as opposed to materials, which are lienable when they are furnished in respect of an improvement Section 6(1)(b).

[23] I find on the facts of this specific case that the gravel pit and the Hangingstone Project site are in the immediate vicinity of each other. Thus, as the rental equipment was at all relevant times located at the gravel pit, the rental equipment was in the immediate vicinity of the contract site (the Hangingstone Project site). The gravel was not obtained out of country, out of province, or even in central or southern Alberta. Given the nature of gravel pits, immediate vicinity must be considered in context.

[24] Take, for example, Tim Hortons. If someone was located in the centre of the City of Edmonton and argued that a Tim Hortons restaurant 30 kilometers away, as the crow flies, or a driving distance of 89 kilometers was in their immediate vicinity, I would dispute that claim, because there are numerous Tim Hortons locations that are much closer than the distance described. The same cannot be said for a gravel pit. Immediate vicinity must be considered on the specific and unique facts of a particular case.

C. Is There a Common Purpose Between the Two Sites? Is This a Case of an Overall Purpose?

[25] Although I have found that the Hangingstone Project site is the "contract site", it is not necessary to determine same, as I am satisfied the two sites are in the immediate vicinity of each other. I accept Tyalta's argument that there is a common purpose in the work being done at the gravel pit and at the Hangingstone Project, as the work being done at the gravel pit is part of the "overall' Hangingstone Project.

[26] In ***Trotter and Morton Building Technologies Inc v Stealth Acoustical & Emission Control Inc (Stealth Energy Services)***, 2017 ABQB 262 Master Prowse stated at para 57:

> In other words, even where the lien is filed on the 'wrong' land it is the "overall project" (to use the language found in the D*avidson* decision) which is considered, and thus work may be considered to have been done on an improvement even where the work was done on another parcel of land and not the parcel that was liened."

2020 ABQB 275 (CanLII)

[27] Even if I am incorrect in finding that the Hangingstone Project site is the “contract site”, ***Trotter and Morton*** stands for the proposition that a lien filed against the wrong parcel of land may still be valid, as long as the “work” performed at the wrong land (i.e. the gravel pit) is found to be part of the overall project.

[28] In her oral decision, the Learned Master referred to the Alberta Court of Appeal decision in ***PTI Group Inc v ANG Gathering & Processing Ltd***, 2002 ABCA 89, where Berger J.A. had stated at para 18:

> The remedy contemplated by the Act, as both Moir and Lieberman JJ.A. recognized *(in Hett et al. v. Samoth Realty Projects Ltd. (1977) 3 Alta. L.R. (2d) 97 at 105)*, must be subject to some limit. That limit will largely be determined by the factual matrix of each case that presents for adjudication. The relevant inquiries will include:
>
> a) whether the contractors, subcontractors and owners contemplated that the services provided were necessary to expedite the construction of the improvement.
>
> b) whether the off-site services could have been provided on the site.
>
> c) whether the improvement could have been carried out absent such off-site services.
>
> d) whether in all of the circumstances, the off-site services were so essential to the construction of the improvement and so directly connected with it, that it can be said that the services in question were “primary” in nature.

[29] It is not contested that the sand and gravel were necessary for the Hangingstone Project construction. It is not contested that the Hangingstone Project site did not have the sand and gravel necessary for the project. I heard no evidence the Hangingstone Project site could have been improved without the sand and gravel, thus I am I am prepared to find that the improvements could not have been carried out in the absence of the sand and gravel.

[30] The final question is, were the services of Tyalta so integral and essential to the construction of the project, that it can be said to be primary in nature? The Learned Master below stated at page 60 of the Proceedings Transcript:

> Now I understand Mr. Kirwin’s [Counsel for NDV] argument that this case is not directly on point. They are talking about primary versus secondary services, but I think the analysis of off-site and the focus on the factual matrix of each case presented for adjudication is applicable to this situation where we have -- obviously the aggregate is necessary. We have got over a $6 million contract to provide aggregate to this Hangingstone Project. The off-site services could not have been provided on site. The evidence is there were other gravel pits around but certainly not on the Hangingstone site itself.

[31] I find that the test in ***PTI Group Inc*** is applicable in this case, and has been met. The two sites clearly have a common purpose: the construction of the Hangingstone Project site. The “work” performed is an integral part of the overall project.

2020 ABQB 275 (CanLII)

D. The Floodgates Argument

[32] NDV argued that in the event that Tyalta was entitled to a lien for its equipment not on the Hangingstone Project contract site, then the lessors of any vehicles used by HRP to transport gravel to the Hangingstone Project site would also be entitled to a lien; so too would be the lessors of equipment to any other subcontractors or material suppliers, not at the contract site, but whose equipment was used to produce products at the site.

[33] With respect, the leased equipment in this case is not the same as a truck which simply transports gravel from the gravel pit to the Hangingstone Project site. The rented crushing and screening equipment were a Cone Crusher, a Jaw Crusher, a Conveyor, a Telescoping Conveyor, a Screener and a Nor-Tech Feeder. While I do not profess to know what each of the pieces of equipment actually do, the equipment was used to extract, crush and screen the sand and gravel so that it was suitable for the Hangingstone Project.

[34] As per s 6(4) of the *Builders' Lien Act*, a person who rents equipment on the terms set out in the section is deemed to have performed a service and has a lien for reasonable and just rental of the equipment while it is used or is reasonably required to be available for the purpose of the work.

[35] Further, the key is that the equipment has to be at the contract site or in the immediate vicinity of the contract site.

[36] It would be speculative to discuss the potential rights of other persons under the *Builders' Lien Act* without a proper factual matrix. In considering NDV's argument, material suppliers who are not at the contract site would have to be in the immediate vicinity in order to claim a lien. Immediate vicinity would have to be assessed in the context of each material supplier, and each material supplier would have to establish that they fall under s 6(4) of the *Builders' Lien Act* as a person who rents equipment to an owner, contractor, or subcontractor, and that the rented equipment is being used or is reasonably required to be available for the purpose of the work. In my view, it would be unjust to use this argument to defeat Tyalta's legitimate claim for a lien under s 6(4).

Conclusion

[37] In my view, Tyalta has satisfied the requirements of s 6(4) of the *Builders' Lien Act* and its lien is therefore valid. The appeal is dismissed.

2020 ABQB 275 (CanLII)

[38] If the parties are unable to agree on costs, they may provide written submissions to me within 60 days after the release of this decision.

Heard on the 15th day of January, 2020.
Dated at the City of Edmonton, Alberta this 20th day of April, 2020.

2020 ABQB 275 (CanLII)

G.D.B. Kendell
J.C.Q.B.A.

Appearances:

Patrick D. Kirwin
Kirwin LLP
For the Appellant, Northern Dynasty Ventures Inc.

Bradley J. Smith
Verhaeghe Law Office
for the Respondent, Tyalta Industries Ltd.

COURT FILE NUMBER	2001-05482	Clerk's Stamp
COURT	COURT OF QUEEN'S BENCH OF ALBERTA	
JUDICIAL CENTRE	CALGARY	

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, as amended

AND IN THE MATTER OF THE COMPROMISE OR ARRANGEMENT OF JMB CRUSHING SYSTEMS INC. and 2161889 ALBERTA LTD.

AND IN THE MATTER OF A PLAN OF ARRANGEMENT OF JMB CRUSHING SYSTEMS INC. and MANTLE MATERIALS GROUP, LTD.

APPLICANTS	JMB CRUSHING SYSTEMS INC., 2161889 ALBERTA LTD., and MANTLE MATERIALS GROUP, LTD.
DOCUMENT	**BRIEF OF LAW OF JMB CRUSHING SYSTEMS INC. FOR ORDERS IN RESPECT OF BUILDERS' LIENS**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

Gowling WLG (Canada) LLP
1600, 421 – 7th Avenue SW
Calgary, AB T2P 4K9

Attn:	**Tom Cumming/Caireen E. Hanert/Alison J. Gray**
Phone:	403.298.1938/403.298.1992/403.298.1841
Fax:	403.263.9193
File No.:	A163514

TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. FACTS 1

A. Background 1
B. Bonnyville Project 3
C. The Liens 4

III. ISSUE 5

IV. LAW AND ARGUMENT 6

A. The Legislative Scheme 6
B. The Havener Liens and the Additional RBEE Lien Claim are Invalid 8
C. The Shankowski Liens are Invalid 8

V. CONCLUSION 12

I. INTRODUCTION

1. The Applicant, JMB Crushing Systems Inc., submits this brief in support of its Application to declare certain liens filed under the *Builders' Lien Act*, RSA 2000, c B-7 (the "***BLA***") invalid and have them discharged from title to the Havener Land and the Shankowski land (as described below).

2. Liens were registered against title to the Havener Land and the Shankowski Land by RBEE Aggregate Consulting Ltd. ("**RBEE**") and J.R. Paine & Associates Ltd. ("**J.R. Paine**") for aggregate crushing and testing in respect of a contract between JMB and the M.D. of Bonnyville No. 87 (the "**MD of Bonnyville**"). The liens registered against the Havener Land are invalid because none of the aggregate extracted, crushed and tested pursuant to the contract with the M.D. of Bonnyville was extracted from the Havener Land and no work was done on the Havener Land by RBEE or J.R. Paine. Thus, the Haveners are not an "owners" under the *BLA* and no work done by RBEE and J.R. Paine constituted an "improvement" of the Havener Land, as defined by the *BLA*.

3. The liens registered on the Shankowski Land are also invalid. While aggregate from the Shankowski Land was extracted, crushed and tested, such work was done to complete the 2020 supply under the contract with the M.D. of Bonnyville. Thus, Shankowski is not an "owner" under the *BLA* and no work done by RBEE and J.R. Paine constituted an "improvement" to the Shankowski Land, as defined by the *BLA*.

4. Consequently, JMB submits the liens registered by RBEE and J.R. Paine against the Havener Land and the Shankowski Land are invalid and should be ordered discharged from title.

II. FACTS

5. The following are found in the Affidavit of Jason Panter sworn October 9, 2020 (the "**Panter Affidavit**").

A. Background

6. JMB's business is the extraction, processing, transportation and sale of gravel, sand and other aggregates in the Province of Alberta. JMB either directly or through its subsidiary 2161889

Alberta Ltd., has rights of access to over 50 aggregate pits in Alberta through surface material leases with the Province of Alberta and royalty agreements with private individuals or companies, and has freehold title to one aggregate pit. The aggregates are produced to customer specifications and delivery services are provided to any location in northeastern Alberta.

Panter Affidavit at para. 4

7. JMB, through its predecessor company JMB Crushing Systems ULC ("**JMB ULC**"), entered into an Aggregates Royalty Agreement (the "**Shankowski Royalty Agreement**") with Jerry Shankowski ("**Shankowski**"). Shankowski is the owner of lands located at SW-21-56-7-W4 (the "**Shankowski Land**").

Panter Affidavit at para. 5

8. Pursuant to the Shankowski Royalty Agreement, JMB was granted the exclusive right to access the Shankowski Land to explore, prospect for, test, get, process and dispose of aggregates contained in the Shankowski Land.

Panter Affidavit at para. 6

9. In exchange for the exclusive rights granted to JMB, JMB was to pay royalties to Shankowski at differing rates depending upon the type and size of the aggregate removed from the Shankowski Land. The royalties were payable 90 days after the aggregate was removed from the Shankowski Land. In the aggregate industry it is common for land owners to grant licenses to aggregate companies in exchange for the payment of royalties on the volume of aggregate extracted from the land.

Panter Affidavit at para. 7

10. JMB ULC also entered into an Aggregates Royalty Agreement dated November 8, 2018 with Helen and Gail Havener (the "**Havener Royalty Agreement**"). The Estate of Helen Havener and Gail Havener own the land described as NW-16-56-7-W4M (the "**Havener Land**").

Panter Affidavit at para. 8

11. Pursuant to the Havener Royalty Agreement, JMB was granted the exclusive right to access the Havener Land to explore, prospect for, test, get, process and dispose of aggregates contained in

the Havener Land. JMB was also granted the right of first refusal to match any offer to purchase made on the Havener Land.

Panter Affidavit at para. 9

12. In exchange for the exclusive rights granted to JMB, JMB was to pay royalties to the Haveners at differing rates depending upon the type and size of the aggregate removed from the Havener Land. The royalties were payable 90 days after the monthly report of aggregate removed from the Havener Land is produced.

Panter Affidavit at para. 10

B. Bonnyville Project

13. On or about November 1, 2013, JMB ULC contracted with the MD of Bonnyville for the production, hauling and stockpiling of crushed aggregate materials for use in road construction (the "**Bonnyville Contract**").

Panter Affidavit at para. 11, Ex. C

14. In order to complete the 2020 supply for the Bonnyville Contract, JMB:

(a) Extracted aggregate from the Shankowski Land. In the aggregates industry, the removal of top soil and overburden to expose the raw aggregate pit run is also often referred to as "stripping". The exposed raw aggregate pit run is then kept in what is referred to as a gravel bank;

(b) Entered into a Subcontractor Services Agreement with RBEE, on or around February 25, 2020, pursuant to which RBEE agreed to provide crushing services of rock and gravel to JMB. RBEE was to provide crushing services to produce gravel from the raw aggregate pit run. RBEE was to provide crushing services in respect of the Bonnyville Contract;

(c) Between approximately February 25, 2020 and April 8, 2020, RBEE crushed the raw aggregate pit run extracted from the Shankowski Land. To do so, RBEE would move the raw aggregate pit run from the gravel bank (also referred to in the industry as "gravel marshalling") to RBEE's mobile crushing unit. This mobile crushing unit was brought onto the Shankowski Land by RBEE to perform the crushing services. Once the crushing services were complete, the mobile crushing unit would be removed from the Shankowski Land and returned to RBEE's premises;

(d) Asked RBEE to perform some stripping on the Shankowski Land. While JMB did the vast majority of stripping on the Shankowski Land for the Bonnyville Contract, RBEE did perform a small amount of stripping, as JMB did not strip and expose enough raw

aggregate pit run to complete the volume of crushing for the 2020 supply for the Bonnyville Contract. RBEE invoiced JMB $7,500 in stripping costs;

(e) Engaged J.R. Paine on or about April 1, 2020, to perform aggregate testing services in respect of the Bonnyville Contract. As part of the aggregate testing services provided, J.R. Paine tested the crushed aggregate from the Shankowski Land to ensure it complied with the specifications in the Bonnyville Contract. J.R. Paine's testing services were completed by April 8, 2020. J.R. Paine did not perform any testing services on the Havener Land or of aggregate from the Havener Land in respect of the Bonnyville Contract; and

(f) After the raw aggregate pit run was crushed to contract specifications, it would be stockpiled on the Shankowski Land until transported to the MD of Bonnyville yard, where it was stored until needed.

Panter Affidavit at para. 12, Ex. D to G

15. RBEE did not crush or extract any raw aggregate pit run extracted from the Havener Land, and no aggregate testing was done by J.R. Paine of aggregate from the Havener Land, in respect of the Bonnyville Contract. Had aggregate been extracted from the Havener Land and supplied to the MD of Bonnyville, JMB would have paid royalties to the Haveners, which it did not.

Panter Affidavit at para. 13

C. The Liens

16. On May 13 and May 15, 2020 respectively, J.R. Paine and RBEE registered liens pursuant to the *BLA*, being instrument numbers 202 104 972 (J.R. Paine) and 202 106 449 (RBEE) on title to the Havener Land (the "**Havener Liens**"), which is legally described as:

MERIDIAN 4 RANGE 7 TOWNSHIP 56
SECTION 16
QUARTER NORTH WEST
CONTAINING 64.7 HECTARES (160 ACRES) MORE OR LESS
EXCEPTING THEREOUT: HECTARES (ACRES) MORE OR LESS
A) PLAN 4286BM – ROAD 0.0004 0.001
B) ALL THAT PORTION COMMENCING AT THE SOUTH WEST CORNER OF THE SAID QUARTER SECTION; THENCE EASTERLY ALONG THE SOUTH BOUNDARY 110 METRES; THENCE NORTHERLY AND PARALLEL TO THE WEST BOUNDARY OF THE SAID QUARTER 110 METRES; THENCE WESTERLY AND PARALLEL TO THE SAID SOUTH BOUNDARY TO A POINT ON THE WEST BOUNDARY; THENCE SOUTHERLY ALONG THE SAID WEST BOUNDARY TO THE POINT OF COMMENCEMENT
CONTAINING 1.21 3.00

C) PLAN 1722948 – ROAD 0.360 0.89
EXCEPTING THEREOUT ALL MINES AND MINERALS

Panter Affidavit at para. 13, Ex J

17. On May 13 and May 15, 2020 respectively, J.R. Paine and RBEE registered liens pursuant to the *Builders Lien Act*, RSA 2000, c B-7, being instrument numbers 202 104 972 (J.R. Paine) and 202 106 447 (RBEE) on title to the Shankowski Land (the "**Shankowski Liens**"), which is legally described as:

FIRST
MERIDIAN 4 RANGE 7 TOWNSHIP 56
SECTION 21
QUARTER NORTH WEST
CONTAINING 64.7 HECTARES (160 ACRES) MORE OR LESS
EXCEPTING THEREOUT: HECTARES (ACRES) MORE OR LESS
A) PLAN 1722948 – ROAD 0.417 1.03
EXCEPTING THEREOUT ALL MINES AND MINERALS
AND THE RIGHT TO WORK SAME

SECOND
MERIDIAN 4 RANGE 7 TOWNSHIP 56
SECTION 21
QUARTER SOUTH WEST
CONTAINING 64.7 HECTARES (160 ACRES) MORE OR LESS
EXCEPTING THEREOUT: HECTARES (ACRES) MORE OR LESS
A) PLAN 1722948 – ROAD 0.417 1.03
EXCEPTING THEREOUT ALL MINES AND MINERALS
AND THE RIGHT TO WORK THE SAME

Panter Affidavit at para. 14, Ex K

18. RBEE also asserts a builder's lien claim against JMB's registered interest in the Havener Land, which interest is evidenced by a caveat registered as 002 170 374 on June 20, 2000 (the **"Additional RBEE Lien Claim**").

Panter Affidavit at para. 14

III. ISSUE

19. The sole issue before this Court is whether the Havener Liens, the Additional RBEE Lien Claim, and the Shankowski Liens are valid. More specifically, the issue is whether the Haveners and Shankowski qualify as an "owner" as defined in the *BLA*, and whether the work done by RBEE

and J.R. Paine, namely aggregate crushing and testing, is an "improvement" to the Havener Land and the Shankowski Land, as required by the *BLA*.

20. JMB asserts the Havener Liens, the Additional RBEE Land Claim and the Shankowski Liens are invalid. With respect to the Havener Land, no aggregate was extracted from the Havener Land to complete the 2020 supply of the Bonnyville Contract, so no work was done by RBEE or J.R. Paine with respect to the Havener Land. Consequently, the Haveners are not an "owner" under the *BLA*, as they requested no work be done to the improve the Havener Land, and no work was done that was affixed to the land or intended to be or become part of the land, as is required for there to be an improvement under the *BLA*.

21. Similarly, the Shankowski Liens are invalid. While aggregate from the Shankowski Land was extracted, crushed and tested to compete the 2020 supply under the Bonnyville Contract, Shankowski is not an "owner" under the *BLA*, as JMB requested the work be done, which work was not for an improvement to the Shankowski Land. Further, the extraction, crushing and testing of the aggregate from the Shankowski Land is not an "improvement" as defined by the *BLA*, as again, the aggregate was not affixed to the Shankowski Land after extraction, nor was it intended to be or become part of the land.

IV. LAW AND ARGUMENT

22. As stated above, neither the Havener liens, the Additional RBEE Lien Claim, nor the Shankowski liens are valid liens under the *BLA*, as they do not comply with the legislative requirements.

A. The Legislative Scheme

23. When determining the right of a lien claimant to maintain a lien, builders' lien legislation must be strictly interpreted. Further, because builders' liens interfere with common law property rights, no right should be found unless the law clearly expresses it.

> *Rahco International Inc. v Laird Electric Ltd.*, 2006 ABQB 592 ("***Rahco***") at para. 25 **[Tab 1]**
>
> *Royal Bank of Canada v 1679775 Alberta Ltd.*, 2019 ABQB 139 at para. 27 **[Tab 2]**

24. In referring to the Supreme Court of Canada's decision in *Clarkson Co. Ltd. v Ace Lumber Ltd.*, the New Brunswick Court of Appeal stated:

> We should not, therefore, give a large and liberal interpretation to the words "to be used in an improvement".
>
> *Beloit Canada Ltd. v Fundy Forest Industries Ltd.*, 1981 CanLII 2865 (NB CA) at para. 16 **[Tab 3]**

25. Section 6(1) of the *BLA* governs the lien claims in this case. Section 6(1) provides:

> 6(1) Subject to subsection (2), a person who
>
> (a) does or causes to be done any work on or in respect of an improvement; or […]
>
> for an owner, contractor or subcontractor has,…a lien on the estate or interest of the owner in the land in respect of which the improvement is being made.
>
> *BLA*, s. 6(1) **[Tab 4]**

26. "Owner" is defined in s. 1(j) of the BLA as "a person having an estate or interest in land at whose request, express or implied,…work is done…for an improvement", and "Improvement" is defined in s. 1(d) of the BLA as:

> anything constructed, erected, built, placed, dug or drilled, or intended to be constructed, erected, built, placed, dug or drilled, on or in land except a thing that is neither affixed to the land nor intended to be or become part of the land.
>
> *BLA*, s 1(d), (j) **[Tab 4]**

27. Consequently, to have a valid builders' lien, the following must be proven:

(a) The owner must request the work be done for an improvement to her land;

(b) There must be an improvement to the owner's land;

(c) The improvement must be a thing constructed, erected, built, placed, dug or drilled, on or in the land; and

(d) The improvement must be affixed to the land or intended to be or become part of the land.

B. The Havener Liens and the Additional RBEE Lien Claim are Invalid

28. JMB submits the Havener Liens and the Additional RBEE Lien Claim are invalid and should be discharged from title because the work done by RBEE and J.R. Paine does not amount to an improvement to the Havener Land, as is required by the *BLA*. Further, any work done by RBEE and J.R. Paine was not done at the request of the Haveners as an "owner" under the *BLA*.

29. While the Haveners are the registered owners of the Havener Land, they are not an "owner" under the *BLA*, because they did not expressly or impliedly request any work be performed by JMB, RBEE or J.R. Paine for an improvement on the Havener Land. In fact, the work done and services provided by RBEE and J.R. Paine was in no way connected to the Havener Land; no aggregate from the Havener Land was used to complete the 2020 supply under the Bonnyville Contract.

Panter Affidavit at para. 13

30. Given the Haveners are not an "owner" under the *BLA*, no consideration need be given to whether the work done by RBEE and J.R. Paine in respect of the Bonnyville Contract amounted to an "improvement" on the Havener Land.

31. Based on the above, JMB submits the Havener Liens and the Additional RBEE Lien Claim are invalid and should be discharged from title to the Havener Land.

C. The Shankowski Liens are Invalid

Shankowski is not an "owner" under the BLA

32. Shankowski is the registered owner of the Shankowski Land. However, he is not an "owner" under the *BLA*, because he did not expressly or impliedly request the work completed by JMB, RBEE or J.R. Paine be done for an improvement on the Shankowski Land.

33. As noted above, "owner" is defined in s. 1(j) of the *BLA* as a person with an estate or interest in land <u>who requests another to undertake work for an improvement on the land</u> in which that person has an estate or interest. Whether an owner made an express or implied request for the work is a question of fact.

Royal Trust Corp. of Canada v Bengert Construction Ltd., 1988 ABCA 58 ("***Bengert CA***") at para 18 **[Tab 5]**

34. In this case, JMB contracted with RBEE and J.R. Paine to provide work to complete the 2020 supply to the MD of Bonnyville pursuant to the Bonnyville Contract. Shankowski is not a party to the Bonnyville Contract, so he could not have expressly or impliedly requested the aggregate be extracted, crushed and tested in performance of the Bonnyville Contract. The "owner" for purposes of the *BLA* is the MD of Bonnyville, as it contracted with JMB for the supply of aggregate and JMB, in turn, contracted with RBEE and J. R. Paine to provide work in order to fulfill JMB's contractual obligation of supply. The fact that JMB obtained the aggregate from the Shankowski Land pursuant to the Shankowski Royalty Agreement is irrelevant, as it is the Bonnyville Contract that must be the focus of the analysis when determining who qualifies as an "owner" under the *BLA*.

35. The facts in this case are similar to those in *Sustainable Developments Commercial Services Inc.*, where the respondent registered a lien against the land to which it hauled aggregate. The work was done under and pursuant to a prime contract between the County of Vermilion and the applicant. The respondent was to haul aggregate to be stockpiled for the benefit of the County, who planned to use it for road graveling over the course of the following year. The Master held that the landowner was not an "owner" within the meaning of the *BLA*, finding the work done by the respondent was for the County and not for the landowner.

Sustainable Developments Commercial Services Inc. v Budget Landscaping & Contracting Ltd., 2020 ABQB 391 at paras 3, 7 **[Tab 6]**

36. While Shankowski arguably obtains a "benefit" from the work done on the Shankowski Land to compete the 2020 supply of the Bonnyville Contract that benefit arises directly from the Shankowski Royalty Agreement and does not in any way flow from the Bonnyville Contract. A mere benefit is not sufficient to satisfy the "owner" requirement in the *BLA*. In this regard, the case law addressing builders' liens in the landlord-tenant and landowner-home builder contexts are helpful. In both situations, where the landlord/landowner has no active participation in work done by the tenant/homebuilder on the land, there can be no lien claim against the landlord/landowner's interest in the property. An agreement with a home builder or a landlord without more is not enough to find an implied request within the meaning of the *BLA*.

K & Fung Canada Ltd. v N.V. Reykdal & Associates Ltd., 1998 ABCA 178 at paras 7-8, 10 **[Tab 7]**

Bengert CA, supra at paras 27-29 **[Tab 5]**

Royal Trust Corp. of Canada v Bengert Construction Ltd., 1986 CarswellAlta 257, at para 17 **[Tab 8]**

Georgetown Townhouse GP Ltd. v Crystal Waters Plumbing Company Inc., 2018 ABQB 617 at paras 1-3 **[Tab 9]**

37. Here there is no evidence Shankowski was actively involved in any of the work done on the Shankowski Land or directed either RBEE or J.R. Paine in doing the work necessary to complete the supply of the 2020 Bonnyville Contract. Rather, the only connection between Shankowski and the extraction, crushing and testing of the aggregate from his land by JMB, RBEE and J.R. Paine is the Shankowski Royalty Agreement, which agreement is wholly unconnected to the Bonnyville Contract and any work done to fulfill the terms of that contract. Thus, Shankowski is not an "owner" under the *BLA*, with the result that the Shankowski Liens are invalid.

There was no "Improvement" on or in the Shankowski Land

38. Even if Shankowski is an "owner" under the *BLA*, central to the issue of whether or not a registered builders' lien can be said to be valid, is whether or not the work forming the basis for the lien has effected an "improvement" to the land. The definition of improvement in the *BLA* is exclusive, not inclusive. In Alberta, in order for work to have "improved" land, one or more of the activities listed in the opening words of the section (i.e. constructed, erected, etc.) must have occurred and the work product must be both "affixed to" the land and "intended to be or become part of the land". Absent any of these factors, the work is not an improvement and, consequently, not lienable.

Rahco, supra at paras 42, 64 **[Tab 1]**

39. In this case, the aggregate excavated, crushed and tested was not affixed to the Shankowski Land and there was no intention that the aggregate be or become part of the Shankowski Land. In fact, it was the opposite; the express purpose of the work performed on the Shankowski Land was to remove the aggregate from the land, so it could be processed and hauled to the MD of Bonnyville yard in satisfaction of the Bonnyville Contract.

40. "Improvement" must be considered from the perspective of the overall project. The overall project in this case is that governed by the Bonnyville Contract, which required JMB supply aggregate crushed to specification to the MD of Bonnyville for use in road construction. Thus, in determining whether there was an improvement to the Shankowski Land, the focus must be on whether the work done by RBEE and J.R. Paine was directly connected to an "improvement" as defined by the overall project (road construction), such that it can be considered "work on or in respect of an improvement." Given the "improvement" is the construction of roads by the MD of Bonnyville, the only land that could be subject to the improvement would be land in which the MD of Bonnyville had an interest, not the Shankowski Land.

Davidson Well Drilling Limited (Re), 2016 ABQB 416 at paras 79, 81-82 **[Tab 10]**

41. Further, the case law establishes that adding value to the land by irrigating or mining the land is not sufficient, in and of itself, to cause something to be an improvement. There must be further evidence that there is an improvement to land; there must be something affixed to the land and an intention that it be or become part of the land. In this case, nothing was affixed to the Shankowski Land or intended to be or become part of the land. Rather, aggregate was removed from the land with the intention that it be used on unrelated land for the purpose of road construction by the MD of Bonnyville.

Rahco, *supra* at para 63 **[Tab 1]**

42. This Honourable Court considered a chain of contracts similar to those in this case, where one party was to supply aggregate for a project and held a license to extract aggregate from the lands of a third party unconnected to the project. While the Court was not asked to consider whether a valid lien could be maintained on the land from which the aggregate was extracted, it did note as follows:

> Although NDV reaped the financial benefits, given the exclusive lease of the gravel pit granted to HRP, the gravel pit was not improved: nothing was constructed at the gravel pit. The off-site work performed using the rental equipment resulted in gravel and sand that was used in constructing the Hangingstone Project, and directly contributed to the actual physical construction of the improvement. […]
>
> It is clear that the removal of gravel did not improve the gravel pit. […]

Northern Dynasty Ventures Inc. v Japan Canada Oil Sands Limited, 2020 ABQB 275 at paras 10, 12 **[Tab 11]**

43. This is the situation here. Shankowski merely granted a license to JMB to enter the Shankowski Land and extract aggregate, which aggregate was used to complete the 2020 supply of the Bonnyville Contract. There was nothing constructed on the Shankowski Land. Based on the above, JMB asserts the Shankowski Liens are invalid and should be discharged from title to the Shankowski Land.

V. CONCLUSION

44. As neither Havener, nor Shankowski qualify as an "owner" under the *BLA* and there is no "improvement" to the Havener Land or the Shankowski Land as required by the *BLA*, the Havener Liens, the Additional RBEE Lien Claim and the Shankowski Liens are invalid and ought to be discharged from title.

All of which is respectfully submitted this 13th day of October, 2020.

GOWLING WLG (CANADA) LLP

Tom Cumming/Caireen E. Hanert/Alison J. Gray
Counsel for the Applicant, JMB Crushing Systems Inc.

TABLE OF AUTHORITIES

1. *Rahco International Inc. v Laird Electric Ltd.*, 2006 ABQB 592

2. *Royal Bank of Canada v 1679775 Alberta Ltd.*, 2019 ABQB 139

3. *Beloit Canada Ltd. v Fundy Forest Industries Ltd.*, 1981 CanLII 2865 (NB CA)

4. *Builders' Lien Act*, RSA 2000, c B-7

5. *Royal Trust Corp. of Canada v Bengert Construction Ltd.*, 1988 ABCA 58

6. *Sustainable Developments Commercial Services Inc. v Budget Landscaping & Contracting Ltd.*, 2020 ABQB 391

7. *K & Fung Canada Ltd. v N.V. Reykdal & Associates Ltd.*, 1998 ABCA 178

8. *Royal Trust Corp. of Canada v Bengert Construction Ltd.*, 1986 CarswellAlta 257

9. *Georgetown Townhouse GP Ltd. v Crystal Waters Plumbing Company Inc.*, 2018 ABQB 617

10. *Davidson Well Drilling Limited (Re)*, 2016 ABQB 416

11. *Northern Dynasty Ventures Inc. v Japan Canada Oil Sands Limited*, 2020 ABQB 275

Tab 1

Court of Queen's Bench of Alberta

Citation: Rahco International Inc. v. Laird Electric Ltd., 2006 ABQB 592

Date: 20060728
Docket: 0601 03273
Registry: Calgary

2006 ABQB 592 (CanLII)

Between:

Rahco International Inc.

Plaintiff

- and -

Laird Electric Ltd.

Defendant

Reasons for Judgment
of
J. B. Hanebury, Master in Chambers

---

[1] This application has implications for subcontractors who do work on, or supply materials to, large pieces of mining equipment at the Alberta tar sands projects. Laird Electric Ltd. entered into a contract with Rahco International Inc. to assemble and do the electrical connections for several large pieces of mining equipment located at the Suncor Energy Inc. tar sands near Fort McMurray. The equipment is huge and had to be trucked in and assembled on site. Laird Electric said it was not paid for all of its work and it filed a builder's lien for $1,321,288.47 against the freehold and leasehold mineral titles to the lands where the equipment was assembled and is operating.

[2] Rahco applies to discharge the lien on the basis that the equipment Laird Electric assembled is not an "improvement to the land"as required by the *Builders' Lien Act*, R.S.A. 2000, c. B-7. The application is on a summary basis, which means that there must be no genuine issue to go to trial.

bears the onus of proving its assertions. It is similar to an application for summary judgement under rule 159 of the *Alberta Rules of Court*. See ***Carrington Homes***, page 3 and ***Dominion Bridge***, paragraph 5.

[22] Rehco relies on the recent Alberta Court of Appeal decision in ***Murphy Oil*** for the description of the test to be applied in a summary judgment application. At paragraph 25, the court found that it is up to the moving party to first adduce evidence to show that there is no genuine issue for trial. Once the moving party has met that burden, the responding party may adduce evidence to persuade the court that there remains a genuine issue to be tried. The court noted that the responding party may choose to adduce no evidence but it then bears a risk that it will be determined that it has been established by the moving party that there is no genuine issue to be tried.

[23] I agree that the application is similar to a summary judgment application and the initial burden is on Rehco to demonstrate that the lien is invalid. The burden then shifts to Laird Electric to demonstrate that there is a genuine issue for trial. The overall evidentiary burden is on Rehco to establish beyond doubt that no genuine issue for trial exists. See: ***Pioneer Exploration.***

Analysis

[24] On the facts and the case law before me, can I find that the lien is invalid and that there is no genuine issue to go to trial? As was noted by the Alberta Court of Appeal in ***Gauntlet***, when determining the validity of a builder's lien, each case is decided on its own facts. In an application to remove a lien under s. 48(1)(c) it is not surprising that there is no case law precisely on point. The situations that present themselves are often unique. However, this does not mean that a determination on an interlocutory basis can never be made. An interlocutory determination was made in ***Gauntlet***. The application of the established principles to the undisputed facts can lead to a conclusion that there is no genuine issue for trial. That is the conclusion that I have reached in this case based on the analysis that follows.

[25] I will start with a fundamental principle that is noted in more than one of the cases cited. The Supreme Court of Canada has held that, when determining the right of a lien claimant to maintain a lien, builders' lien legislation must be strictly interpreted. See: ***Clarkson Co. Ltd. et al. v. Ace Lumber Ltd. et al*** [1963] S.C.R. 110 at p. 114. Similarly, Romaine J. in ***Gauntlet***, concurred with earlier case law where it had been held that because builders' liens interfere with common law property rights, no right should be found unless the law clearly expresses it. Romaine J.'s decision was upheld on appeal.

[26] With that principle in mind, I turn to the matter at issue. Sections 6(1) and (2) of the *Builders' Lien Act* require that there be an "improvement" for there to be a valid lien. The issue is whether the mining equipment is an improvement. The answer to the first part of this issue was not in dispute. Is this large, mobile, custom-build mining equipment an improvement to the land, which is defined as a thing constructed or erected on the land? The mining equipment is a thing that was constructed or erected on the land.

2006 ABQB 592 (CanLII)

[27] The dispute between the parties arises in determining whether the equipment comes within the exception to the definition of improvement, as a thing neither affixed to the land nor intended to be or become part of the land. Rehco argues that the mining equipment in issue does not constitute an improvement. It says that because this equipment is mobile, it comes within the exception to the definition of "improvement" as it is neither affixed to the land nor intended to be or become part of the land. Rehco says that its only connection to the land is a large electrical cord which can be unplugged.

[28] The first Alberta case cited by Rehco is the 1976 Alberta Trial Division decision in ***Evergreen Irrigation Ltd.***, where the claim was for a lien in relation to a mobile irrigation system that had been delivered and set up on the lands of the defendant. The definition of "improvement" in the Act at that time was the same as the definition now.

[29] In considering what constituted an "improvement" in that case, Brennan J. examined the exception found in the concluding words of the definition of improvement: a thing that is neither affixed to the land nor intended to be or become part of the land. He found that the equipment in issue was not permanently affixed to the land, but could be and had been moved from one piece of land to another, although such movement generally required at least some disassembly of the irrigation equipment. The equipment, he held, was not an improvement as it came within the exception found in the definition. It was more in the nature of a farm implement.

[30] Rehco also relied on the 2003 Alberta decision in ***(Re) Gauntlet Energy Corp.*** At issue in that case was the entitlement to a builders' lien of the supplier of sour gas line heater separator packages to certain well sites. In that case drilling at the well sites, where the equipment had been left, did not result in producing wells. As a result the packages were moved to new well sites where they were incorporated into the production process.

[31] Romaine J. found that the separator packages were affixed to the land by being mounted to skids that there welded to metal piles driven into the muskeg. She noted that they can be, and were, moved from well site to well site. In fact, they had never been used at the first site to which they were delivered. She noted that no right to a lien should be found unless the law clearly expresses it. She determined that it was clear from the evidence that the separator packages were "not intended to be or to become part of the land in question" and found the lien invalid.

[32] The supplier appealed and argued that a drilling rig itself is an improvement and any services supplied or materials furnished preparatory to, in connection with, or for an abandonment operation create a valid lien. The supplier said that the court erred in considering the method or extent of affixation of the equipment to the land. It argued that the equipment was prima facie an improvement and the decision had important business ramifications to both it and the oil and gas industry.

2006 ABQB 592 (CanLII)

[33] Paperny, J.A. writing for the Court of Appeal, noted approvingly that the chambers judge had rejected the "bald proposition" advanced by the lien claimant that anything done to recover minerals is an improvement to the mineral interest as the word "improvement" is defined in the *Builders' Lien Act*. She agreed with the chambers judge that the decision in ***Wyo-Ben Inc. v. Wilson Mud Canada Ltd.*** (1985), 23 D.L.R. (4th) 760 (C.A.) does not stand for the proposition that a drilling well is an improvement and thus materials supplied or services rendered in connection with the well, without more, entitle a supplier of those materials or services to a builders' lien. She found that the decision of the chambers judge did not evidence an error in law and upheld it.

[34] Laird Electric relies on the 1984 Alberta case of ***V.A.W. Manufacturing*** for the proposition of whether or not a thing is capable of being disassembled and moved is not determinative of whether it is an improvement. In that decision Master Funduk found that pressure vessels that were installed as part of an ethylene glycol processing plant were part of the land, and were improvements subject to a builders' lien. The vessels were mounted on solid concrete foundations, were connected by numerous piping connections to the rest of the plant equipment and were an integral part of the processing plant. The intention was that the plant would be there for at least 10 years. Master Funduk found that the fact that the vessels could be severed from the land did not make them any less a part of the land. He pointed out that it is possible to sever a furnace in the house from the land. In coming to his conclusion that the vessels were improvements, he relied on no case law.

[35] This is the Alberta case law relied upon by the parties. In considering whether the mining equipment is neither affixed to the land nor intended to be or become part of the land, the parties also relied on case law from British Columbia and Ontario. Those two provinces define "improvement" differently in their builders' lien legislation and, therefore, reliance on their jurisprudence must be undertaken with caution.

[36] In British Columbia the *Builders' Lien Act*, 1979 R.S.B.C. c. 40, defined improvement as including:

> anything made, constructed, erected, built, altered, repaired, or added to, in on or under land, and attached to it or intended to become a part of it, and also any clearing, excavating, digging, drilling, tunnelling, filling, grading or ditching of, in, on or under land.

[37] This definition was considered by the British Columbia Court of Appeal in 1988 in the case of ***Boomars Plumbing.*** In ***Boomars,*** the lien claimant supplied work and material to erect a 120 unit motel. The original intention of the owner of the motel was to clean up, renovate and install housing units that had been used in a construction camp. He planned to create a short-term facility and eventually move the units to a new location. However, the City of Prince Rupert required extensive replacement of electrical and plumbing installations, including the removal of gas heating and the installation of electrical baseboard heating; the gyprocking of interior walls; the installation of underground sewer and water lines; the construction of

2006 ABQB 592 (CanLII)

additional washroom facilities; and a new fire alarm system. The building owner had a three year lease on the lands where the buildings were located, with an option to renew and an option to purchase. The land lease provided that upon its termination the lessee may remove all of the buildings. Under the lease the buildings were not considered to be attached to or to form part of the lands.

2006 ABQB 592 (CanLII)

[38] The buildings were put on a foundation which consisted of wooden cribbing which in turn rested on concrete blocks. The cribbing was not bolted nor welded together, it stayed in place by its own weight and it was not fastened to the concrete blocks. It was the kind of foundation usually employed under temporary structures such as construction camps. The modular units were connected to the concrete base by their own weight and could be dismantled and moved. Moving them would require the disconnecting of the plumbing and electrical connections, the sawing of fascia boards and the taking apart of each 9 unit building into individual units. This would result in some damage to each unit.

[39] The Court of Appeal first noted that the purpose of the *Builders' Lien Act* is to prevent owners from getting the labour and capital of others without compensating them. The definition of improvement, the court said, is an inclusive rather than an exclusive definition. It noted that such a definition can extend the ordinary meaning of the word but cannot take away from it. The ordinary definition of improvement is "a valuable addition made to property (usually real estate) or an amelioration in its condition, amounting to more than mere repairs or replacement, costing labour or capital and intended to enhance its value, beauty or utility or to adapt it for new or further purposes."

[40] The court found that the ordinary meaning of improvement is not significantly different, if at all, from the definition in the statute, at least in relation to structures. The court then considered whether the buildings were "attached to or intended to become a part" of the land. The court found that the buildings were connected to the land by their own weight on the foundation and by electrical and plumbing connections. The buildings enhanced the value and utility of the land, which had previously been undeveloped. Furthermore, while the buildings were of the kind normally seen as temporary, there was a permanency to the buildings in light of the work ultimately undertaken to install them and the difficulty and damage that would be incurred in moving them. The intention was that they stay in place so long as the project was economically viable. The buildings were found to be improvements within the meaning of the legislation and work on them could support a valid lien claim.

[41] The next British Columbia case referred to is ***Deal S.r.l.***, a 2001 decision of the Court of Appeal. In that case concrete moulds were manufactured in one location, transported to another, installed in a shed and bolted to footings. They were intended to be in place for the duration of the project and to be removed thereafter. Relying on the ***Boomars*** decision, the Court of Appeal held that the moulds were "erected" or "built" on the land and attached to it either by a bolted connection to the floor or piles, or by their own weight. Furthermore, the moulds were intended to be in place at least for the duration of the project, which was a time sufficient to satisfy the requirements of the definition that there be an intention to make them part of the land.

2006 ABQB 592 (CanLII)

[42] In both of these British Columbia decisions the court found the structures in issue to be improvements. The definition of improvement in British Columbia is inclusive, rather than exclusive, and the court in these two cases has relied on an expansive approach to the interpretation of that definition when determining to uphold the lien. This contrasts with Alberta, where the definition is exclusionary and the court has held that the rights of lienholders should be interpreted strictly. Therefore these cases can be distinguished. However, it is useful to note that despite this inclusionary wording, the courts in British Columbia upheld the liens only after considering the nature of the attachment of the structure or equipment to the land and the intention that the attachment have some degree of permanency.

[43] The Ontario case referred to is ***Kennedy Electric***, a 2006 decision of three judges of the Ontario Court of Justice. In the Ontario *Construction Lien Act*, 1983 S.O. c. 6, "improvement" is defined as "any alteration, addition or repair to, or any construction, erection or installation on, any land, and includes the demolition or removal of any building, structure or works or any parts thereof, and 'improved' had a corresponding meaning". Land is defined to include "any building, structure or works affixed to the land, or an appurtenance to any of them, but does not include the improvement".

[44] In this case Kennedy and its subcontractors were hired to assemble, off-site, the components of a large assembly line for the manufacture of truck frames. They were then to pack, ship and reinstall the assembly line in the plant facilities owned by Dana. . The contract for the assembly line had a total price of more than 44 million dollars. The issue before the court was whether the services performed by Kennedy constituted an "improvement" to the land and could, therefore, support a lien.

[45] Once installed, the line covered about 100,000 square feet of space, was 20 feet tall and weighed approximately half a million tons. The assembly line sat on the floor and was fastened to it by two to three thousand anchor bolts from six to eight inches in length. The evidence demonstrated that the line could be readily disconnected by shearing the bolts off flush with the floor.

[46] The trial judge found that the work performed by Kennedy was exclusively related to the assembly line and not to the building in which it was housed. The judge held that the assembly line installation represented the installation of manufacturing equipment in a building and did not constitute an improvement or part of an improvement to the land.. The majority of the court upheld the trial judge and said that the rights of a lien claimant should be strictly interpreted.

[47] The trial judge found that the definition of "improvement" in the Ontario legislation is both exhaustive and restrictive. He also concluded that the definition of "improvement" in the British Columbia *Builders' Lien Act*, R.S.B.C. 1979, c. 40 is an expansive definition and the British Columbia cases of ***Boomars Plumbing*** *(supra)* and ***Deal S.r.l.*** *(supra)* were therefore distinguishable.

[48] The trial judge considered two other British Columbia decisions: ***Spears Sales & Services Ltd. v. Westpine Fisheries Ltd. et al*** (1985), 17 C.L.R. 197 and ***Chubb Security Safes v. Larken Industries Ltd.*** [1990] B.C.J. No. 26, both of which found that equipment designed and used for the operations of the business within the structure, but not integral to the structure, was not an improvement to land

[49] The trial judge in ***Kennedy*** found that the assembly line was not part of an improvement nor a freestanding improvement on its own. Although the word “portable” did not appear in any of the contract documents, those documents made it clear that the assembly line was, by its nature and design, a fully portable line. He said that it was designed like a giant meccano set that could be put together for a test run and then disassembled, moved, and reassembled. He noted that a similar line had been moved in the past. If one were to disassemble the $44.372 million assembly line, no “improvement” would remain at the plant. The assembly line, he said, is “all about machinery and equipment and has nothing to do with ‘improvements’ to the land and/or the buildings in the ...plant”. As a result, the liens were invalid.

[50] The definition of “improvement” and “land” considered in ***Kennedy*** does not refer to any intention for the equipment to be or become part of the land. The definition is based on a structure or work being “affixed” to the land. The court found that equipment that was attached to the floor of a building with thousands of bolts was not “affixed” to the land because it could, and might, be moved elsewhere. As a result, while intention is not a specific consideration in the Ontario legislation, it appears it was considered as part of the consideration of the meaning of “affixed”.

[51] The final case for consideration is a 1981 decision from the New Brunswick Court of Appeal, ***Beloit Canada Ltd. v. Fundy Forest Industries Ltd.*** Under the legislation in place in that province “improvement” was defined to include “anything constructed, erected, built, placed, dug or drilled on or in land except a thing that is not attached to the realty nor intended to be or become part thereof”. It is the only case that relies on a definition of improvement similar to that used in Alberta.

[52] In that case a supplier claimed a lien for the furnishing of a corrugating paper machine. The machine weighed two and a half million tons and cost over two million dollars. The supplier was not paid in full and filed a lien against the lands where the paper-mill had been erected. The evidence disclosed that Fundy Forest Industries had acquired land and designed a building specifically to house the custom-designed paper-making machine. At issue was whether the building and the machine were an improvement to the land or if the building was something designed and erected to house and protect the machine and provide a working area in which the machine can be utilized.

[53] The court in that case began by adopting the principle that, in determining whether a lien claimant is someone to whom a lien is given by the legislation, builders’ lien legislation should be given a strict interpretation. The court found that the building that housed the equipment was an improvement to the land.

2006 ABQB 592 (CanLII)

[54] As a result of that finding, the question then became: Was the paper-making machine "material to be used in an improvement"? To be so, it must be incorporated in and become part of the improvement, or be consumed in the construction of the improvement. The court found that the question of whether there is an intention to erect or place something on land, to be or become part of that land is not relevant to a determination of whether materials are used in an improvement. That intention is only relevant when determining if something is itself an improvement. The court held that the paper machine was sold as a paper-making machine and not as a component of the building. There was no evidence that it was intended that it form or become a component of the building which was itself the improvement. The building was merely the location for the machine and the concrete foundation was the required support. The court found the machine to be, essentially, equipment, not something that formed or became part of the improvement, the building in which it was housed.

2006 ABQB 592 (CanLII)

[55] The cases from British Columbia, Ontario and New Brunswick, while dealing with differing fact situations and, mostly, different legislation, are of assistance in relation to the fundamental principles to be considered in determining if something is an improvement to land.

[56] In all of these cases a two step analysis was taken, either explicitly or implicitly. The first question was whether the structure or equipment in issue was attached, or affixed to the land? In all of these cases it was attached by way of bolts, various connections or its own weight. However, in no case did the analysis stop there. Mere attachment was not enough. In each case the courts looked further. In the British Columbia cases cited by the parties, the court, relying on an expansive definition of the definition of improvement, looked beyond the mere attachment of the structure to the land. The court also considered the degree of permanence of the attachment, both physically and from a time perspective. This permanence was required for the court to determine that the structures were improvements.

[57] In ***Kennedy***, the Ontario case, the British Columbia cases it cited, and the New Brunswick case of ***Fundy Forest Industries*** the courts considered the nature and purpose of the equipment in issue. Was it truly an improvement or part of an improvement to the land or was it more in the nature of equipment used to run a business; equipment that could be moved to run a business elsewhere? In each case the court found the equipment could be assembled, disassembled and moved to another plant. It was manufacturing equipment and was not an improvement to the land.

[58] In all of these cases a mere attachment to the land was not sufficient to render equipment or a structure an improvement to the land.

[59] I turn to the three Alberta cases cited by the parties, two of which are binding upon me. In ***V.A.W.*** it appears that the court agreed with the argument of the lien claimant that the pressure vessels were an improvement because they were heavy and inter-connected with other equipment. As that case did not consider the case law and its facts are different than those in this case, it is not significant to the determination to be made in this case.

[60] Of more assistance are the cases of ***Evergreen Irrigation*** and ***Gauntlet.*** In both of those cases the equipment was stationery, was interconnected with other equipment and thereby attached to the land. In both cases the equipment required some disassembly or unbolting to be moved. However, in both instances it could be and was moved, and this mobility indicated that there was no clear intention to make it part of the land.

[61] In ***Evergreen*** the irrigation system improved the usefulness of the land, but the court found it was not attached to the land as it could be disconnected and moved. It found the system was not an improvement and was more in the nature of a farm implement.

[62] In ***Gauntlet*** the court rejected the argument that anything done to recover minerals is an improvement under the *Builders' Lien Act.* The court then looked at the nature of the equipment and the permanence of its attachment to the land, both physically and in practice, to find that the equipment was not an improvement to the land. In ***Evergreen*** and ***Gauntlet*** it was difficult for the lienholder to prove an intention for the equipment to be or become part of the land as the equipment had actually been moved from the lands before the court considered the matter.

[63] From this case law it is clear that adding value to the land by irrigating the land or mining the land is not sufficient, in and of itself, to cause something to be an improvement. The court looks further for evidence that the equipment is an improvement to the land. Therefore, the fact that the equipment in this case is used to mine the lands is not enough to claim that it is an improvement to the land. It must be affixed to the land and there must be an intention that it be or become part of the land.

[64] Is this mining equipment affixed to the land? Before answering this question I note that I am required to construe the Act strictly when determining that lien claimants are entitled to a lien. The definition of "improvement" in the Alberta legislation is exclusive, not inclusive.

[65] There was no evidence given of any intention to move the equipment off the Suncor site. The evidence is that the mobile conveyor was custom-designed for the tar sands project, was assembled in California, broken down and trucked to the site in over 60 containers, and then re-assembled on the site and moved to its present location. In its present location it moves around the tar sands site, but obviously cannot be driven down the road to another tar sands project.

[66] However, within the site, the mining equipment is mobile. It moves as part of the nature of its part in the operation of the mining undertaking. The mobile conveyor moves by way of its own tractors and its connection to the power source. The mobile conveyor does not rest on the land; it is not immobile; it is only attached by a lengthy power cord. It could be readily disconnected from this power source and re-connected to another power source, if one were available. The hopper sits on top of the mobile conveyor, so moves with it. The transfer conveyor is moved by way of separate tractors; it is not attached to the land other than by the power it receives from the cable. It rests on the land under its own weight, however it only does

2006 ABQB 592 (CanLII)

so until it is moved again. This equipment is not connected to the land as the equipment was in ***Evergreen*** and ***Gauntlet*** This equipment must be moveable to carry out its ongoing functions.

[67] Mobile mining equipment requires a source of power and the power cable is the only way the equipment is attached to the land. At the end of that cable it can, does and must move. An electric cable connecting mobile equipment to an electrical substation is not a sufficient physical connection to the land to satisfy the requirement that the equipment be affixed to the land. The equipment is not affixed to the land; it is only tethered.

[68] Even if the equipment were affixed to the land, the equipment is not intended to be or become part of the land. It is mobile mining equipment and, as earlier noted, Laird Electric cannot rely on the argument that anything done to mine a mineral in the land improves the land. Looking more broadly at the case law cited, the law has generally differentiated between equipment to carry out a business function, and equipment that is an improvement to the land or is incorporated into an improvement to the land. This distinction has often been made on the basis of the potential mobility of the business equipment, even when, as in ***Kennedy***, the equipment is enormous and attached by thousands of bolts. While the mining equipment in this case is not readily movable off the Suncor site, it was assembled, disassembled, moved, reassembled, moved and then connected to a power source to allow it to move around the site. The equipment in issue in this case has been moved to and around the site and is itself designed to be movable to carry out the business of mining. It is mining equipment. It is not an "improvement" to the land.

[69] Laird Electric argued that it would be unconscionable to allow Rahco to claim that the lien should be removed, as Rahco's contract with Laird Electric indicates that the *Builders' Lien Act* applies. I have some sympathy with Laird Electric's argument. Unfortunately, Laird Electric is either entitled to the protection of the Act or it is not. I note that other jurisdictions, such as the Yukon, the Northwest Territories and Nova Scotia, have enacted specific legislation to protect those who provide services to mines. While Alberta has given lienholders the right to lien mineral titles, it has not extended the same protection as those jurisdictions have to the providers of services to mines.

[70] In conclusion, I find that Rehco met the burden upon it and established that the lien should be removed. Laird Electric has not demonstrated that there is a genuine issue to be tried. The lien will be discharged. Rehco shall have its costs of this application.

Heard on the 20th day of April, 2006.
Dated at the City of Calgary, Alberta this 28th day of July, 2006.

2006 ABQB 592 (CanLII)

J. B. Hanebury
M.C.C.Q.B.A.

Appearances:

Jamie Flanagan
(McLennan Ross LLP)
for the Applicant

Geoffrey Edgar & Mr. Kickham
(Miller Thomson LLP)
for the Respondent

2006 ABQB 592 (CanLII)

Tab 2

2019 ABQB 139
Alberta Court of Queen's Bench

Royal Bank of Canada v. 1679775 Alberta Ltd.

2019 CarswellAlta 352, 2019 ABQB 139, [2019] A.W.L.D. 2414, [2019] A.W.L.D. 2416, 305 A.C.W.S. (3d) 532, 87 Alta. L.R. (6th) 379, 91 C.L.R. (4th) 192

Royal Bank of Canada (Plaintiff) and 1679775 Alberta Ltd, Reid-Built Homes Ltd, Reid Worldwide Corporation, Builder's Direct Supply Ltd, Reid Built Homes Calgary Ltd, Reid Investments Ltd, Reid Capital Corp and Emilie Reid (Defendants)

Georgetown Townhouse GP Ltd (Plaintiff) and Crystal Waters Plumbing Company Inc, R and R Bruno Enterprises Ltd, Kidco Construction Ltd, Siena Flooring Inc, Spindle, Stairs & Railings 2002 Ltd, Rob's Drywall Services Ltd, 840307 Alberta Ltd, operating as Wildwoord Cabinets, Double R Building Products Ltd, WM Schmidt Mechanical Contractors Ltd, Lehigh Hanson Materials Limited operating as Inland Concrete, Lehigh Hanson Manson Materials Limited, E2 Construction Ltd, Gienow Canada Inc, doing business as Ply Gem, High Caliber Construction Inc, TBA Cleaning Services Ltd, Signature Fan Company Ltd, Scotty's Rentals and Landscaping Ltd, Majestic Electric Inc, Prairie Pipe Sales Ltd, 789072 Alberta Ltd and RKG Developments Ltd operating as Lenbeth Weeping Tile Calgary and Watt Consulting Group Ltd. (Defendants)

Robert A. Graesser J.

Heard: October 3, November 30, 2018
Judgment: February 27, 2019
Docket: Edmonton, Calgary 1703-21274, 1701-15571

Counsel: Dean Hitesman, Nicholas Williams, for Royal Bank of Canada Limited
Michael McCabe, Q.C., for Melcor Developments Ltd. and RBC
Howard Gorman, Q.C., Aditya Badami, Samantha Jenkins, for Alvarez and Marsal Canada Inc.
Glen M. Hickerson, for Crystal Waters Plumbing Company Inc. et al
Jeff Wreschner, for Georgetown Townhouse GP Ltd.
John Regush, for La Vita Lands Inc.
Allan Garber, for BACA Construction 2013
Anthony Di Lello, for Rob's Drywall Services Ltd. and Prattco Excavating Ltd.
Halley Carcasole, for Davidson Enman Lumber Ltd.
Michelle Andresen, for Diversified Mechanical Ltd.
Peter Ridout, Joel Pagkatipunan (Student-at-law), for R and R Bruno Enterprises Ltd.

Subject: Contracts; Corporate and Commercial; Insolvency
Related Abridgment Classifications
Construction law
IV Construction and builders' liens
IV.3 Owner
IV.3.b Requirement of privity and consent
Construction law
IV Construction and builders' liens
IV.9 Priorities
IV.9.a General principles

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

21 Reid-Built had commenced construction on some of the lots, so Georgetown ended up keeping what Reid-Built had paid as a down-payment as well as any lot improvements that remained on Georgetown's lands. There was no evidence as to any ultimate benefit to Georgetown by virtue of getting the lots back with some improvements on them.

22 In the builders' liens before me (but for those in *Georgetown*) the Developers were ultimately paid what was owed to them for the lots sold by the Receiver to other home builders. None of those Developers got any lots back or received the benefit of any improvements constructed on their lots. Any improvements were presumably valued in the price for the lots received by the Receiver so Reid-Built (or at least Reid-Built's secured creditors) may have received some value for the work performed by the lien claimants.

23 Georgetown did not wait for the Receiver to bring its application for declaratory relief regarding the various builders' liens. Instead, Georgetown applied to have the builders' liens filed against its lots discharged under section 48 of the *BLA*. Liens against its lots were discharged on payment of the face amount of the liens plus an amount for security for costs into court. In the proceedings before Master Prowse, Georgetown sought a declaration that the builders' liens filed against its lots were invalid as it was not an owner within the meaning of the *BLA*. Master Prowse agreed, and the application before me is the builders' lien claimants' appeal from that decision.

Issues

24 There are a number of issues arising on the remaining applications. With respect to the Receiver's application regarding the definition of "owner" in the *BLA*, there are several issues:

1. Are any of the Developers "owners" within the meaning of section 1(j) of the *BLA*?

2. Are any of the builders' liens filed against the Developers' interests in various lots invalid because they did not properly describe the interests in land to be liened?

3. Are any of the builders' liens filed against the Developers' interests in various lots invalid because they did not specify the estate or interest in the land being charged by the builders' liens?

4. If there are deficiencies or irregularities in any of the filed builders' liens, can they be cured under the provisions of section 37 of the *BLA*?

25 With respect to the *Georgetown* appeal:

1. What is the applicable standard of review from Master Prowse's decision?

2. Is Georgetown an owner within the meaning of section 1(j) of the *BLA*?

Case law

26 The case law relating to the matters on these applications is relatively sparse. The *BLA* is somewhat unique legislation in Canada, such that decisions from other provinces on their builders' liens or mechanics' liens are not particularly helpful (save for a few significant cases). All parties have essentially referred to the same body of case law, relying on the cases helpful to their positions and distinguishing those that are unhelpful.

27 As a starting point, builders' liens are entirely statutory. There was no body of common law giving a material supplier, builder, or worker a charge against the real estate they supplied materials to or worked on. As with income tax legislation, these statutory exceptions to common law rights have been construed narrowly and not expansively: *K. & Fung Canada Ltd. v. N.V. Reykdal & Associates Ltd.*, 1998 ABCA 178 (Alta. C.A.) *(CanLII)*, leave to appeal dismissed, [1998] S.C.C.A. No. 349 (S.C.C.) (hereinafter "*Fung*") at para 5. That case cites *Ace Lumber Ltd. v. Clarkson Co.*, [1963] S.C.R. 110 (S.C.C.), 1963 CanLII 4.

WestlawNext. CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

28 Various provinces have treated builders' lien rights and remedies differently in their legislative provisions. It is not surprising that the legislation gives an interest in land to someone who deals directly with the owner of the lands that they improved at the owner's request. It is more challenging to give proprietary remedies to claimants who did not deal directly with the owner, but rather a contractor or subcontractor whose interest in the improvements is tenuous at best.

29 The *BLA* provides a mechanism for owners to protect themselves from builders' lien claims filed by claimants other than their direct contracting parties. Essentially, owners are generally protected if they retain 10 percent from payments made to the parties they contract with directly. Once substantial completion of the work has occurred, they have trust obligations with respect to payment of further amounts to such parties.

30 Alberta has limited trust provisions. Other provinces like Ontario have much more onerous ones, which arise at the commencement of the project. Alberta protects mortgagees who have advanced mortgage funds in good faith and prior to the registration of any builders' liens. Other jurisdictions protect lien claimants for the increase in value to the property resulting from the improvements they constructed.

31 The reality of the Alberta provisions is that those who are looking to the lands they have improved as security for payment are behind mortgagees in priority, and the mortgagees get the benefit of the value of any improvements made to the lands after any mortgage advances and before the filing of any builders' liens. Liens attach only to the owner's equity in the lands.

32 Beyond that, with the limitations on recoveries against the land in the event the owner has maintained proper holdbacks, and the ultimate limitation on recovery by subcontractors, material suppliers (other than those who supply directly to the owner) and those who provide labour (other than directly to the owner), the *BLA* is all too frequently an ineffective remedy for project creditors.

33 This reality has led to claimants seeking to attach the interests of landlords and mortgagees in the property. The seminal case in this area is *Northern Electric Co. v. Manufacturers Life Insurance Co.* (1976), [1977] 2 S.C.R. 762 (S.C.C.), 1976 CanLII 203 (hereinafter "*Northern Electric*"). In that case, a lien claimant succeeded in establishing that the mortgagee of the property was an "owner" within the meaning of the applicable lien legislation, allowing the claimant to take priority ahead of the first mortgagee.

34 That decision turned on the definition of "owner" under the Nova Scotia *Mechanics' Lien Act* of the time. That definition is virtually identical to the definition of owner in section 1(j) of the *BLA*.

35 The Nova Scotia Act provided:

> (d) "owner" extends to any person, body corporate or politic, including a municipal corporation and a railway company, having any estate or interest in the land upon or in respect of which the work or service is done, or materials are placed or furnished, at whose request and
>
> > (i) upon whose credit; or
> >
> > (ii) on whose behalf; or
> >
> > (iii) with whose privity and consent; or
> >
> > (iv) for whose direct benefit;
>
> work, or service is performed or materials are placed or furnished, and all persons claiming under him or them whose rights are acquired after the work or service in respect of which the lien is claimed is commenced or the materials furnished have been commenced to be furnished...

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

36 *Northern Electric* turned on the finding that Manulife, as mortgagee, was more than a mere mortgagee on the property. It had, in effect, entered into a joint venture arrangement with the developer of the property (who had gone into bankruptcy leaving a slew of unpaid creditors, including the mechanics' lien claimants). Manulife had acquired the fee simple interest in the property from the developer, and then leased the property back to the developer under a long term head-lease. The project was financed by a mortgage against the developer's leasehold estate. At the expiry of the lease, the property reverted to Manulife as owner.

37 Martland J, speaking for the majority in the Supreme Court of Canada, held at page 770:

> In my opinion, the work herein can properly be said to have been done also on the respondent's behalf, if not also for its direct benefit. It may be said that it was also done on behalf of Metropolitan and for its direct benefit, but, if so, this does not preclude a similar finding in respect of the respondent, having regard to the arrangement between it and Metropolitan. The outright purchase by the respondent of the land on which the apartment building was to be built, the fact that title to the building would belong to the respondent no less than the title to the land, without any revestment right in Metropolitan, and the fact that, to the knowledge of the respondent, Metropolitan was to act as contractor on the project which was to proceed according to plans and specifications approved by the respondent and under the latter's financial control, are significant indications to me that the work was being done and the materials furnished more on behalf of the respondent than on behalf of Metropolitan, and more for its direct benefit than for the direct benefit of Metropolitan.

38 He continued at page 774:

> I cannot agree with the submission that Metropolitan was merely borrowing money to enable it to put up a building of its own, and that the respondent was not advancing money for the construction of a building for it by Metropolitan. The title position and the rent payment provisions are against any such submission. Whose building was it if not the respondent's, subject to possession and use by Metropolitan for a limited period, by way of being able to realize some pecuniary advantage from its original ownership of the land and from its exertions as contractor? The letters of commitment are clear enough on this point since they associate the obligation to construct the building with the transfer to the respondent of the land upon which the building is to be constructed, and they provide that the construction will be paid for by the respondent. This is the substance of the overall arrangement, and the security aspect of the transaction, involving a mortgage of the leasehold, cannot be allowed to mask that substance. I am not at all persuaded that the true character of the transaction between the parties can be founded upon a consideration of only the mortgage of the leasehold, with its commonplace provision that any advances thereon are in the discretion of the mortgagee.

39 In that case, Metropolitan had acted as general contractor for the construction of the improvements on the lands.

40 There have been numerous attempts in Alberta to find mortgagees and landlords to be "owners" under the *BLA* and thus liable for builders' liens registered against their interests in the land. Few such claims have been successful.

41 The Alberta Court of Appeal has considered these issues in a number of cases. Three are the most significant: *Acera Developments Inc. v. Sterling Homes Ltd.*, 2010 ABCA 198 (Alta. C.A.) (hereinafter ("*Acera*"), *Royal Trust Corp. of Canada v. Bengert Construction Ltd.*, 1988 ABCA 58 (Alta. C.A.), *sub nom Gypsum Drywall (Northern) Ltd v Coyes*, (hereinafter "*Bengert*"), and *Fung*.

42 The challenge for the builders' lien claimants here is to demonstrate that the Developers fall within the *BLA*'s definition of "owner," or put another way, for the Receiver to demonstrate that none of the Developers Reid-Built dealt with fall within that definition.

43 The case law is found within *Acera*, *Bengert* and *Fung*, as well as subsequent decisions such as my decision in *Westpoint Capital Corp. v. Solomon Spruce Ridge Inc.*, 2017 ABQB 254 (Alta. Q.B.), *Arres Capital Inc. v. Graywood Mews Development Corp.*, 2011 ABQB 411 (Alta. Q.B. [In Chambers]), and Master Prowse's decision in *Georgetown*.

BLA framework

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

44 To begin the analysis, it is important to look at the structure of the *BLA*. "Owner" is defined in section 1(j):

(j) "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;

"Contractor" is defined in section 1(b):

(b) "contractor" means a person contracting with or employed directly by an owner or the owner's agent to do work on or to furnish materials for an improvement, but does not include a labourer;

"Subcontractor" is defined in section 1(n):

(n) "subcontractor" means a person other than

(i) a labourer,

(ii) a person engaged only in furnishing materials, or

(iii) a person engaged only in the performance of services,

who is not a contractor but is contracted with or employed under a contract...

45 Builders' liens are created by section 6(1):

6(1) Subject to subsection (2), a person who

(a) does or causes to be done any work on or in respect of an improvement, or

(b) furnishes any material to be used in or in respect of an improvement,

for an owner, contractor or subcontractor has, for so much of the price of the work or material as remains due to the person, a lien on the estate or interest of the owner in the land in respect of which the improvement is being made.

46 Section 6(2) relates to work with respect to mines and minerals, so has no application here.

47 Section 25 limits the owner's liability:

25 An owner is not liable under this Act for more than

(a) the total of the major lien fund and the minor lien fund, or

(b) the major lien fund, where a minor lien fund does not arise under section 23.

48 The "major lien fund" is described in section 1(h):

(h) "major lien fund" means

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

(i) where a certificate of substantial performance is not issued, the amount required to be retained under section 18(1) or (1.1) plus any amount payable under the contract

(A) that is over and above the 10% referred to in section 18(1) or (1.1), and

(B) that has not been paid by the owner in good faith while there is no lien registered;

(ii) where a certificate of substantial performance is issued, the amount required to be retained under section 18(1) or (1.1) plus any amount payable under the contract

(A) that is over and above the 10% referred to in section 18(1) or (1.1), and

(B) that, with respect to any work done or materials furnished before the date of issue of the certificate of substantial performance, has not been paid by the owner in good faith while there is no lien registered...

49 "Minor lien fund" is described in section 1(i), but only arises after a certificate of substantial performance has been issued.

50 There is no indication in the evidence that a certificate of substantial performance was ever issued with respect to any of the work done for Reid-Built on any of the liened properties, so I will not deal with any minor lien fund obligations.

51 Section 4 defines the "value of the work done":

4 For the purposes of this Act, the value of the work actually done and materials actually furnished shall be calculated on the basis of

(a) the contract price, or

(b) the actual value of the work done and materials furnished, if there is not a specific contract price.

52 The mechanics of the major lien fund is out in section 18:

18(1) Irrespective of whether a contract provides for instalment payments or payment on completion of the contract, an owner who is liable on a contract under which a lien may arise shall, when making payment on the contract, retain an amount equal to 10% of the value of the work actually done and materials actually furnished for a period of 45 days from

(a) the date of issue of a certificate of substantial performance of the contract, in a case where a certificate of substantial performance is issued, or

(b) the date of completion of the contract, in a case where a certificate of substantial performance is not issued.

. . .

(2) In addition to the amount retained under subsection (1) or (1.1), the owner shall also retain, during any time while a lien is registered, any amount payable under the contract that has not been paid under the contract that is over and above the 10% referred to in subsection (1) or (1.1).

(3) Except as provided in section 13(1), when a lien is claimed by a person other than the contractor, it does not attach so as to make the major lien fund liable for a sum greater than the total of

(a) 10% of the value of the work actually done or materials actually furnished by the contractor or subcontractor for whom and at whose request the work was done or the materials were supplied giving rise to the claim of lien, and

(b) any additional sum due and owing but unpaid to that contractor or subcontractor for work done or materials furnished.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

53 Simply stated, the structure of the *BLA* is to give a contractor a lien for the full value of the work done by the contractor, determined under the contract (if the contract specifies a contract price) or by *quantum meruit* if the contract does not specify a price (section 4). Being a contractor requires contracting with the owner, or being employed directly by the owner.

54 The lien funds are aimed at protecting subcontractors, sub-subcontractors, labourers and materialmen, all of whom are not "contractors." These are the notional funds established to protect those who have dealt with contractors or subcontractors in the event they are not paid by the party who contracted with them.

55 The owner is not actually required to set aside funds to be available to lien claimants. Rather, it is a notional amount based on 10 percent of the value of the work performed under the contract between the owner and the contractor, and calculated with reference to the value of the work done by the contractor (for those claiming through the contractor). For those claiming through a subcontractor, the notional fund is based on 10 percent of the value of the work done by the subcontractor.

56 In reality, the scheme is more complicated, as the lien funds are increased by the value of any monies owed but unpaid to the respective contractor or subcontractor, and they are also increased by the amount of any payments made in the face of a registered builders' lien.

57 Essentially, an owner can limit its potential liability to everyone other than a "contractor" to 10 percent of the value of the work done under the contract with the contractor, as long as the owner does not make any payments to the contractor or anyone under the contractor in the face of a lien.

58 The "worst case scenario" for an owner who has made payments on account to the contractor but has not made payments in the face of builders' liens is to be liable for 110 percent of the contractor price or the value of the work done.

59 Where the contractor fails on a project and leaves a host of unpaid subcontractors and suppliers, it is often little solace to the unpaid parties when they share only 10 percent of the value of the work done under the contract between the owner and the contractor.

60 Here, none of the builders' lien claimants contracted with any of the Developers. Reid-Built was acting as its own general contractor with respect to the work done on the subject lots, and all of the claimants appear to have contracted directly with Reid-Built. None of the builders' lien claimants are "contractors" within the meaning of the *BLA*.

61 Reid-Built was more than a general contractor, as it had an interest in the lots themselves. Its equitable interest as purchaser is a lienable interest in the lots, despite Reid-Built not having filed any caveats to protect its purchaser's interest. Thus any of the claimants who contracted directly with Reid-Built would have a 100 percent lien for the value of work done by them, as they attached to Reid-Built's interest in the lots. As noted above, that does not get any of the lien claimants anywhere, as the Royal Bank's interest under its security against Reid-Built crystallized before any builders' liens were filed and thus takes priority over the liens. Despite the Receiver having realized on Reid-Built's interest in many of the lots, the information before me indicates that there will be nothing left over for creditors other than the Royal Bank and creditors with superior claims to those of the Royal Bank.

62 It is a different story if the lien claimants can succeed against the Developers.

63 The lien claims against the Developers are not expressly contemplated by the *BLA*. Reid-Built itself was an "owner" and was building houses on the lots to its own account. It alone would benefit from any profit on sales to third-party house buyers. It alone contracted with the third-party house buyers. And it alone contracted with the trades and material suppliers. So in the conventional sense, Reid-Built was the owner of the lots and the general contractor for all house building on the lots. It was solely responsible to purchasers for completion of the houses and performance of the house purchase agreements. And it was solely responsible for payment to the trades and material suppliers that contracted with it.

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

64 There was no payment due to Reid-Built from any of the Developers, so there was no practical ability for a Developer to make any holdback from Reid-Built to protect themselves (if they needed any protection) against default by Reid-Built to its trade creditors. Under section 25 of the *BLA*, it is difficult to see how any claims against the Developers could be quantified.

65 Section 25 does not distinguish between or among "owners." But how does that relate to a Developer's interest in the lots? These are questions unanswered by the *BLA*, although as discussed below, the Supreme Court has held that the absence of a specific remedy in the provincial legislation and difficulties in quantifying liens against non-contracting parties do not affect the ability of a lien claimant to obtain a remedy from *any* "owner."

Analysis

1. Are any of the Developers "owners"?

66 It is clear that for this provision to apply, a Developer must be found to have made a request (express or implied) for work to be done on its lands *and* that one of the criteria in section 1(j) be met. That requires that the Developer be found to have done one of the following:

(a) agreed to pay for the improvement;

(b) contracted for the work as principal;

(c) consented to the work in some contractual way; or

(d) directly benefited from the work.

67 *Acera* is the most recent Alberta Court of Appeal decision on this point. It is important to understand the underlying facts in that case.

68 Acera was the owner of a large parcel of land in Cochrane, Alberta. It was in the process of subdividing the land into a number of individual lots. Before the subdivision process was complete, Acera agreed to sell a number of the lots to Sterling Homes Ltd., a home builder.

69 The lot purchase agreement required Sterling to pay some $2.5 million down, with the balance of some $10 million to be paid at a later date, including when individual lots were sold by Sterling to third party home buyers.

70 Despite the fact that the subdivision process was not complete and no individual lots existed other than on unregistered plans, Sterling began construction on a number of four-plexes on the land. Filing the subdivision plan was a condition precedent to the agreement, and the agreement provided various remedies in the event the subdivision plan was not registered. It was silent on remedies for improvements constructed by Sterling before subdivision.

71 Architectural and construction guidelines had been finalized before the plan was to be registered and Sterling submitted some initial plans to Acera for approval. During this pre-plan registration period, Acera facilitated Sterling's applications for building permits and Acera's staff visited the site daily. Acera itself built underground services, developed and paved the roadways, and installed hydrants and streetlights in anticipation of the filing of the plan.

72 During this period, Acera continuously represented to Sterling that the subdivision plan process was proceeding and that the plan would be registered soon. Ultimately, Sterling stopped work and filed a builders' lien for the value of the work that it had done on the four-plexes.

73 Berger JA, writing for the majority, described the issues at paragraph 23 of the decision:

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

[23] The critical question here is whether Acera is an "owner" within the meaning of subsec. 1(j) of the *Act*. The relevant inquiry is whether Acera requested that work be done or material be furnished for an improvement to the lands in question and whether the work done and the material furnished by Sterling accrued to the "direct benefit" of Acera.

74 Acera's participation in the construction process was described in paragraphs 24-27 of the decision:

[24] The Appellant points to the architectural and construction guidelines issued by the Respondent which set out detailed requirements for the design of the residential units and which gave Acera control over that design. Sterling was also required to comply with TRC being a low impact development.

[25] The homes to be constructed by Sterling had to be approved by Acera or its consultant, in which case an approval form was issued. The Appellant also points to Acera's role in facilitating Sterling and other home builders obtaining building permits for their respective homes.

[26] In the result, Sterling obtained building permits for twelve homes. The building permit applications included an "architectural approval form" issued by Acera's consultant and by a "building grade form" issued by Acera's engineering consultant. The Appellant maintains that it was always contemplated by Acera that the home builders would build on the lands prior to the subdivision being registered and, accordingly, prior to the home builder getting a transfer of the lots.

[27] It is clear on this record that Sterling has excavated, laid the foundations, framed the structure, completed some of the rough-in plumbing and electrical work, and brought the homes to various stages of construction. The value of the work performed to date by the Appellant is $1,750,000.

75 At paragraph 32 Berger JA noted:

[32] It was always contemplated by Acera that the homebuilders would build on the lands prior to the subdivision being registered.

76 He concluded on the request issue at paragraph 36:

...the construction proceeded prior to subdivision at the owner's request. Indeed, the liened party who was actively involved in the supervision of the construction was fully aware that the construction was proceeding prior to subdivision approval. The lien claimant was contractually bound to construct improvements to a specific standard and scope. Indeed, Acera's architectural and construction guidelines required that Acera approve the construction plans, elevations, finished grades, finishing materials and colours, final grade slips, setbacks, foundation designs, auxiliary buildings and fencing, and landscaping. All such plans were approved prior to construction. The construction was inspected by Acera as work progressed. In my opinion, that is sufficient to conclude that the homes were constructed at the request of the liened party.

77 Having found a "request," Berger JA went on to consider whether Acera had received a direct benefit. He concluded at paragraphs 37-39:

[37] It remains, accordingly, to consider whether the work done and the material furnished by Sterling accrued to the "direct benefit" of Acera. Acera allowed Sterling to improve its lands. In law, the improvements become attached to the land and are owned by the owner of the freehold. Until the subdivision plan is registered Acera is prohibited from selling the lots, so it must be taken to have invited Sterling to improve the lands "for its [Acera's] direct benefit". Acera owns the freehold, therefore it owns the improvements, therefore it is directly benefitted. Having allowed Sterling in as a tenant-at-will it cannot argue the improvements were done against its will, i.e. that they were "not requested". Paragraph (iv) of the definition of "owner" is satisfied.

[38] Acera has failed to transfer the lots in accordance with the lot purchase agreement. Accordingly, Sterling cannot sell the homes to interested third parties. It follows that Acera has directly gained the value of the improvements to the lands and will continue to hold that increase in value to its benefit as long as it retains title to the lands. In other words, were it

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

not for Sterling's lien, Acera would keep the benefit of the improvements. Therefore, until such time as Sterling is able to acquire title to the homes, the direct benefit from the entirety of the work accrues to Acera.

[39] In addition, the contractual arrangement whereby Sterling would build homes in advance of acquiring title to the land included, as I have found, the implied request by Acera of Sterling to do just that. All of this, as I have indicated, took place under the watchful eye and subject to the stringent building requirements imposed by Acera. It is apparent, by way of illustration, that strict adherence to Acera's architectural and construction guidelines were intended to facilitate and enhance the development of Acera's lands. In that sense, mindful that it was anticipated that construction would begin before sub-division approval and transfer of the lots was obtained, such construction was of direct benefit to Acera.

78 Berger JA noted that while the lien was declared valid, the quantum of the lien was undetermined. That issue was left for trial.

79 *Acera* followed two previous Court of Appeal decisions where similar claims failed. *Bengert* involved a priority fight between a purchaser and a builders' lien claimant. Bengert Construction Company was a home builder. It had arrangements with a developer to purchase a lot, but had not yet acquired title. Bengert contracted with the Coyes to build a house for them on the lot. The Coyes paid a significant down payment and filed a purchaser's caveat against title to the lot. Bengert then acquired the lot and obtained a mortgage. Bengert began construction, paying for the costs from further mortgage advances. The Coyes had no control over the mortgage advances and had no means to ensure that the subtrades were being paid as construction proceeded.

80 Before completion, Bengert went broke. Unpaid subtrades filed builders' liens. Following foreclosure proceedings on the mortgage, there was a surplus. The Coyes and lien claimants disputed priority of access to the funds.

81 The Court of Appeal noted at paragraph 25:

[25] In this case, the Coyes' participation in the construction activities was little more than to choose a house plan. They had such a minimal part in design that their contract does not even specify any extras to be added to it. The contract does not empower them to inspect during construction or to have any involvement with sub-trades. The builder had obtained the mortgage and financed construction from it so that Mr. and Mrs. Coyes were unable to control the cash flow into the project to ensure that no builders' liens would be outstanding. Moreover the form of contract describes the Coyes as interim purchasers, which was borne out by the provision for a closing when the house was completed at which time most of the purchase price would be paid by cash and the assumption of the builders' mortgage. Only then would title be transferred.

82 It concluded that the "essential contract" in the case was for the purchase of a completed home. The Court of Appeal held that the Coyes were not "owners" within the meaning of the *BLA*, finding that the Coyes' participation in the construction process was merely passive and consensual (at paragraph 26).

83 At paragraph 27, the Court noted:

[27] The task before the court in each case of this kind, where the contract with a builder is relied upon as constituting a request, is to determine, as a finding of fact, the essential purpose of the contract as it can be determined from all the factors in evidence. For this reason cases decided on a different set of facts are not particularly helpful in reaching a conclusion.

84 In *Fung*, an unpaid electrical contractor sought to lien the landlord's interest in the property when the tenant failed to pay for improvements done to its restaurant. The case turned on the Court of Appeal's consideration of the extent to which the landlord had participated in the construction of the restaurant improvements.

85 The Court of Appeal noted at paragraph 8:

[8] Whether or not active participation is established is a question of fact. The learned Master held as follows:

".....the applicant (sic) participation in the substantial renovations consisted of:

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

> (a) approving concept plans and;
>
> (b) approving the selection of paint for the exterior of the building.
>
> The applicant did not select the general contractor, did not prepare a set of plans nor approve a set of construction plans, did not control funding for the construction, did not provide any on-site supervision or inspection; did not receive any participation rent, in summary there is not sufficient evidence that the landlord actively participated to the extent that the court ought to find that the applicant made an implied request of the respondents to do work or provide materials."

86 The tenant was given a significant allowance by the landlord to construct improvements to the premises, and the landlord reserved the right to approve "the Tenant's conceptual drawings and specifications for the finishing of the Premises, storefront design and signage design." There was no evidence that the landlord had actually done so, and the tenant was not required to construct the improvements.

87 The Court of Appeal noted at paragraph 10:

> There is no question that the Landlord intended an arrangement whereby considerable control might have been exercised over tenant's improvements. And had that intended participation materialized, it might well have satisfied the test.

88 There, the Court of Appeal confirmed the Master's decision holding that there had been no request by the landlord to the contractor to have the work performed.

89 *Fung* approved a decision by McDonald J (as he then was), *Suss Woodcraft Ltd. v. Abbey Glen Property Corp.*, [1975] 5 W.W.R. 57, 1975 CarswellAlta 48 (Alta. T.D.) (hereinafter "*Suss Woodcraft*"), which in turn relied on *John A. Marshall Brick Co. v. York Farmers Colonization Co.* [1916 CarswellOnt 285 (Ont. C.A.)], 1916 CanLII 521, aff'd, (1917), 54 S.C.R. 569 (S.C.C.), 1917 CanLII 596 (hereinafter "*Marshall Brick*"). In *Marshall Brick*, the Supreme Court stated at page 581:

> While it is difficult if not impossible to assign to each of the three words 'request', 'privity' and 'consent' a meaning which will not to some extent overlap that of either of the others, after carefully reading all the authorities cited I accept as settled law the view enunciated in *Graham v. Williams* (1885), 8 O.R. 478, affirmed 9 O.R. 458 (C.A.), and approved in *Gearing v. Robinson* (1900), 27 O.A.R. 364, at page 371, that 'privity and consent' involves "'something in the nature of a direct dealing between the contractor and the persons whose interest is sought to be charged ... Mere knowledge of, or mere consent to, the work being done is not sufficient.'"

90 In *Suss Woodcraft*, it is important to note that the respondent landlord/fee simple owner had conceded that there had been an "implied request" that the work be done by Suss Woodcraft. The facts as found by McDonald J made it clear that there were direct dealings between the tenant's contractor and the landlord relating to the plans and the building permit, and that the landlord had played a role in supervising and monitoring the construction. The case turned on "privity and consent" and "direct benefit." The landlord had for the purposes of the application admitted that it had made a "request," so that was not in issue.

91 *Fung* points out the difficulty noted in *Marshall Brick* in distinguishing between "direct dealings" for the purpose of determining if there had been a "request" and "direct dealings" for the purpose of finding "privity and consent." If privity and consent is found, I cannot imagine circumstances where a "request" would not be found, or at least an implied request. But just because there has been a request does not mean there has been privity and consent. Request needs to be considered separately from privity and consent, and "direct dealings" are more important for privity and consent than they are for request.

92 However, *Suss Woodcraft* has certainly been considered in subsequent cases in the context of "request" and it is an important case in this area. It is more important with respect to "privity and consent" and "direct benefit" than it is to "request," and I will deal with it further when discussing those issues.

93 *Bengert* required an analysis as to the "true nature" of the contract, where the contract with a builder is relied upon as constituting a request. That instructs the master or chambers judge to determine "as a finding of fact, the essential purpose of the

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

contract as it can be determined from all the factors in evidence" (at paragraph 27). In that case, the "true nature of the contract" was that it was a contract between the ultimate purchaser and the vendor for a completed home. Since the purchaser had played no role in the construction process, no "request" was found.

94 *Fung* confirmed that *Bengert* "governs the determination of whether a request, expressed or implied, that materials be furnished or that the work be done is made out" (at para 17). It notes that "whether or not active participation is established is a question of fact" (at para 8).

95 The Court in *Fung* stated at paragraph 10:

> There is no question that the Landlord intended an arrangement whereby considerable control might have been exercised over tenant's improvements. And had that intended participation materialized it might well have satisfied the test.

96 It upheld the findings below that the landlord had not actively participated in the renovation project and, as such, that there had been no "request" by the registered owner (at para 14). The lien was struck.

97 The keys to the *Acera* decision are found in paragraphs 35 and 37. In paragraph 35, the majority found that there had been an implied request by Acera that Sterling begin to build homes on the unsubdivided lots. Berger JA stated:

> [35] In my opinion, by its course of conduct, Acera impliedly requested that the work be performed. Here the lien claimant entered into an agreement with the liened party to build according to plans approved by the liened party. It is not a condition precedent that there be a direct communication amounting to an express request between the liened party and the builder, but something more than mere knowledge or consent must exist.

98 At paragraph 37, the majority found that Sterling's construction activities had been for the direct benefit of Acera:

> [37] It remains, accordingly, to consider whether the work done and the material furnished by Sterling accrued to the "direct benefit" of Acera. Acera allowed Sterling to improve its lands. In law, the improvements become attached to the land and are owned by the owner of the freehold. Until the subdivision plan is registered Acera is prohibited from selling the lots, so it must be taken to have invited Sterling to improve the lands "for its [Acera's] direct benefit". Acera owns the freehold, therefore it owns the improvements, therefore it is directly benefitted. Having allowed Sterling in as a tenant-at-will it cannot argue the improvements were done against its will, i.e. that they were "not requested". Paragraph (iv) of the definition of "owner" is satisfied.

99 Berger JA continued at paragraph 39:

> [39] In that sense, mindful that it was anticipated that construction would begin before sub-division approval and transfer of the lots was obtained, such construction was of direct benefit to Acera.

100 Martin JA in separate but concurring reasons would have directed the trial of an issue as to whether Acera had been unjustly enriched and whether Sterling was entitled to a restitutionary remedy. Restitutionary remedies have progressed significantly since builders' lien remedies were enacted decades ago, so there are arguably more potential remedies for unpaid contractors and subcontractors now than before.

101 This analysis of the binding case law leads me to now consider the three key issues: Was Reid-Built the Developers' contractor? Was there a request within the meaning of the *BLA*? If so, are any of the other conditions to a finding of "owner" satisfied?

a. Was Reid-Built the "contractor" of any of the Developers?

102 This argument flows from *Northern Electric*, where the Supreme Court concluded that Manufacturers Life was not only an "owner" for the purposes of the Nova Scotia *Mechanics' Lien Act*, but that Metropolitan, the fee simple owner who contracted with the various trades (including Northern Electric) was essentially Manufacturers Life's contractor.

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

103 The contracts between Reid-Built and the Developers were not construction contracts. As discussed above, unless Reid-Built defaulted on its obligations after building something on one of the lots, the Developers got no benefit from the construction that they were paying Reid-Built for. They got the same price for the lot whether Reid-Built had constructed something or not. The contracts between the parties were lot purchase agreements, not construction contracts. The Developers did not ask Reid-Built to build anything; they had no power under the contract to require Reid-Built to build anything. If Reid-Built wanted to build something before paying the full price for a lot, Reid-Built had to get the developer's approval for the plans and specifications. The Developers had extensive rights under the lot purchase agreements to inspect any work being constructed, but there is no evidence any of them ever did so.

104 I cannot see that Reid-Built could or should be considered to be the Developers' contractor.

b. Request

105 *Northern Electric* requires the trier of fact to determine the true nature of the contract in question. Here, that contract is the lot purchase agreement between Reid-Built and the various Developers.

106 As noted in *Marshall Brick* at page 581, "it is difficult if not impossible to assign to each of the three words 'request', 'privity' and 'consent' a meaning which will not to some extent overlap that of either of the others."

107 I am satisfied that there is no material difference in the terms of the various lot purchase agreements relevant to the determination of this issue. In all cases, the agreement governed how and when Reid-Built would acquire title to the lots it had agreed to purchase from the developer, and when Reid-Built would pay for the lots. In all cases, the Developers retained control over some aspects of construction of houses on the lots by Reid-Built, including approval of plans and specifications and architectural controls.

108 In all cases, where construction activities by Reid-Built took place on various lots, the Developers had approved plans and specifications. Beyond that, there is no evidence of any involvement by any of the Developers during the construction process itself, such as by supervising the work, inspecting the work, or having any dealings of any kind with any of Reid-Built's contractors or suppliers.

109 Reid-Built acted as its own general contractor. So long as Reid-Built fulfilled its contractual obligations to the Developers, the Developers would receive exactly the same price for a lot whether Reid-Built had built on it or not. It was Reid-Built that benefited from the payment arrangements relating to construction: it did not have to pay the full price for a lot until it had sold the lot to a purchaser, or when final payment for the lots came due regardless of the state of construction.

110 This case is somewhat unique, at least in Alberta. In all cases, Reid-Built's contractors, who are the lien claimants here, are themselves like general contractors in that they contracted directly with Reid-Built. Reid-Built was itself the "owner" of the various lots, at least in equity. Reid-Built was not a contractor building houses for the registered owners, the Developers. It was building show homes for its own account or for purchasers from it, and it was solely liable for payment to the various contractors working for it. Reid-Built had no right to receive any payment from the Developers.

111 *Vis-a-vis* Reid-Built, this case is very similar to *Acera*. Theoretically, Reid-Built might have liened the properties in the event that any of the Developers terminated the lot purchase agreements and purported to have the value of any improvements forfeited to them. But it is not Reid-Built advancing any claims.

112 There are several reasons why the facts in *Acera* are unique in the case law. There, Sterling began construction on lots that it had a conditional right to purchase. The condition precedent to purchase was subdivision of the lands owned by Acera. Satisfaction of the condition precedent was solely in Acera's control. Acera was contractually obliged with Sterling to obtain subdivision approval and complete the subdivision. Until subdivision was completed, Acera, as registered owner of the lands, was the only party who could directly benefit from the value of any improvements to those lands. Construction was encouraged by Acera, if not specifically requested. Acera cooperated fully with Sterling with obtaining building permits and approving

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

plans and specifications. Its failure to complete subdivision could hardly (at least in equity) allow it to benefit from its default in fulfilling its obligation to subdivide.

113 I do not think that *Acera* should be seen as altering in any way the law set out in *Bengert* and *Fung*. It does not purport to do so, and in fact relies on *Bengert* and distinguishes *Fung* on its facts (on the issue of request). On first glance, it appears in *Acera* that there was not much more than the developer approving the builder's plans and specifications. But there was clearly more than just that. Acera did exercise some of the contractual powers over the builder such as inspections, and the contractual imperative to build was stronger in *Acera*, as were exhortations for Sterling to do so by Acera.

114 *Acera* is, on its facts, distinguishable from this case. In *Acera*, a key fact finding was that Acera expected that Sterling *would* commence construction before it acquired title to any lots. Acera expected Sterling to commence construction before the subdivision plan had been registered, so Sterling effectively could not obtain title before it commenced construction.

115 There is no evidence here that any of the Developers expected or required Reid-Built to commence construction on any lot before it was paid for and transferred to Reid-Built. The lot purchase agreements allowed Reid-Built to build on a lot before taking title, but that was up to Reid-Built. Reid-Built could also obtain title to a lot by paying for it without any construction having occurred on a lot.

116 The *Acera* fact findings also emphasize the greater control exercised by Acera and the greater involvement by Acera in the construction activities than is the case here.

117 In *Bird Construction Co. v. Ownix Developments Ltd.*, [1984] 2 S.C.R. 199 (S.C.C.), the facts were somewhat similar to those in *Northern Electric*. Phoenix Assurance wanted to build a head office, and entered into a complicated arrangement with Ownix Developments Limited whereby a Phoenix subsidiary would acquire the lands necessary for the office building, lease the lands to Ownix on a long-term lease, and then sublease the building back from Ownix. Ownix mortgaged its leasehold interest, and the rent was sufficient to pay off the mortgage. At the end of the lease, the building would revert to the Phoenix subsidiary.

118 Ownix contracted with Bird Construction for the construction of the building, but went bankrupt during the course of construction, leaving Bird Construction unpaid. Bird Construction liened the interests of Ownix and Phoenix.

119 Under the terms of the agreement with Ownix, Phoenix had the right to alter plans, and to inspect and supervise construction. The Supreme Court of Canada held at page 215:

> It should be noted that it is difficult to examine the factual complexities of the transactions with which this appeal is concerned without concluding that both PUK and PCDA, in a factual sense, requested that the work be done. PUK, the parent, owns all the issued and outstanding shares of PCDA. PUK entered into these arrangements for the sole purpose of establishing a suitable head office facility in Toronto for its wholly-owned subsidiary. PUK was the guiding entrepreneur in these operations, and PCDA the immediate occupant and ultimate owner of the building. It would be legalism in its purest form to conclude that either company had not requested the work, in the sense of s. 1 of the Act.

120 Thus, the Supreme Court concluded that Phoenix had "requested" the work for the purposes of the Ontario *Mechanics' Lien Act*.

121 The Supreme Court reached a similar conclusion in *Cipriani v. Hamilton (City)* (1976), [1977] 1 S.C.R. 169 (S.C.C.), where Laskin CJ (for a unanimous court) stated at page 173:

> Schroeder J.A. in the Ontario Court of Appeal, looking to the substance of the transactions between the City, the Commission and McDougall, construed the interrelationship as one where the Commission became the general contractor for the City and, as such, proceeded to carry out its contract through another general contractor. In my opinion, this is a proper analysis, recognizing the fact that the Commission was being the City's banker. The City was and remained the "owner" within s. 1(*d*) so as to make its land lienable under s. 5, and it is idle formalism to contend that the work was not done at its request. I do not regard *Marshall Brick Co. v. York Farmers Colonization Co*. as standing in the way of this

WestlawNext. CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

conclusion. That case turned largely on the words "privity and consent" which were then conjunctive under the statute and they are now disjunctive. If the submission is that direct dealing is required before a request can be found, I am unable to accept such a limitation under the present *Mechanics' Lien Act*.

122 It is clear that there was no direct request by any of the Developers that Reid-Built construct any improvements on the lots. The Developers consented to Reid-Built doing so, and facilitated Reid-Built in doing so by approving plans and specifications.

123 The contractual provisions involved here should not, in my view, be interpreted as impliedly "requesting" Reid-Built to commence construction.

124 Essentially, what the lien claimants suggest here is that the Developers are guarantors of Reid-Built. Because Reid-Built constructed improvements on lots being purchased by Reid-Built but not yet conveyed to it, any builders' lien obligations owed by Reid-Built to its contractors or suppliers are jointly owed by the Developers.

125 That, in my view is an interpretation of the *BLA* that goes far beyond the narrow approach mandated in the early case law.

126 The facts here do not demonstrate that any of the Developers exercised any of their supervision or inspection rights under the lot purchase agreements. While they could have been involved in the construction activities, they did not do so other than by approving plans and specifications. The Developers had no dealings at all with the lien claimants. While direct dealings are only one factor to be considered and are not conclusive one way or the other, the absence of direct dealings and the absence of any significant involvement by the Developers is telling. The lien claimants worked for Reid-Built, took all of their direction from Reid-Built, and until Reid-Built went into receivership, looked solely to Reid-Built for payment.

127 I note here that the "request" required under section 1(j) of the *BLA* does not require that the imputed owner have made or be deemed to have made a request of all lien claimants. If the lien claimants are contractors or subcontractors or material suppliers who provided work on an improvement for someone whom an owner had requested work or materials from, that is sufficient to satisfy that part of the test for anyone claiming under a contractor or someone else who directly contracted with the owner. That is clear from *Northern Electric*. Manufacturers Life was liable for Northern Electric's mechanics' lien because Manufacturers Life was held to have requested Metropolitan to construct a building for Manufacturers Life. Northern Electric was a contractor or subcontractor for Metropolitan.

128 It is not fatal to the lien claimants' claims that none of them had any direct dealings with the Developers, or that the Developers made no express requests of work from them. It would have been sufficient had the Developers been found to have requested, expressly or impliedly, Reid-Built to construct the improvements on the lots.

129 Ultimately, the facts here do not bring the Developers within any of the cases, including *Acera*, where a developer or other stranger to the construction contract made an express or implied request that improvements be constructed on its lands.

130 As a result, I conclude that none of the Developers made a request of Reid-Built to construct improvements on the lots within the meaning of section 1(j) of the *BLA*.

131 This finding effectively precludes any of the Developers from being found to be "owners." However, if I am wrong in this analysis, I need to deal with the other elements of the *BLA*'s definition of "owner," such as the issues of privity and consent and direct benefit.

c. Privity and consent

132 The case law is clear that the finding of a request does not equate to a finding that there is privity and consent under section 1(j)(iii). Any reading of the legislation leads to the conclusion that they are different requirements. That is not to say that there are not significant similarities.

133 As noted in *Marshall Brick* at 581:

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

> While it is difficult if not impossible to assign to each of the three words 'request', 'privity' and 'consent' a meaning which will not to some extent overlap that of either of the others, ... I accept as settled law ... that 'privity and consent' involves
>
>> something in the nature of a direct dealing between the contractor and the persons whose interest is sought to be charged ... Mere knowledge of, or mere consent to, the work being done is not sufficient.

134 The leading Alberta case on privity and consent is *Suss Woodcraft*. There, McDonald J stated at paragraphs 17-21:

> [17] ... The question here is whether there was "something in the nature of a direct dealing" between the plaintiff and the defendant. The plaintiff contends that that "something" is to be found in the facts that:
>
>> (a) The defendant approved the plans,
>>
>> (b) The plaintiff provided plans to the defendant,
>>
>> (c) The defendant obtained the building permit,
>>
>> (d) The defendant's representative discussed with Mr. Suss the fact that the defendant would apply for the building permit with the plans Mr. Suss had delivered,
>>
>> (e) The plaintiff delivered to the defendant a copy of a page from the contract between the plaintiff and the tenant,
>>
>> (f) The plaintiff paid the defendant the cost of the building permit, and
>>
>> (g) During the construction period the defendant's representative (Mr. Yacyk) and his assistants expressed concern regularly with what the plaintiff was doing (e.g., by giving instructions directly to the plaintiff in respect of fireproofing, and by specifying that the general contractor was to cut the floor where the front doors were to be installed).
>
> [18] I find all these facts except (c) to exist.
>
> [19] I consider that these facts, whether including (c) or not, do not constitute "something in the nature of a direct dealing." Consequently I find that, while there was consent, there was not "privity and consent." In reaching that conclusion I recognize that the test to be applied does not require direct contractual relations between the owner and the lien claimant, and I realize that the facts of *Orr v. Robertson* are similar. However, on the facts of the latter case as reported it appears to me that something in the nature of direct dealing was afforded particularly by the fact that the head tenant ordered the contractor to do certain of the work. In the present case that did not occur.

135 The decision in *Suss Woodcraft* ultimately turned on the fact that Suss Woodcraft had not registered extra-provincially in Alberta. It was found to have had no capacity to file a builders' lien, so its claim was dismissed.

136 There is no doubt here that there were direct dealings between the Developers and Reid-Built. The direct dealings were limited to the lot purchase agreement itself and the obtaining of the Developers' approval of plans and specifications for the houses to be built. The Developers were simply not involved in the improvements, other than knowing about them and consenting to them by way of approving plans and specifications. They could have been more involved because of the terms of the lot purchase agreements, but they were not.

137 The direct dealings between Reid-Built and the Developers were not, on the facts before me, sufficient to constitute "privity and consent" as contemplated in section 1(j)(iii) of the *BLA* so as to make the Developers "owners." It cannot be said that Reid-Built was in effect the Developers' contractor or that "privity and consent" existed with respect to the construction of the houses.

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

138 As discussed above, it is not necessary for each of the lien claimants to be able to establish that it had direct dealings with the Developer. It would have been sufficient if the contractor for whom a lien claimant worked (Reid-Built) had such sufficient direct dealings, as in *Northern Electric* and *Cipriani v. Hamilton (City)*.

139 As a result, it has not been established that privity and consent existed so as to make the Developers "owners" for the purpose of the *BLA*.

d. Direct benefit

140 *Northern Electric* remains the main binding precedent from the Supreme Court in this area. The majority found that the construction activities were for the direct benefit of Manufacturer's Life as they would share in the gross revenues from the developed property over the 80-year period of the lease with Metropolitan Projects Limited.

141 No authority has been provided to me, and I am not aware of any other authority, suggesting that a reversionary right to improvements at the end of a lease or on termination of the lease by the landlord for tenant default, without more, is a "direct benefit" to the landlord.

142 *Northern Electric* found a direct benefit because the chambers judge and the Supreme Court concluded that the development was as much for Manufacturers Life's benefit as for the developer, Metropolitan. In *Cipriani v. Hamilton (City)* the Supreme Court concluded that the Ontario Water Services Commission acted as Hamilton's contractor (and banker) such that Hamilton became an owner and was liable for liens filed by contractors and suppliers working for the Commission. In *Bird Construction Co. v. Ownix Developments Ltd.*, the Supreme Court concluded that the improvements were for the direct benefit of Phoenix and its subsidiary because the construction was in effect for Phoenix's head office.

143 Before *Acera*, *Suss Woodcraft* was the leading Alberta case on "direct benefit." There, McDonald J (as he then was) found a direct benefit because of the participation rent the landlord was entitled to, not the landlord's reversionary interest in the improvements at the end of the lease. McDonald J considered the effect of the reversion at the end of the term, as well as the potential forfeiture of the improvements to the landlord in the event the tenant defaulted under the lease during the term. However, those comments (as well as the comments by the trial judge in *Northern Electric* referred to in *Suss Woodcraft*) do not hold that the reversion, or the possibility of forfeiture because of the landlord's default, constitute by themselves direct benefit.

144 McDonald J considered that issue at paragraphs 20-21:

> **(b) Was there "direct benefit"?**
>
> [20] It is submitted by the plaintiff that the defendant is an "owner" within the meaning of s. 2 of the Act because the work done and the material furnished by the plaintiff were for the "direct benefit" of the defendant. The plaintiff points to the fact that in the lease between the defendant and the tenant, cl. 9.03 governs the surrender of the premises on the expiration of the lease or the sooner determination of the term, and provides in particular as follows:
>
>> ".... all alterations, improvements and fixtures (other than the fixtures in the nature of trade or tenant's fixtures) upon the leased premises and which in any manner are or shall be attached to the floors, wall or ceiling, or any linoleum or other floor covering which may be cemented or otherwise affixed to the floor of the leased premises, shall remain upon the leased premises and become the property of the landlord at the expiration or sooner determination of this lease".
>
> [21] The plaintiff submits that the effect of the reversionary interest created by cl. 9.03 is that the landlord had a direct benefit from the work done and materials supplied.

145 McDonald J reviewed the case law and concluded at paragraph 26:

> [26] Despite those cases, I consider that the reasoning of *O Hearn Co. Ct. J. in Northern Electric Co. Ltd. v. Metropolitan Projects Ltd.*, supra, is correct. Adapting it to the present case: the lease here provides not only for rent but for rent equal

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

> to a specified percentage of the gross sales if that share exceeds the basic rent. (The landlord thus stands to benefit directly from the improvements, for without them the store will not attract customers and there will be lower or no sales.) When the reversion falls in, the improvements will remain on the property, pursuant to cl. 9.03. The tenant has the right to remove only trade fixtures at the expiration of the lease, and those only if he has paid the rent and performed his covenants. As in Northern Electric, the lease is subject to forfeiture for many reasons, such as bankruptcy or insolvency, and in such event the landlord would keep the improvements. (In my opinion it matters not that the improvements are trade fixtures which may last less than the full term, or, as in Northern Electric, a building.)

146 To put McDonald J's decision into the proper context, it should be noted that the Supreme Court of Canada had effectively restored O'Hearn J's decision by the time of McDonald J's decision.

147 All three of the Supreme Court cases, *Northern Electric*, *Cipriani v. Hamilton (City)* and *Bird Construction Co. v. Ownix Developments Ltd.*, make it clear that there must be some *immediate* benefit for there to be a "direct benefit." A request may be inferred from the immediate benefit that makes it clear that the improvement is really being constructed at least partly for the imputed owner.

148 That cannot be said to be the case here. The true nature of the arrangement between Reid-Built and the Developers was a sale of lots to Reid-Built. There was no intention at the time of the making of the contract that a developer would have any interest in the improvements being constructed on the lots.

149 It would, in my view, be inappropriate to find a "direct benefit" from a reversionary interest that would only materialize 80 years hence, or from a speculative contingent interest based on a possible future default by a tenant.

150 The same principles apply to the possibility of a forfeiture arising from a purchaser's default.

151 It is undoubtedly true that the Developers would benefit by the fact of any construction activities taking place on their developments, in that potential purchasers might want to buy homes under construction, or see the potential of the development. Other house builders might want to acquire lots from the Developers and greater demand might result for their lots. That in turn might speed up their cash flow and ability to realize on their investment. However, those are not, in my view, the sort of "direct benefits" contemplated by the *BLA*. Those are "indirect" benefits. There is no interest in the lots retained by the Developers after the close of the purchase by Reid-Built, and the Developers get the same price from Reid-Built whether the lots have been built on or not.

152 The Developers' situation is no different than a landlord benefitting from a tenant occupying premises and getting rent from an operating tenant, and the fact that other space in the landlord's building might be leased to other tenants who might be attracted to the building by successful operations of existing tenants.

153 In *Acera*, the Alberta Court of Appeal concluded that Acera had received a direct benefit from Sterling's construction activities. That was because from the time the construction began on the lands, only Acera owned the lands and had a legal interest in the lands. Because the lands were not subdivided, no one could derive an enforceable interest in the lots until the subdivision was effected.

154 In my view, *Acera* should not be read as concluding that an after-the-fact benefit (as opposed to an initially intended benefit) is sufficient to constitute a "direct benefit." The inevitability of a landlord's reversionary interest in tenant improvements has not by itself been found to be a direct benefit so as to make a landlord an owner. More is required for that. *Acera* did not purport to vary existing law in the area.

155 In this case, the benefits suggested by the lienholders are, in my view, intangible benefits and not direct benefits. It was never intended that the Developers would obtain any direct benefit from the improvements themselves. They might obtain intangible benefits from the fact that homebuilders were buying lots on their subdivision and actually constructing homes there, but that is not a "direct" benefit.

WestlawNext. CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

156 It is true that the Developers stood to potentially benefit if, after they entered into lot purchase agreements with Reid-Built, subtrades constructed improvements on the lots being sold (and those improvements actually added value to the lots), then Reid-Built defaulted in its obligations under the lot purchase agreements, Reid-Built was then unable to cure any such defaults and, finally, the lots were then forfeited or foreclosed by the Developers against Reid-Built. However, that possibility is far too speculative and dependent on too many contingencies to be considered to be a "direct benefit" to the Developers.

157 There is, in any event, no evidence that any of the Developers received any benefit from the improvements constructed by or for Reid-Built, so this argument is somewhat moot.

158 As a result, I find that even if there had been a "request" by any of the Developers that Reid-Built improve the lots, none of the Developers received a "direct benefit" as contemplated by section 1(j)(iv) of the *BLA*.

2. Are any of the builders' liens filed against the Developers' interests in various lots invalid because they did not properly describe the interests in land to be liened?

159 The leading case in this area is *LT Interior & Drywall Ltd. v. Sota Centre Inc.*, 2003 ABQB 552 (Alta. Q.B.) (hereinafter "*LT Interior*"). That decision makes it clear that a builders' lien claimant must describe in the builders' lien the nature of the interest in land the lien claimant intends to attach with the lien (see section 34(2)(a)(iii)). The curative provision in the *BLA*, section 37, allows the Court to cure a defective lien, *provided* the lien was in substantial compliance with section 34 *and* the party whose interest is sought to be charged has suffered no prejudice. *LT Interior* is clear that failure to describe the interest to be charged in any way (as opposed to a misnomer) is not substantial compliance.

160 In *LT Interior*, the work was done for the tenant. The defendant was the landlord and registered owner of the property. Greckol J (as she then was) described the facts:

> [23] The Defendants note that the Statement of Lien was registered against the fee simple interest of the registered owner, 924745 Alberta, but not against Sota Holdings' leasehold interest. Further, the Statement of Lien identifies Sota Centre as the party for whom the work or materials were provided and does not state that the work was requested by 924745 Alberta.

161 The lien was declared invalid.

162 I considered *LT Interior* in *Westpoint Capital Corp. v. Solomon Spruce Ridge Inc.*, 2017 ABQB 254 (Alta. Q.B.). In that case, a lien claimant sought to attach the mortgagee's interest in the property on which work had been performed. The builders' lien purported to attach the interest of the registered owner, for whom the claimant claimed to have done the work.

163 I stated at paragraphs 112 and 113:

> [112] I find the logic and reasoning in *LT Interior & Drywall Ltd. v Sota Center Inc.*, 2003 ABQB 552 (CanLII), and *Arres Capital Inc. v Greywood Mews Development Corp.*, 2011 ABQB 411 (CanLII), compelling. The failure to specifically name Westpoint in its lien and to specifically register a builder's lien claim against Westpoint's interest in the lands is fatal to Solomon's claim against Westpoint or its interest in the lands.
>
> [113] I am also satisfied that the problem here is not one that can be remedied under s 37 of the *Builder's Lien Act*.

164 Here, some of the builders' liens describe Reid-Built as the "owner." They do not name the developer specifically, although in all cases the developer is the registered owner of the lands.

165 The builders' liens registered in this fashion would be validly registered against Reid-Built's unregistered and uncaveated interest in the applicable lots. As regards the interest of the developer as owner, failing to describe the developer as "owner" fails to comply with section 34, and any builders' lien so filed does not substantially comply with section 34.

WestlawNext. CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

Tab 3

New Brunswick Court of Appeal

Citation: Beloit Canada Ltd. v. Fundy Forest Industries Ltd.*
Date: 1981-08-18

Hughes C.J.N.B., Limerick and Stratton JJ.A.

Counsel:
William L. Hoyt, Q.C., and *Eugene J. Mockler,* for appellant.
David T. Hashey, Q.C., and *A. G. Dickson,* for respondent.

1981 CanLII 2865 (NB CA)

[1] HUGHES C.J.N.B.:—I have examined the factums filed on behalf of the parties to this appeal and have considered the submissions of counsel advanced on the hearing of the appeal.

[2] I have also had the advantage of perusing the reasons prepared for delivery by my brothers Limerick and Stratton and have nothing to add to the analysis of the relevant provisions of the *Mechanics' Lien Act,* R.S.N.B. 1952, c. 142 [now R.S.N.B. 1973, c. M-6], made by them. In my opinion the result is unfortunate but under the present wording of the Act I am unable to conclude that it creates a lien upon the estate or interest of the owner of land in favour of a person who sells and installs in a pulp mill located on the land a paper-making machine such as was sold and installed by the appellant in the respondent's paper-mill. I therefore concur with the conclusion reached by the other members of the Court that the appeal must fail and I agree with the disposition of the appeal and of the cross-appeal which they have made.

[3] LIMERICK J.A.:—The respondent Fundy Forest Industries Ltd. (hereinafter referred to as "Fundy") relying on a guarantee by the Province of New Brunswick of a bond issue floated by Fundy in the amount of $5,000,000, purchased land in New Brunswick, erected a building thereon for the purpose of housing therein a corrugating paper machine and purchased and had installed therein a paper-making machine, the whole comprising what is commonly called a paper-mill.

[4] The appellant (hereinafter called "Beloit") is the vendor to Fundy of the corrugating paper machine which weighed approximately 2,500,000 pounds and cost $2,371,198. On April 16, 1971, when 60% of the purchase price had been paid according to the terms of the contract of sale, the appellant duly filed a claim for a mechanics' lien for the balance of the purchase price claimed due and brought this action claiming the balance owing and a lien on the lands on which the paper-mill was erected. The admitted balance due on the purchase price without any addition for interest is $875,226. Interest in the amount of $880,601.33 is claimed to July 31, 1978, and thereafter at 10¾% per annum.

[5] Three issues were determined by the trial Judge [28 N.B.R. (2d) 656.] He held that the delivery to and installation of the paper-making machine in the premises of Fundy was not an

---

* Leave to appeal to the Supreme Court of Canada (Martland, Ritchie and Dickson JJ.) refused November 2, 1981.

improvement to land nor was it material used in an improvement to land.

[6] He also held that the mortgage by Fundy to the Province of New Brunswick registered after Beloit's lien, if any, arose, and prior to such lien being filed, under which mortgage advances were made to Fundy, took priority to any lien which might have arisen to the extent of the amount of such advances made prior to the filing of the lien and he further found that interest was payable as claimed as having been included in the contract price.

[7] From the first two findings Beloit appealed and Fundy has appealed from the finding that interest is payable.

[8] In the argument submitted by the appellant it relied on decisions of various Courts relating to what are fixtures, or chattels real under real property law and landlord and tenant law. No case so similar in facts to the matter under consideration as to be persuasive of any opinion, has been brought or has come to my attention. The only conclusion which I come to from Canadian as well as from United States law is that each case must be decided on the wording of the applicable statute and on the facts of the case being considered.

[9] The evidence discloses that Fundy acquired land suitable in size and location for the particular purpose of locating on it a paper-mill of a specified design and capacity. It erected on the land a building specifically designed to house a custom-designed paper-making machine and purchased the machine.

[10] Are the building and the machine to be considered an improvement to the land or is the building only to be regarded as something designed and erected to house and protect the machine as well as to provide a working area in which the machine can be utilized — and if so, is the land also an incidental acquisition, a place on which the machine and building can be located?

[11] The applicable provisions of the *Mechanics' Lien Act,* R.S.N.B. 1952, c. 142 [now R.S.N.B. 1973, c. M-6], as amended to 1970, are as follows:

> 1. In this Act, unless the context otherwise requires,
>
> • • • • •
>
> (*b*) "contractor" means a person contracting with, or employed directly by, the owner or his agent to do work upon or to furnish material *for* an improvement, but does not include a labourer;
>
> • • • • •
>
> (*e*) *"improvement" includes anything* constructed, erected, built, placed, dug or drilled on or in land except *a thing that is not attached to the realty nor intended to be or become part thereof;*
>
> • • • • •

1981 CanLII 2865 (NB CA)

3(1) *A person who*

• • • • •

(*b*) *furnished any material to be used in an improvement;*

for an owner, contractor, or sub-contractor has, subject as herein otherwise provided, a lien for wages or for the price of the work or material, as the case may be, or for so much thereof as remains owing to him, upon the estate or interest of the owner in the land in respect of which the improvement is being made, as such estate or interest exists at the time the lien arises, or at any time during its existence.

• • • • •

8(2) Upon filing of the claim of lien, the lien subject to subsection (3) has priority over all claims under conveyance, mortgages and other charges, and agreements for sale of land, registered or unregistered, made by the owner after the lien arises, [am. 1965, c. 27, s. 2(a)]

(3) *A conveyance, mortgage or other charge,* and an agreement for sale of land, *registered after a lien arises but before the filing of the claim of lien, has priority over the lien to the extent of any payments or advances made thereunder in good faith before the filing of the claim of lien.* [rep. & sub. 1965, c. 27, s. 5]

(Emphasis mine.)

[12] I concur with the trial Judge and find no error in applying the reasoning of Mr. Justice Ritchie who, when speaking for the Court in *Clarkson Co. Ltd. et al. v. Ace Lumber Ltd. et al.* (1963), 36 D.L.R. (2d) 554 at p. 558, [1963] S.C.R. 110 at p. 114, 4 C.B.R. (N.S.) 116, adopted the statement of Kelly J.A. [33 D.L.R. (2d) 70 at p. 711, [1962] O.R. 748] that:

". . . while the statute may merit a liberal interpretation with respect to the rights it confers upon those to whom it applies, it must be given a strict interpretation in determining whether any lien-claimant is a person to whom a lien is given by it..."

[13] Section 3(1)(*b*) provides that a person who furnishes any material to be used in an improvement has a lien for the price of the material. Reading the Act as a whole one must give a somewhat restricted meaning to the words "material to be used in an improvement". In this case there can be no question that the building in which the paper machine is installed is an improvement to the land. Literally, giving a liberal interpretation to the section, a chair is material to be used in the building or improvement. The strict and proper interpretation to be given to the provision, however, is that the use of the material furnished is that it be incorporated in and become part of the improvement. This is corroborated by s. 1(*b*) which uses the words "material for an improvement". The material supplied must not, by itself, constitute an improvement — it must be incorporated in and form a component of an improvement. It must, in the case before us, become a component of the building or at least be consumed in the construction of the building.

1981 CanLII 2865 (NB CA)

[14] In *Giroday Sawmills Ltd. v. Roberts et al.,* [1953] 2 D.L.R. 737 (B.C.C.A.), it was stated that the claimant must prove that the material he supplied and delivered at the site was so delivered with the intention and expectation of it being used in the construction at that site.

[15] This case though not directly applicable to the determination as to whether the machinery in the case under consideration in this Court is "material to be used in an improvement" is indicative of the view that the intention of the parties as to the use to which the material furnished is to be put is relevant in the determination as to the right of a claimant to a lien.

[16] In *Clarkson Co. Ltd. et al. v. Ace Lumber Ltd., supra,* it was held by unanimous decision of the Supreme Court that no lien could be acquired for the rental or the use of tools, machinery, or appliances furnished or rented for the purpose of facilitating the work where they remained the property of the contractor and are not consumed in their use. They are not to be considered as being used in an improvement. We should not, therefore, give a large and liberal interpretation to the words "to be used in an improvement".

[17] The matter is not to be determined by whether landlord and tenant law defines machinery as a landlord's fixture or tenant's fixture but whether it is a component of the building or improvement.

[18] The definition of "improvement" provides no assistance in determining whether a lien arises in this case, as the claim of the appellant is that the machine is a component of the paper-mill which is an improvement. The definition refers to the improvement as a whole not to the determination of what may constitute a component thereof or material to be used therein.

[19] The trial Judge referred to the decision of Stevenson J. in *Dobbelsteyn Electric Ltd. et al. v. Whittaker Textiles* (*Marysville*) *Ltd.* (1976), 14 N.B.R. (2d) 584, wherein it was found that other heavy manufacturing machinery was not part of the realty, the trial Judge stating "they were not intended to be or become part thereof.

[20] The intention of having something erected or placed on land being or becoming part of the land is referrable to improvements themselves and is not referable to the consideration as to whether or not this machinery is material to be used in an improvement. That is a matter which must stand or fall on the interpretation of s. 3(1)(*b*) of the Act. The section reads "to be used" and not "to be used or has been used". The words "to be" implies an intended future use: see *Giroday Sawmills Ltd.* case, *supra.* To support a claim for a lien the material furnished must be purchased for use in the construction of a specific improvement.

[21] The paper machine was sold as a paper-making machine and not as a component of the building. There is no evidence submitted that the machine was furnished by Beloit with the intention that it form or become a component of the building. To Beloit the building was merely the location in which to install the machine and the concrete foundation on which the sole plate was installed was simply the required support which Fundy was obligated to supply for the machine.

[22] I also have difficulty in believing that Fundy regarded the purchase of the machine as being something to be used as a component of an improvement. To Fundy the machine was

1981 CanLII 2865 (NB CA)

something which would produce their earnings and the land and building were necessary accessories to house and protect the machine.

[23] The trial Judge [at p. 661] referred to the definition [s. 1] of "building materials" as contained in the *Conditional Sales Act,* R.S.N.B. 1952, c. 34, s. 1 [now R.S.N.B. 1973, c. C-15]:

> "(*c*) *"building materials" includes* goods that become so incorporated or built into a building that their removal therefrom would necessarily involve the removal or destruction of some other part of the building and thereby cause substantial damage to the building apart from the value of the goods removed; but does not include goods that are severable from the land merely by unscrewing, unbolting, unclamping, uncoupling, or by some other method of disconnection; *and does not include machinery installed in a building for use in the carrying on of an industry, where the only substantial damage, apart from the value of the machinery removed, that would necessarily be caused to the building in removing the machinery therefrom, is that arising from the removal or destruction of the bed or casing on or in which the machinery is set and the making or enlargement of an opening in the walls of the building sufficient for the removal of the machinery;"*

(Italics added.)

[24] That definition is expressly stated to be applicable "in this Act", *viz.,* the *Conditional Sales Act* and is not applicable to the *Mechanics' Lien Act* which must be interpreted in accord with the language to be found in that Act. The fact that the vendor might have availed itself of a remedy under the *Conditional Sales Act* does not prevent it from claiming another remedy which may be provided by law or by statute, at least, to that point in time when an election may be made as to what remedy will be enforced.

[25] The charging section, which creates the lien, vests it in a person who furnished material to be used in an improvement. There cannot be a lien unless there is a common intention by the owner, contractor or subcontractor and by the supplier of the material that it will be used as a component of the improvement or consumed in the creation of the improvement. No such intention has been established.

[26] It is, therefore, not necessary to consider the second and third grounds of appeal.

[27] The appeal is dismissed with costs of the appeal to the respondent. The cross-appeal is dismissed without costs.

[28] STRATTON J.A.:—This appeal raises the question whether a large machine installed in a building which was constructed to house it was "material to be used in an improvement" within the meaning of s. 3 of the *Mechanics' Lien Act,* R.S.N.B. 1952, c. 142 [now R.S.N.B. 1973, c. M-6], as that Act read in 1971.

[29] Fundy Forest Industries Ltd., with the financial assistance of the Province of New Brunswick, purchased lands at St. George in Charlotte County and constructed thereon a paper-mill. A portion of the funds required for the project was raised by the issue of first

1981 CanLII 2865 (NB CA)

Tab 4

Province of Alberta

BUILDERS' LIEN ACT

Revised Statutes of Alberta 2000
Chapter B-7

Current as of July 1, 2012

Office Consolidation

© Published by Alberta Queen's Printer

Alberta Queen's Printer
7th Floor, Park Plaza
10611 - 98 Avenue
Edmonton, AB T5K 2P7
Phone: 780-427-4952
Fax: 780-452-0668

E-mail: qp@gov.ab.ca
Shop on-line at www.qp.alberta.ca

Copyright and Permission Statement

Alberta Queen's Printer holds copyright on behalf of the Government of Alberta in right of Her Majesty the Queen for all Government of Alberta legislation. Alberta Queen's Printer permits any person to reproduce Alberta's statutes and regulations without seeking permission and without charge, provided due diligence is exercised to ensure the accuracy of the materials produced, and Crown copyright is acknowledged in the following format:

© Alberta Queen's Printer, 20__.*

*The year of first publication of the legal materials is to be completed.

Note

All persons making use of this consolidation are reminded that it has no legislative sanction, that amendments have been embodied for convenience of reference only. The official Statutes and Regulations should be consulted for all purposes of interpreting and applying the law.

Regulations

The following is a list of the regulations made under the *Builders' Lien Act* that are filed as Alberta Regulations under the Regulations Act

	Alta. Reg.	*Amendments*
Builders' Lien Act		
Builders' Lien Forms	51/2002	*108/2004, 217/2009, 164/2010, 227/2011, 130/2012, 124/2015*

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Alberta, enacts as follows:

Definitions

1 In this Act,

(a) "certificate of substantial performance" means a certificate of substantial performance issued under section 19;

(b) "contractor" means a person contracting with or employed directly by an owner or the owner's agent to do work on or to furnish materials for an improvement, but does not include a labourer;

(c) "court" means the Court of Queen's Bench;

(d) "improvement" means anything constructed, erected, built, placed, dug or drilled, or intended to be constructed, erected, built, placed, dug or drilled, on or in land except a thing that is neither affixed to the land nor intended to be or become part of the land;

(e) "labourer" means a person employed for wages in any kind of labour whether employed under a contract of service or not;

(f) "lienholder" means a person who has a lien arising under this Act;

(g) "lien fund" means, as the case may be, the major lien fund, the minor lien fund or both the major lien fund and the minor lien fund;

(h) "major lien fund" means

(i) where a certificate of substantial performance is not issued, the amount required to be retained under section 18(1) or (1.1) plus any amount payable under the contract

(A) that is over and above the 10% referred to in section 18(1) or (1.1), and

(B) that has not been paid by the owner in good faith while there is no lien registered;

(ii) where a certificate of substantial performance is issued, the amount required to be retained under

section 18(1) or (1.1) plus any amount payable under the contract

(A) that is over and above the 10% referred to in section 18(1) or (1.1), and

(B) that, with respect to any work done or materials furnished before the date of issue of the certificate of substantial performance, has not been paid by the owner in good faith while there is no lien registered;

(i) "minor lien fund" means the amount required to be retained under section 23(1) or (1.1) plus any amount payable under the contract

(i) that is over and above the 10% referred to in section 23(1) or (1.1), and

(ii) that, with respect to any work done or materials furnished on and after the date of issue of a certificate of substantial performance, has not been paid by the owner in good faith while there is no lien registered;

(j) "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;

(k) "prescribed" means prescribed by the regulations;

(l) "registered lienholder" means a lienholder who has registered a statement of lien in the appropriate land titles office and includes a lienholder who has registered a statement of lien that has been removed pursuant to section 27 or 48(1);

(a) the work under a contract or a subcontract or a substantial part of it is ready for use or is being used for the purpose intended, and

(b) the work under a contract or a subcontract cannot be completed expeditiously for reasons beyond the control of the contractor or the subcontractor,

the value of the work to be completed or materials to be furnished is to be deducted from the contract price in determining substantial performance.

1985 c14 s3

Valuation of work done

4 For the purposes of this Act, the value of the work actually done and materials actually furnished shall be calculated on the basis of

(a) the contract price, or

(b) the actual value of the work done and materials furnished, if there is not a specific contract price.

1985 c14 s3

Creation and Extent of Lien

Waiver prohibited

5 An agreement by any person that this Act does not apply or that the remedies provided by it are not to be available for the person's benefit is against public policy and void.

RSA 1980 cB-12 s3

Creation of lien

6(1) Subject to subsection (2), a person who

(a) does or causes to be done any work on or in respect of an improvement, or

(b) furnishes any material to be used in or in respect of an improvement,

for an owner, contractor or subcontractor has, for so much of the price of the work or material as remains due to the person, a lien on the estate or interest of the owner in the land in respect of which the improvement is being made.

(2) When work is done or materials are furnished

Tab 5

1988 ABCA 58
Alberta Court of Appeal

Royal Trust Corp. of Canada v. Bengert Construction Ltd.

1988 CarswellAlta 39, 1988 ABCA 58, [1988] 4 W.W.R. 308, [1988] A.W.L.D. 732, [1988] C.L.D. 766, [1988] A.J. No. 277, 48 R.P.R. 116, 50 D.L.R. (4th) 335, 58 Alta. L.R. (2d) 97, 85 A.R. 210, 9 A.C.W.S. (3d) 397

GYPSUM DRYWALL (NORTHERN) LTD. et al. v. COYES and COYES

Laycraft C.J.A., Belzil and Stratton JJ.A.

Judgment: March 24, 1988
Docket: Calgary Appeal No. 19029

Counsel: *A.S. Rudakoff*, for appellants.
J.P. St. Pierre, for respondents.

Subject: Property; Contracts; Corporate and Commercial

Headnote

Construction Law --- Construction and builders' liens — Owner — What constituting request for work

Construction Law --- Construction and builders' liens — Owner — Under agreement of purchase and sale

Builders' liens — Priorities — Purchaser's lien — Builders' Lien Act not specifically including purchaser's lien as interest over which subsequently registered builders' lien will take priority — Priority between purchaser's and builders' liens to be determined by general rules of priority.

Builders' liens — Owners — Definition — Purchasers buying lot and house to be built on it under agreement for sale — Purchasers making advances stipulated under contract but otherwise having no role in construction of house — Purchasers not being owners within meaning of Builders' Lien Act — Facts not supporting finding of implied request by purchasers to those supplying work and materials to house.

Real property — Registration of interest in land — Priority of registered instruments — Builders' Lien Act not specifically including purchaser's lien as interest over which subsequently registered builders' lien will take priority — Priority between purchasers' and builders' liens to be determined by general rules of priority.

The plaintiffs entered into an agreement with a construction company for the purchase of a lot and a home to be built on the lot. The construction company subsequently acquired title to the land, obtained a mortgage which was registered against title, and work began. Shortly before the house was completed the construction company went bankrupt. The plaintiffs registered caveats against the property claiming an interest under their agreement for sale and claiming a purchaser's lien for the $14,700 they had paid in advances under the contract. Builders' liens were subsequently registered against the property. Following foreclosure of the mortgage and sale of the property the plaintiffs applied for an order for payment of $14,700 plus costs in priority to all builders' lien claims. The master's decision that the lien claimants took priority was reversed on appeal and the lien claimants appealed.

Held:

Appeal dismissed.

The plaintiffs were not the "owners" of the property within the meaning of s. 1(*g*) of the Builders' Lien Act. The contract was essentially for the sale of a completed house, and the plaintiffs' role in the construction of the house was passive, although an agreement alone may be sufficient to support the inference of an implied request. The plaintiffs had a minimal part in design, and the contract did not empower them to inspect during construction, or to have any involvement with subtrades. The builder obtained financing and the plaintiffs could not control cash flow to ensure liens did not arise. Therefore, the facts did not support a finding of an implied request by the plaintiffs in this case. As between the competing interests, the plaintiffs' purchaser's lien took priority over the builders' liens. Section 9(1) of the Builders' Lien Act, which specifies those interests over which a

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

subsequently registered builders' lien will take priority, does not include a purchaser's lien and, accordingly, the general rules of priority apply.

Appeal from decision of Virtue J., 49 Alta. L.R. (2d) 79, 24 C.L.R. 280, 75 A.R. 281, upholding priority of purchaser's lien over builders' liens.

The judgment of the court was delivered by *Laycraft C.J.A.*:

1 The dispute in this case arises from the bankruptcy of a building contractor during the construction of a house. Following foreclosure and sale of the property a surplus remains to be distributed after the mortgage lender was paid out. The issue now to be determined is whether the purchasers of the lot and a home to be built on it are entitled to recover the amount of their purchaser's lien, which they protected by caveat, in priority to builders' liens registered subsequently to the caveat. In master's chambers, Master Dalgleish gave priority to the builders' liens. On appeal in Court of Queen's Bench chambers [49 Alta. L.R. (2d) 79, 24 C.L.R. 280, 75 A.R. 281], Mr. Justice Virtue allowed the appeal and held that the purchasers' lien had priority. I respectfully agree with the conclusion reached by Mr. Justice Virtue and would dismiss the appeal.

I

2 The evidence in Queen's Bench (adduced by way of an agreed statement of facts) discloses that on 11th October 1985 Mr. Coyes entered into an agreement with Bengert Construction Ltd. The agreement was contained on a printed form in which blank spaces for amounts and dates had been filled in by handwriting. The document is entitled "OFFER TO PURCHASE AND INTERIM AGREEMENT". Despite the indication by its title that the document is an offer, Mr. Coyes, described as "purchaser", agrees in the opening words "to purchase the lot and home municipally described as __________". Clause 1 then provides for payment:

> 1. The total purchase price of the said lot and home including extras and credits, as set out in the attached Schedule "A" on page 2, is *$127,500* to be paid to BENGERT CONSTRUCTION LTD. AS FOLLOWS:

```
                      $5,700      herewith, as deposit;
                      ------
                      $9,000      as balance on deposit to be paid upon
                      ------
                                  approval of Purchaser(s) mortgage
                                  application;
                      $72,000     (more or less) by assumption (or
                      -------
                                  arrangement) of mortgage having monthly
                                  payments of $__________ (principal,
                                  interest and __________) included;
                      $40,800     (more or less) being the balance of the
                      -------
                                  purchase price by a cash payment 15 days
                                  after the Purchaser has been notified that
                                  Bengert Construction Ltd. has received
                                  a final or semi-final inspection by the
                                  mortgage company or 5 days before the
                                  purchaser takes possession of said premises
                                  whichever is sooner.
Total                 $127,500
                      --------
```

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

> Provided, however, should the net mortgage proceeds of such mortgage be less than the sum hereinbefore agreed to be assigned to BENGERT CONSTRUCTION LTD., the Purchaser shall forthwith, on demand, pay to BENGERT CONSTRUCTION LTD. the amount necessary to make up such deficiency.

3 Clause 2 states that the purchase price includes taxes to the date of possession and the preparation and registration of a transfer. Clause 3 provides:

> 3. BENGERT CONSTRUCTION LTD. agrees to construct a house on the said lot according to house plan model *Maria*, to be built complete to House Plan specifications and shall include such extras as are listed on the said attached Schedule. If the house is essentially complete or under construction when purchased, it is sold on an as is basis, excepting completion of unfinished work in accordance with House Plan Specifications and such extras as are listed on the said attached Schedule.

4 The remaining clauses deal with the date of possession, for additional payment if a retaining wall is required, for the "vendor" to have the risk until possession date and for "extras" (of which none were specified). Near its end the document reverts to wording appropriate to an offer and states "if my offer is not accepted the deposit shall be returned forthwith ..." Mr. Coyes signed the document as purchaser. A salesman employed by Bengert signed that "Bengert hereby accepts this offer, subject to the purchaser being approved by the mortgagee". Though only Mr. Coyes is shown as a party to the agreement, the case has proceeded on the basis that Mrs. Coyes is also a party and I will assume that to be so.

5 On the date of this agreement, Bengert was not the registered owner of the property, but had apparently made arrangements with another company, described as the "developer", to obtain title. The price to it of the lot alone was $38,000. Bengert received title on 21st March 1986. On the same day a mortgage from Bengert to a mortgage lender was registered against the property. Presumably, Mr. and Mrs. Coyes had been approved by the mortgage lender to assume the mortgage when construction was complete and title to the property was transferred to them. Meanwhile, construction was financed by periodic payments directly from the mortgage lender to Bengert. The evidence does not disclose that Mr. and Mrs. Coyes had any control over the mortgage advances nor any means to ensure that the subtrades were being paid as construction proceeded.

6 Mr. and Mrs. Coyes duly made the second payment of $9,000 and construction commenced. Work went on and materials were delivered until 13th April when the house was nearly completed. At some date, not disclosed in the evidence, Bengert went into bankruptcy. On 14th April Mr. and Mrs. Coyes registered two caveats against the property claiming an interest under their agreement for sale, and claiming a purchaser's lien for the $14,700 which they had paid. In the next few days, a number of builders' liens were registered. The appellant, Gypsum Drywall, represents all holders of builders' liens in these proceedings.

7 The mortgage was foreclosed by order in master's chambers on 21st August 1986 and thereafter the property was sold in a court-supervised sale. After the mortgage was paid out there remained in court $21,316.60 with interest. Mr. and Mrs. Coyes then applied for an order that $14,700 plus solicitor and client costs be paid to them in priority to all claims under builders' liens.

8 In master's chambers, Master Dalgleish decided, without written reasons, that the builders' liens had priority over the purchasers' lien. In Court of Queen's Bench, Mr. Justice Virtue heard extensive argument on the agreed facts and delivered written reasons for judgment. He defined two issues:

9 1. Whether Mr. and Mrs. Coyes were "owner(s)" of the property within the meaning of the Builders' Lien Act, R.S.A. 1980, c. B-12.

10 2. If they are not "owners", what is the relative priority of their interest "vis-à-vis the Builders' Liens which have been registered"?

11 On the first issue he had defined, Mr. Justice Virtue reviewed the extensive case law on this subject, including *Phoenix Assur. Co. of Can. v. Bird Const. Co.*; *Yarwood v. Ownix Dev. Ltd.*, [1984] 2 S.C.R. 199, 8 C.L.R. 242, 33 R.P.R. 221, 11 D.L.R (4th) 1, 5 O.A.C. 109, 54 N.R. 109, and concluded that Mr. and Mrs. Coyes were not owners within the meaning of s. 1(*g*) of the Act. He held that there is not in this case any evidence "from which it can be inferred that the real request for the work or materials came from the party whose interest is sought to be charged with the lien" [at p. 85].

WestlawNext. CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

12 On the second issue he had defined, Mr. Justice Virtue concluded that Mr. and Mrs. Coyes were entitled to priority for their purchaser's lien by s. 16(5) of the Land Titles Act. He held that, though, by s. 8 of the Builders' Lien Act, the lien arises when work is begun or the first material is furnished, a purchaser's lien is not among the interests over which a builders' lien is given priority under s. 9(1). Accordingly he allowed the appeal and directed that the purchasers' lien and costs had priority over the builders' liens.

II

13 By s. 4 of the Builders' Lien Act the person who does work or supplies material in respect of an improvement "for an owner" has a builders' lien for it. The definition of "owner" is contained in s. 1(*g*) of the Act which provides:

(*g*) "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 him whose rights are acquired after the commencement of the work or the furnishing of the material.

14 Wording similar to this appears in many of the Canadian statutes on this subject and has been considered in many decided cases. The section applicable in the 1892 case, *Reggin v. Manes* (1892), 22 O.R. 443 (Ch. Div.), for example, is identical to the Alberta section though arranged somewhat differently. In Alberta the section appeared in the first Mechanics' Lien Act enacted after Alberta became a province (S.A. 1906, c. 21). It was derived from the Mechanics' Lien Ordinance of the North-West Territories (Ordinance No. 6 of 1884).

15 To bring the person sought to be charged within the definition of owner, the lien claimant must establish three elements. First it must be shown that the person has "an estate or interest" in the land, secondly that he has requested, expressly or impliedly, that the materials be furnished or the work done and finally at least one of the remaining elements must be present: the work must have been done or the materials furnished on his credit, on his behalf, with his privity and consent or for his direct benefit.

16 The first element is clearly present in this case; indeed this was conceded by counsel. By the interim agreement with Bengert and their payment of $14,700, Mr. and Mrs. Coyes acquired an equitable interest in the land. They thus have the "estate or interest" which the section requires.

17 Most of the argument on this appeal was directed to the second element of the definition to determine whether a request from Mr. and Mrs. Coyes could be inferred from the circumstances of this case. The word "request", in the context in which it appears in the section, has a somewhat elusive meaning. As Anglin J. observed in *Marshall Brick Co. v. York Farmers Colonization Co.* (1916), 54 S.C.R. 569, 36 D.L.R. 420 [Ont.], any meaning assigned to the word "request" overlaps to some extent with the subparagraphs in the concluding portion of the definition.

18 Whether there is a "request" in a given case is a question of fact. The request may be express or implied from the circumstances of the case. Admittedly Mr. and Mrs. Coyes made no direct or express request in this case, nor does the evidence disclose that they had any dealings with, or control over any of the subtrades or materials suppliers. It was urged, however, that an agreement with a builder, without more, is an implied request within the meaning of the section. It was said that this proposition is established by a long line of cases commencing with *Reggin v. Manes*, supra, and expressed in *Trustee of Watt Milling Co. v. Jackson*, [1951] O.W.N. 841 (H.C.).

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

19 In *Reggin v. Manes*, two builders, who had purchased building lots, entered into an agreement with Dr. Hearn, by a part of which they were to construct certain buildings for him on the lots. Ferguson J. held Dr. Hearn to be an "owner". At p. 446 he said:

> Then looking at the "tender," as it is called, for the work, the plans of the same, what is said of the specifications, the manner in which the work was done, the conduct of the parties from the beginning of it in respect of the work, and the advances made by Dr. Hearn, for which, or some of which, he took temporary security, there can, I think, be no doubt that the work was done for him at his request and upon his credit and under a contract with him from the commencement. I think it is plain that Dr. Hearn was the "owner", and Manes and Booth the "contractors."

20 *Trustee of Watt Milling Co. v. Jackson*, supra, was decided in master's chambers in 1934 by Assistant Master Lennox but was not then reported. It was published in 1951 with the note that "It has been frequently consulted since its delivery, and is now published for that reason." Master Lennox adopted the headnote in *Reggin v. Manes*, which stated:

> An agreement to purchase property, under which buildings are to be erected thereon by the seller, and which has been acted on by the parties ... constitutes the person agreeing to buy an "owner" within (the Act).

21 From this headnote Master Lennox reached the conclusion that the contract alone makes the buyer an owner without any further involvement, and, presumably, regardless of its terms. Of the purchaser in the *Watt* case (at p. 843) he said: "it would be just the same if she had immediately [after signing the contract] gone abroad and shown no further interest."

22 In my view this proposition, stated as a rule of law applicable to all cases, is not correct. It converts into a rule of law that which is really a question of fact. All of the factors in each case must be weighed to determine the question of fact. Depending on its terms, an agreement may be sufficient to found the implication, but no rule can be stated that any agreement with a builder will be sufficient. Moreover, the headnote does not accurately reflect the decision in *Reggin*. Dr. Hearn's involvement there was much greater than merely signing a contract.

23 It was urged that a rule similar to that in the *Watt* decision may be derived from *Orr v. Robertson* (1915), 34 O.L.R. 147, 23 D.L.R. 17 (C.A.). In that case, Tyrrell sublet his land to Hyland, who agreed to erect a building on it. In brief reasons the Ontario Court of Appeal held, to quote the headnote, that "the taking ... of an agreement to build was a 'request'" from Tyrrell and made him an owner. Subsequently, however, the court felt it necessary to explain this decision. When the *Marshall* case, supra, was in the Ontario Court of Appeal (38 O.L.R. 542, *(*sub nom. *Marshall Brick Co. v. Irving)* 28 D.L.R. 464), Riddell J. reviewed his decision in *Orr v. Robertson* and said:

> We thought that there was no need of a personal request by Tyrrell to the contractor, but that the exaction by him of a contract that Hyland should build was, in the circumstances of the case, a sufficient implied request, i.e., taken in connection with the signing by him of the plan, the taking out by him of the building permit, &c. The language, "even if Tyrrell took no further nor other part in the matter," refers to such acts of interference as rendered him personally liable, which had been the subject of our consideration immediately before, and not to the circumstances already spoken of. We did not, and did not intend to, lay down any general rule — and the generality of the language employed must be restricted.

24 In *MacDonald v. MacDonald-Rowe Woodworking Co.* (1964), 49 M.P.R. 91, 39 D.L.R. (2d) 63 (P.E.I. S.C. in banco), Campbell C.J. reviewed a number of cases and, in my respectful view, correctly summarized their effect. At p. 98 he said:

> Analysis of the above-cited cases leads us to a reasonably clear appreciation of the concept "request" in s. 1(j): — it must be decided on the facts of each individual case; it does not necessarily involve a direct communication by alleged owner to contractor; it does involve something more than mere knowledge or consent.
>
> In ordinary language the word "request" indicates the idea of an active or positive proposal, as contrasted with mere passivity or acquiescence. Webster groups it as a synonym with "ask" and "solicit", synonyms which agree in meaning "to seek to obtain by making one's wants or desires known". "Request", he says, has a suggestion of greater courtesy and formality in the manner of asking.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

25 The Supreme Court of Canada has considered the definition of "owner" in similar words in other statutes in three cases since 1976: *City of Hamilton v. Cipriani*, [1977] 1 S.C.R. 169, 67 D.L.R. (3d) 1, 9 N.R. 83; *Nor. Elec. Co. v. Mfr. Ins. Co.*, [1977] 2 S.C.R. 762, 79 D.L.R. (3d) 336, 18 N.S.R. (2d) 32, 12 N.R. 216; and *Phoenix Assur. Co. v. Bird Const. Co.*, supra. None of these cases, in my opinion, stands for the proposition that contracting with a builder, of itself, brings one within the definition of "owner". In all of those cases, there was an active participation by the entity eventually held to have made a "request" and so to be within the definition of "owner".

26 The position of many new home buyers is aptly stated by Mr. E. Mirth, of the Alberta bar, in a paper delivered to the Alberta branch of the Canadian Bar Association and reproduced in the association's papers for 1986 at p. 488:

> ... one must ... *quaere* the application of the Act to an "interim" purchaser: — one who acquires an interest under an "interim" agreement for sale and who expects to have little or no involvement in the project until it is completed. It is not uncommon for a new-home buyer to tie a property up with an "interim" purchase with no further significant involvement until closing after house completion. The buyer, in his own mind at least, is buying a completed house; not a lot with construction to be done thereon. Often his "interim" says little more about what construction is to be done (and how) than to say that a house of a certain type is to be built. There are no progress payments, and often the buyer simply assumes the builder's mortgage (which finances construction) on closing and possession. From the buyer's perspective he is on closing buying a completed house and lot by cash (or cash and mortgage assumption). Especially where the builder has or places permanent financing to be assumed on closing, the "interim agreement" seems closer in character to an option than to an agreement for sale. The deal has a distinct and separate level of closing once the house is built. The buyer swaps his full price payment for title to a completed house.

27 In this case, the Coyes' participation in the construction activities was little more than to choose a house plan. They had such a minimal part in design that their contract does not even specify any extras to be added to it. The contract does not empower them to inspect during construction or to have any involvement with subtrades. The builder had obtained the mortgage and financed construction from it so that Mr. and Mrs. Coyes were unable to control the cash flow into the project to ensure that no builders' liens would be outstanding. Moreover the form of contract describes the Coyes as interim purchasers, which was borne out by the provision for a closing when the house was completed at which time most of the purchase price would be paid by cash and the assumption of the builder's mortgage. Only then would title be transferred.

28 All of these factors lead to the conclusion that the essential contract in this case is for the sale of a completed house. I respectfully agree with Mr. Justice Virtue that these facts do not lead to a finding of an implied request by the Coyes to the persons who supplied work and materials to the house. The Coyes' role was passive and no more than the "mere knowledge or consent" referred to in *MacDonald v. MacDonald-Rowe*, supra. I agree with his conclusion that the Coyes were not "owners" within the meaning of s. 1(*g*) of the Builders' Lien Act.

29 The task before the court in each case of this kind, where the contract with a builder is relied upon as constituting a request, is to determine, as a finding of fact, the essential purpose of the contract as it can be determined from all the factors in evidence. For this reason cases decided on a different set of facts are not particularly helpful in reaching a conclusion. The appellant cited the decision of the Saskatchewan Court of Appeal in *Arrow Plumbing & Heating (1978) Ltd. v. Enercon Bldg. Corp.*, [1987] 1 W.W.R. 724, 53 Sask. R. 108 (C.A.). In that case, as here, the home buyer entered a contract with a builder who had title to the building lot throughout. On this point, the case turns on the finding by Bayda C.J.S. at pp. 728-29 that "the essential purpose of the contract between the respondents [the buyers] and Enercon [the builder] was that Enercon would commission the work to be done on the property for the respondents". Applying the same test to a different set of facts he has reached a different conclusion than was reached in this case.

III

30 The remaining point is to determine the priority between the purchasers' lien and the builders' liens registered subsequently to it. Mr. and Mrs. Coyes claim priority for their purchaser's lien under s. 16(5) of the Land Titles Act on the ground of prior

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

registration. By that section, priority between "mortgagees, transferees and others" is determined by the time of registration. The builders' lien holders, on the other hand, point out that, by s. 8 of the Builders' Lien Act, their liens arose in each case when the work was begun or the first material was furnished.

31 The applicable sections are as follows:

32 The Land Titles Act, R.S.A. 1980, c. L-5:

> 16 ...
>
> (5) For purposes of priority between mortgagees, transferees and others, the serial number assigned to the instrument or caveat shall determine the priority of the instrument or caveat filed or registered.

33 The Builders' Lien Act, R.S.A. 1980, c. B-12:

> 8 The lien created by this Act arises when the work is begun or the first material is furnished.
>
> 9(1) A lien has priority over all judgments, executions, assignments, attachments, garnishments and receiving orders recovered, issued or made after the lien arises.

34 In my view the purchasers' lien has priority in this case. Section 9(1) of the Builders' Lien Act (quoted above) gives a builders' lien priority over "judgments, executions, assignments, attachments ... and receiving orders recovered, issued or made" after the lien arises even though the lien may not then be registered. A purchaser's lien, however, is not among the interests specified as losing a priority gained by time of registration to a builders' lien which had arisen but not been registered. The list of interests specified in s. 9(1) as exceptions to the general rules of priority cannot be extended beyond those specifically mentioned.

35 Accordingly, I would dismiss the appeal, with costs to the respondents.

Appeal dismissed.

End of Document Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

Tab 6

Court of Queen's Bench of Alberta

Citation: Sustainable Developments Commercial Services Inc v Budget Landscaping & Contracting Ltd, 2020 ABQB 391

Date: 20200707
Docket: 2003 09136
Registry: Edmonton

2020 ABQB 391 (CanLII)

Between:

Sustainable Developments Commercial Services Inc

Applicant

\- and -

Budget Landscaping & Contracting Ltd

Respondent

Endorsement
of
Brian W. Summers, Master in Chambers

---

[1] The application by Sustainable Developments Commercial Services Inc ("Sustainable") to discharge the builder's lien ("Budget Lien") registered by the Respondent Budget Landscaping & Contracting Ltd ("Budget") against the title to land owned by Victor Kochan is granted.

[2] Sustainable asserts two bases upon which the Budget Lien ought to be struck: firstly, that the work done by Budget was not an "improvement" to the lands; and secondly, that Victor Kochan is not an "owner" within the meaning of the *Builders' Lien Act.* I agree with both of those assertions.

[3] With respect to the first point, the work done by Budget was to haul aggregate to Victor Kochan's land. This work was done by Budget under and pursuant to a prime contract between the County of Vermilion and Sustainable and a subcontract between Sustainable and Budget. Both of these contracts are in evidence. Those contracts indicate that the work was to load aggregate at the Bykowski 3 Pit, haul it to the Kochan Stockpile site and stockpile the aggregate there. The evidence of Sustainable's officer James Green goes further to say that the aggregate material was for the purpose of a temporary stockpile to be utilized for road graveling over the course of the following year. Counsel for Budget argues that this information is hearsay (from the County) and that it is inadmissible under Rule 13.18(3) of the *Rules of Court* because

Sustainable's application is not interlocutory, but final. That is, if Sustainable's application is granted, the Budget Lien will be struck.

[4] I accept that Mr. Green's evidence that the aggregate would be used by the County of Vermilion over the course of the year for the county roads is hearsay. However, there is other evidence from Sustainable that the stockpiling of aggregate for the County on the Kochan lands was not an improvement to those lands. Firstly, the contracts make it clear that the aggregate was being stockpiled on the Kochan lands for the benefit of the County of Vermilion. Mr. Green also put into evidence the lease between Mr. Kochan and the County. That lease agreement is entitled "Lease Agreement for Stockpile Site". The lease states the County is the owner of the aggregate material on the Stockpiling Site and its employees and agents may access the site for the purpose of inspecting, removing or adding materials during the term of the lease. The lease also indicates that the County is responsible for the reclamation of the Stockpile Site. Clearly, the aggregate delivered by Budget to the lands at the request of the County of Vermilion was not an improvement to the Kochan lands.

2020 ABQB 391 (CanLII)

[5] When Mr. Green was cross examined by counsel for Budget he was pressed to admit that his information was corporate. He readily acknowledged that his information was information of the corporation of which he was the representative and a director. I find that Mr. Green's evidence on behalf of the corporation that the aggregate was being stockpiled on the Kochan lands for the County of Vermilion; that the County was the owner of the aggregate at all times and was responsible for reclamation of the lands under the lease is sufficient to prove that the stockpiling of aggregate was not an improvement to the Kochan lands.

[6] Furthermore, Budget has tendered no evidence that the stockpiling of aggregate on the Kochan lands was intended as or in fact constituted an improvement to those lands.

[7] With respect to Sustainable's second assertion, I agree that Victor Kochan was not an owner within the meaning of the *Builders' Lien Act.* The work by Budget forming the basis of the lien claim was for the County of Vermilion, not for Mr. Kochan. There is absolutely no evidence or any suggestion whatsoever that it was for the benefit of Mr. Kochan. No notice was served upon Mr. Kochan pursuant to section 15. The fact that the County of Vermilion had not registered a caveat with respect to its leasehold interest does not give Budget the right to lien Mr. Kochan's fee simple title. The Budget Lien should have indicated that it was against the County of Vermilion's leasehold estate.

[8] Sustainable is entitled to costs under Column 3 of Schedule "C" of *Alberta Rules of Court*. Since I called upon the parties to provide written argument on the issue of whether Budget could lien the fee simple interest of Mr. Kochan, the sum of $500 shall be added to the amount otherwise payable under item 7.

Heard on the 23rd day of June, 2020.
Dated at the City of Edmonton, Alberta this 6th day of July, 2020.

Brian W. Summers
M.C.Q.B.A.

Appearances:

Robyn L. Graham
Bryan & Company LLP
for the Applicant

Peter Alexander
Smith Thompson Law LLP
for the Respondent

2020 ABQB 391 (CanLII)

Tab 7

K & Fung Canada Ltd. v. N.V. Reykdal & Associates Ltd., 1998 ABCA 178

Date: 19980512
Docket: 97-17305

1998 ABCA 178 (CanLII)

IN THE COURT OF APPEAL OF ALBERTA

THE COURT:

THE HONOURABLE MR. JUSTICE BRACCO
THE HONOURABLE MADAM JUSTICE HUNT
THE HONOURABLE MR. JUSTICE BERGER

BETWEEN:

K & FUNG CANADA LIMITED

Respondent (Applicant)

- and -

N.V. REYKDAL & ASSOCIATES LTD and
571582 ALBERTA LTD., carrying on business
under the firm name and style of
Wagner Electrical Contractors

Appellants (Respondents)

Appeal from the Order of
THE HONOURABLE MR. JUSTICE PROWSE
Dated the 15th day of July, A.D. 1997
Filed the 13th day of August, A.D. 1997
(IN CHAMBERS)

MEMORANDUM OF JUDGMENT

COUNSEL:

D.W. McGrath
For the Respondent (Applicant)

W.D. Goodfellow, Q.C.
For the Appellants (Respondents)

1998 ABCA 178 (CanLII)

MEMORANDUM OF JUDGMENT

THE COURT:

[1] This is an appeal from the order of Prowse, J. dated July 15, 1997 upholding the decision of Master Laycock directing that the Appellant's builders lien against the estate of the Respondent be discharged.

[2] The issue is whether, in all of the circumstances of this case, the Respondent is an "owner" pursuant to s.1(g) of the ***Builders Lien Act***. In particular, the question to be decided is whether the Respondent, either expressly or impliedly, requested the work and materials which are the subject of the lien.

[3] The Respondent was the registered owner of restaurant premises in Calgary. A lease agreement was entered into between the Respondent and the operators of the restaurant, No Name Café, which provided that the tenant would upgrade the premises. The Lessee contracted with the Appellant to effect the leasehold improvements.

[4] The Appellant was not paid and filed a builders lien. The Respondent successfully applied before the learned Master to have the lien removed from title. On appeal, Prowse, J. upheld the Master.

ANALYSIS

[5] The ***Builders Lien Act*** constitutes an abrogation of the common law in that it creates, in certain specified circumstances, a charge upon a person's land which would not exist but for the ***Act***: ***Morguard Investments Limited v. Hamilton's Floorcoverings (1982) Ltd.*** (1986), 49 Alta. L.R. (2d) 88 (Alta. Q.B.) at pp. 90-91, relying upon ***Clarkson Co. et al. v. Ace Lumber Ltd.***, [1963] S.C.R. 110.

[6] The learned Master in Chambers and the learned Justice of the Court of Queen's Bench sitting in appeal, relied upon ***Royal Trust Corp. of Canada v. Bengert Construction Ltd.*** (1988), 58 Alta. L.R. (2d) 97 at p. 102 to decide the issue against the Appellant. To bring the Landlord within the classification of an "owner", the Appellant was required to prove that the Respondent:

(a) had an "estate or interest" in the lands;

(b) had requested, expressly or impliedly, that the materials be furnished or that the work be done; and

1998 ABCA 178 (CanLII)

1998 ABCA 178 (CanLII)

> (c) at least one of the remaining elements must be present: the work must have been done or materials furnished; (i) on its credit; (ii) on its behalf; (iii) with its privity and consent; or (iv) for its direct benefit.

[7] ***Royal Trust Corp. of Canada v. Bengert Construction Ltd. (supra)*** governs the determination of whether a request, expressed or implied, that materials be furnished or that the work be done is made out. This Court said at p. 104:

> "In MacDonald v. MacDonald-Rowe Woodworking Co. (1964), 49 M.P.R. 91, 39 D.L.R. (2d) 63 (P.E.I. S.C. in banco), Campbell C.J. reviewed a number of cases and, in my respectful view, correctly summarized their effect. At p. 98 he said:
>
>> Analysis of the above-cited cases leads us to a reasonably clear appreciation of the concept 'request' in s.1(j): - it must be decided on the facts of each individual case; it does not necessarily involve a direct communication by alleged owner to contractor, it does involve something more than mere knowledge or consent.
>>
>> In ordinary language the word 'request' indicates the idea of an active or positive proposal, as contrasted with mere passivity or acquiescence. Webster groups it as a synonym with 'ask' and 'solicit', synonyms which agree in meaning 'to seek to obtain by making one's wants or desires known.' 'Request', he says, has a suggestion of greater courtesy and formality in the manner of asking.'
>
> The Supreme Court of Canada has considered the definition of 'owner' in similar words in other statutes in three cases since 1976: *City of Hamilton v. Cipriani* [1977] 1 S.C.R. 169, 67 D.L.R. (3d) 1, 9 N.R. 83; *Nor. Elec. Co. v. Mfr. Ins. Co.*, [1977] 2 S.C.R. 762, 79 D.L.R. (3d) 336, 18 N.S.R. (2d) 32, 12 N.R. 216; and *Phoenix Assur. Co. v. Bird Const. Co., supra*. None of these cases, in my opinion, stands for the proposition that contracting with a builder, of itself, brings one within the

> definition of 'owner'. In all of those cases, there was an **active participation** by the entity eventually held to have made a "request" and so to be within the definition of 'owner'." [Emphasis added]

[8] Whether or not active participation is established is a question of fact. The learned Master held as follows:

> ".....the applicant (sic) participation in the substantial renovations consisted of:
>
> (a) approving concept plans and;
>
> (b) approving the selection of paint for the exterior of the building.
>
> The applicant did not select the general contractor, did not prepare a set of plans nor approve a set of construction plans, did not control funding for the construction, did not provide any on-site supervision or inspection; did not receive any participation rent, in summary there is not sufficient evidence that the landlord actively participated to the extent that the court ought to find that the applicant made an implied request of the respondents to do work or provide materials."

[9] The Lessor's written offer to lease was accepted by the Lessee on January 24, 1996. Schedule "B" provided that the premises were accepted on an "as is" basis (A.B. 313). There were four conditions precedent (A.B. 410):

> a) Tenant is satisfied as to its ability to procure all necessary building and operating permits and licenses for use, signage and occupation of the Premises;
>
> b) the approval of the terms and conditions of this letter by the Board of Directors of No Name Café.
>
> c) the approval by the Landlord of the Tenant's conceptual drawings and specifications for the

1998 ABCA 178 (CanLII)

1998 ABCA 178 (CanLII)

finishing of the Premises, storefront design and signage design.

d) the Tenant shall supply to the Landlord concurrently with the submission of this Offer to Lease such information, including financial information, as the Landlord may require to satisfy itself of the financial soundness of the Lessee and its ability to meet and continue to meet its obligations under the Lease. Should the Landlord not give its written approval of said financial information within seven (7) business days of acceptance hereof, at the Lessor's election this Offer to Lease shall be null and void.

[10] Our review of the record reveals no overriding or palpable error on the part of the adjudicators below. There is no question that the Landlord intended an arrangement whereby considerable control might have been exercised over tenant's improvements. And had that intended participation materialized, it might well have satisfied the test.

[11] But negotiations, as the exchange of correspondence confirms, eroded the initial requirement of $400,000 in tenant's improvements to $187,500 which, in any event, only had to be spent by the tenant on **operations or improvements at the location of the restaurant**. This erosion is evidenced by the letter from Argon Group Ltd on behalf of the Lessor dated 2 February, 1996 (A.B. 426) and that of MacKimmie Matthews on behalf of the Lessee dated 7 February, 1996 (A.B. 427).

[12] The Argon Group letter confirms the Lessor's position as follows:

"The Lessor requires the following to satisfy their concerns:

A. List of investors detailing existing contributions and amounts committed but not yet received.
B. Full disclosure on what trust conditions are in place on cash held by lawyer and Lessor's satisfaction of same.
C. Lessor requires verification that $200,000 cash is in place and will be irrevocably used in the premises at 6712 Macleod Trail.

D. Verification that additional financing is in place or readily available to provide a total of $400,000 for the improvement and operations of the restaurant."

[13] The Lessee's response is, in part, as follows:

> "....we confirm that the funds held by us in trust are subject only to the condition that they represent capital contributions to a company to be incorporated to hold the lease and operate the subject restaurant."

[14] In addition to the foregoing, there is evidence in the examinations on affidavit upon which the Master was entitled to rely to support the conclusions that the tenant was not contractually bound to construct improvements to any standard or of any specified scope (A.B. 230, lines 17-21) and that, in any event, the Respondent did not actively participate in the renovation project (A.B. 145, lines 7-14). It follows that there was no "request" by the registered owner, expressed or implied, and the lien was properly struck by the Master as confirmed in the Court of Queen's Bench.

[15] For these reasons, the appeal must be dismissed.

1998 ABCA 178 (CanLII)

APPEAL HEARD ON FEBRUARY 3, 1998
JUDGMENT DATED at CALGARY, Alberta,
this Day of May
A.D. 1998

BRACCO J.A.

HUNT, J.A.

BERGER, J.A.

1998 ABCA 178 (CanLII)

Tab 8

1986 CarswellAlta 257
Alberta Court of Queen's Bench

Royal Trust Corp. of Can. v. Bengert Const. Ltd.

1986 CarswellAlta 257, [1987] A.W.L.D. 055, [1987] C.L.D. 083, 2 A.C.W.S. (3d) 238, 49 Alta. L.R. (2d) 79, 75 A.R. 281

ROYAL TRUST CORPORATION OF CANADA v. BENGERT CONSTRUCTION LTD., COYES and COYES

Virtue J.

Judgment: December 4, 1986
Docket: Calgary No. 8601-08123

Counsel: *J. St. Pierre*.
J. A. Drummond.
C. N. D. Hotzel.
J. Legg.

Subject: Contracts; Corporate and Commercial

Related Abridgment Classifications

Construction law
IV Construction and builders' liens
  IV.3 Owner
    IV.3.c What constituting request for work
Construction law
IV Construction and builders' liens
  IV.3 Owner
    IV.3.g Under agreement of purchase and sale

Headnote

Construction Law --- Construction and builders' liens — Owner — What constituting request for work
Construction Law --- Construction and builders' liens — Owner — Under agreement of purchase and sale
Builders' liens — Owners — Definition — Purchasers of house from contractor not being "owners" as defined by Builders' Lien Act — Purchasers having interest in land but not requesting lienholders' services — Purchasers' lien having priority over subsequent builders' liens.
Builders' liens — Priorities — Purchasers' liens — House contractor going bankrupt — Materials and services supplied prior to registration of purchasers' caveat but builders' liens registered after caveat — Purchasers not being owners — Section 9(1) of Builders' Lien Act not giving builders priority — Purchasers having priority under Land Titles Act for amount of deposit.
The purchasers executed an offer to purchase and interim agreement of a house and lot with B. Ltd., which was to construct a house according to plans and specifications. The purchasers paid a deposit and the plaintiff supplied a builders' mortgage. The purchasers filed caveats to protect their interest on 14th April 1986. Prior to the filing of the caveats, builders proceeded to supply work and materials to B. Ltd. for the house. No contracts existed between the purchasers and the builders. The builders registered liens for the work done and materials supplied prior to April 1986, but the liens were registered after the purchasers' caveats. B. Ltd. went into bankruptcy. The plaintiff foreclosed on the mortgage, the house was sold and the bank paid out on its mortgage. The remaining moneys were paid into court pending resolution of the matter of priority between the purchasers and the lienholders. A master's order determined that the lienholders had priority for any liens filed prior to 21st August 1986. The purchasers appealed.

Held:

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

imposed upon "owners" by that Act. Secondly, if the appellants are not "owners", what is the relative priority of their interest vis-à-vis the builders' liens which have been registered?

Are the appellants owners under the Builders' Lien Act?

10 The term "owner" is defined in s. 1(*g*) of the Builders' Lien Act as follows:

(*g*) "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 him whose rights are acquired after the commencement of the work or the furnishing of the material.

11 Section 1(*g*) comprises three elements, all of which must be proven by the lien claimants. First of all, it is necessary to show that the appellants have "an estate or interest in land". Secondly, it must be established that the work was done and materials furnished at the appellants' request, either express or implied, and finally, that such work was done and materials furnished on the credit or on behalf, or with the privity and consent, or for the direct benefit of the appellants.

12 The interim agreement between the appellants and respondents gives the appellants "an estate or interest" in the land sufficient to satisfy the first element of s. 1(*g*) (*Phoenix Assur. Co. of Can. v. Bird Const. Co.; Yarwood v. Ownix Dev. Ltd.*, [1984] 2 S.C.R. 199 at 213, 8 C.L.R. 242, 33 R.P.R. 221, 11 D.L.R. (4th) 1, 5 O.A.C. 109, 54 N.R. 109).

13 Whether or not the appellants can be said to have made a "request" for work or materials is a question of fact (*Triple Five Corp. v. Nordel Dev. Corp.* (1985), 37 Alta. L.R. (2d) 33, 11 C.L.R. 261, 60 A.R. 241 (M.C.); *MacDonald-Rowe Woodworking Co. v. MacDonald* (1963), 49 M.P.R. 91, 39 D.L.R. (2d) 63 (P.E.I.C.A.)). In the latter case, the Prince Edward Island Supreme Court discussed "request" as used in s. 1(*j*) of the Prince Edward Island Builders' Lien Act, which is identical to s. 1(*g*) of the Alberta Act. After analyzing several cases, the court found at p. 98:

> Analysis of the above-cited cases leads us to a reasonably clear appreciation of the concept "request" in s. 1(j): — it must be decided on the facts of each individual case; it does not necessarily involve a direct communication by alleged owner to contractor; it does involve something more than mere knowledge or consent.
>
> In ordinary language the word "request" indicates the idea of an active or positive proposal, as contrasted with mere passivity or acquiescence. Webster groups it as a synonym with "ask" and "solicit", synonyms which agree in meaning "to seek to obtain by making one's wants or desires known". "Request", he says, has a suggestion of greater courtesy and formality in the manner of asking.

14 In *Beaver Lumber Co. v. Korotky and Tsbrey*, [1927] 1 W.W.R. 945 (Sask. Dist. Ct.), Ross D.C.J. considered the word "request" as it was used in s. 2(6) of the Mechanics' Lien Act, R.S.S. 1920, c. 206, and at p. 948 he stated:

> ... the whole section is governed by the word "request," and while it is not necessary that there should be evidence of a direct request, yet there must be circumstances from which a request can be implied.

15 In the case of *Reggin v. Manes* (1892), 22 O.R. 443 (Ch. Div.), Ferguson J. considered certain factors in implying a request. At p. 446 he states:

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

> Then looking at the "tender", as it is called, for the work, the plans of the same, what is said of the specifications, the manner in which the work was done, the conduct of the parties from the beginning of it in respect of the work, and the advances made by Dr. Hearn, for which, or some of which, he took temporary security, there can, I think, be no doubt that the work was done for him at his request...

16 In *Phoenix Assur. v. Bird Const.*, supra, Estey J. reviews the types of circumstances from which a request may be implied. In that case Estey J. examined the overall arrangements between the parties which resulted in the work being done and concluded that, although the construction contract for the work was made between Ownix and Bird, nevertheless Phoenix made the request. The learned Justice states at pp. 215-16:

> Consequently, I conclude, as did the Divisional Court and the Court of Appeal below, that Phoenix did make "the request" that the work for which the lien claim (other than third party space tenants' improvements) was made be done by Bird. The request was made in a strict factual sense by Ownix who, of course, entered into the construction contract with Bird in the performance of its role under the development contract between Ownix and Phoenix. That agreement stipulated that:
>
> > The building shall be constructed by the Developer at its expense in accordance with detailed drawings, elevations and specifications (including materials to be used) which must first be approved by Phoenix Canada ...

17 From these cases I conclude that in order to show an indirect request sufficient to constitute a party an owner under s. 1(*g*) of the Builders' Lien Act, there must be evidence of some arrangement from which it can be inferred that the real request for the work or materials came from the party whose interest is sought to be charged with the lien. This might include evidence of a right to some degree of control over the way in which the work will be done, or the selection of the materials to be used, or control of the financing of the building project, or some active participation in the building process or some other matter from which an indirect request might be inferred. In my view the evidence must go beyond showing mere knowledge, acquiescence, consent or a mere benefit derived from the building project. In my opinion no such evidence exists here and no request within the meaning of s. 1(*g*) of the Builders' Lien Act has been demonstrated.

18 C. E. Mirth, in a paper presented to the Alberta branch of the Canadian Bar Association during the 1986 mid-winter meeting entitled "Builders' Liens: Priorities" 463 at p. 488 distinguishes *Reggins v. Manes*, supra, and similar cases from cases such as this one:

> Notwithstanding these decisions, one must still quere the application of the Act to an "interim" purchaser: — one who acquires an interest under an "interim" agreement for sale and who expects to have little or no involvement in the project until it is completed. It is not uncommon for a new-home buyer to tie a property up with an "interim" purchase with no further significant involvement until closing after house completion. The buyer, in his own mind at least, is buying a completed house; not a lot with construction to be done thereon. Often his "interim" says little more about what construction is to be done (and how) than to say that a house of a certain type is to be built. There are no progress payments, and often the buyer simply assumes the builder's mortgage (which finances construction) on closing and possession. From the buyer's perspective he is *on closing* buying a completed house and lot by cash (or cash and mortgage assumption).

19 This aptly described the situation in the case before me.

20 The agreement between the appellants and Bengert is an interim agreement which contemplates transferring the full purchase price for a completed house and lot. This is not, in my view, a case of two contracts: one for the sale of the lot and the other for the construction as was found to be in the case in *Consol. Concrete Ltd. v. Leamac Indust. Devs. Ltd.* (1982), 40 A.R. 613 (M.C.).

21 As the appellants are not owners under s. 1(*g*) of the Builders' Lien Act, they are not subject to the requirements of that Act.

Priorities between builders' liens and purchasers

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

Tab 9

Court of Queen's Bench of Alberta

Citation: Georgetown Townhouse GP Ltd v Crystal Waters Plumbing Company Inc, 2018 ABQB 617

Date: 20180820
Docket: 1701 15571
Registry: Calgary

2018 ABQB 617 (CanLII)

Between:

Georgetown Townhouse GP Ltd.

Applicant

- and -

Crystal Waters Plumbing Company Inc.; R. and R. Bruno Enterprises Ltd.; Kidco Construction Ltd.; Siena Flooring Inc.; Spindle, Stairs & Railings 2002 Ltd., Rob's Drywall Services Ltd.; 840307 Alberta Ltd. operating as Wildwoord Cabinets; Double R Building Products Ltd.; WM. Schmidt Mechanical Contractors Ltd.; Lehigh Hanson Materials Limited operating as Inland Concrete; Lehigh Hanson Manson Materials Limited; E2 Construction Ltd.; Gienow Canada Inc. doing business as Ply Gem; High Caliber Construction Inc.; TBA Cleaning Services Ltd.; Signature Fan Company Ltd.; Scotty's Rentals And Landscaping Ltd.; Majestic Electric Inc.; Prairie Pipe Sales Ltd.; 789072 Alberta Ltd.; R.K.G. Developments Ltd.; And Prairie Pipe Sales Ltd., 789072 Alberta Ltd.; And R.K.G Developments Ltd. operating as Lenbeth Weeping Tile Calgary And Watt Consulting Group Ltd.

Respondents

Reasons for Decision
of
J.T. Prowse, Master in Chambers

---

[1] This case involves an often litigated issue: can a registered owner of land, who knows that work is being done on the land, defeat the liens of unpaid contractors on the basis that the it is not an 'owner' for the purposes of section 1(j) of the *Builders' Lien Act* (the "BLA") where it does not expressly request the work nor agree to pay the contractor for it.

[2] Section 1(j) of the BLA defines an owner as follows:

> "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;

[3] There are three common categories of cases where this issue arises:

> (i) a landlord (registered owner of land) disavows liens placed on its land by unpaid contractors of a tenant,
>
> (ii) a purchaser who agrees to buy land upon which a building is to be built, and later takes a transfer of the land after the structure has been built, disavows liens subsequently placed on his/her land by unpaid contractors of the builder,
>
> (iii) a developer/vendor (registered owner of land) who agrees to sell land, and allows the purchaser to build on the land prior to completion of the sale, disavows liens placed on its land by unpaid contractors of the purchaser.

[4] This case involves category (iii) but I will briefly discuss the other two categories. Typically, mere knowledge by the registered owner that the work is being done is not sufficient to constitute 'express or implied' consent so as to make the registered owner an 'owner' for the purposes of section 1(j) of the BLA. Rather, the registered owner must become actively involved in the building process to be held to have given express or implied consent.

(i) a landlord (registered owner of land) disavows liens placed on its land by unpaid contractors of a tenant,

[5] There is a well-developed body of case law on what degree of participation by a landlord is sufficient to make the landlord's title lienable notwithstanding that the tenant's contractor did not serve the landlord with a notice under section 15(1) of the BLA, which states:

> 15(1) When the estate on which a lien attaches is a freehold estate for a life or lives or a leasehold estate then, if the person doing the work or furnishing the material gives to the person holding the fee simple, or that person's agent, <u>notice in writing</u> of the work to be done or materials to be furnished, the lien also attaches to the estate in fee simple unless the person holding that estate, or that person's agent, within 5 days after the receipt of the notice, gives notice that the person holding that estate will not be responsible for the doing of the work or the furnishing of the materials. (emphasis added)

[6] In my decision in ***Labbe-Leech Interiors Ltd. v TRL Real Estate Syndicate (07) Ltd.***, 2009 ABQB 653, 2009 CarswellAlta 1898 (Alta. Q.B.), I listed chronologically and summarized eight of those earlier decisions issued between 1977 and 2001, including ***K.& Fung Canada Ltd.***

2018 ABQB 617 (CanLII)

v N.V. Reykdal & Associates Ltd., 1998 ABCA 178, 1998 CarswellAlta 417, and ***Lightning World Ltd. v Help-U-Build Ltd.***, 1998 ABQB 930, 1998 CarswellAlta 1010.

[7] In my view, it is better to consider cases specifically decided under category (iii), as discussed below, rather than to deal with landlord – tenant case law.

> **(ii) a purchaser who agrees to buy land upon which a building is to be built, and later takes a transfer of the land after the structure has been built, disavows liens subsequently placed on his/her land by unpaid contractors of the builder,**

[8] There are also a number of cases dealing with this situation.

[9] The leading case is ***Royal Trust Corp. of Canada v Bengert Construction Ltd.***, 1988 ABCA 581, 1988 CarswellAlta 39, where the plaintiffs entered into an agreement with a builder for the purchase of a lot and a home to be built on the lot. When the builder failed and foreclosure ensued, surplus funds were paid into court where a contest arose between the plaintiffs and the lienholders. The Court of Appeal held that the plaintiffs were not 'owners' of the property within the meaning of section 1(j) of the BLA, and their purchasers' lien took priority to the builders' liens.

[10] A similar result occurred subsequently in ***Permasteel v Semon***, 2000 ABQB 275, [2000] A.J. No. 523, where the purchaser 676 agreed to purchase the land from Semon with a building to be built, and Semon hired Permasteel to construct the building. After the building was completed and the land transferred to 676, Permasteel (who had not been paid in full by Semon) filed a builders lien. 676 argued, successfully, that it was not an 'owner' under the BLA, and its title was not subject to Permasteel's lien.

[11] Unsuccessful attempts were made, in two related decisions, by a party named the Gemba Group to assert that it was merely a purchaser of buildings to be built by Karmis, and therefore not subject to builders' liens. However, in each case, it was found that Gemba was in fact a joint venturer with Karmis, and hence an 'owner' under the BLA. See ***Con-Forte Contracting Limited Partnership v Eagle Hill Developments Ltd.***, 2012 ABQB 724, 2012 CarswellAlta 2246, and ***MCAP Service Corp. v Anthony Plaza II ULC***, 2013 ABQB 41, 2013 CarswellAlta 97.

[12] Again, in my view it is better to consider cases specifically decided under category (iii), as discussed below, rather than to deal with cases involving purchasers who agree to buy land with a building to be erected on the land and then conveyed to them.

> **(iii) a developer/vendor (registered owner of land) who agrees to sell land, and allows the purchaser to build on the land prior to completion of the sale, disavows liens placed on its land by unpaid contractors of the purchaser.**

[13] This is the category of cases directly relevant to this application. Georgetown is a developer/owner who agreed to sell the 48 lots in question to 167 (doing business as ReidBuilt Homes). Georgetown says that its interest in the land cannot be liened by contractors and sub-contractors of 167.

[14] The key factual component is the degree to which Georgetown became involved in 167's building activities. In the end it appears that, while Georgetown reserved to itself (in its contract

2018 ABQB 617 (CanLII)

with 167) the authority to become quite involved in the building process, Georgetown did not exercise that authority to any significant extent.

[15] The contract between Georgetown and 167 allowed 167 to occupy the land and build houses upon payment of the first two installments, constituting 15% of the lot purchase price.

[16] The goal for 167 was to complete and sell individual houses (and pay Georgetown in full for such lots on conveyance to the purchaser) so that, when the remaining 85% became due in 603 days, most or all of that 85% would already have been paid from the sale of individual completed houses.

[17] In the contract, it was provided that Georgetown had the right to approve the style and colours of the homes to be constructed. There is no evidence that Georgetown was ever asked for that approval or gave that approval.

[18] The contract further provided that 167 would not apply for a building permit for a house until it had first obtained Georgetown's approval for the plans for the house. There is no evidence that Georgetown was ever asked for or gave that approval, notwithstanding the 167 must have obtained building permits for the few houses which it built.

[19] The contract also provided that 167 was to provide utility servicing within the lot boundaries but only with contractors approved by Georgetown, and the work was to be supervised by Georgetown's engineers. There is no evidence that Georgetown approved the contractors used by 167 to install utilities within the lot lines, or that Georgetown's engineers supervised that work.

[20] The contract provided that167 was to keep the lots with an orderly and tidy appearance to the satisfaction of Georgetown, but there is no evidence that Georgetown ever directed 167 to tidy up their lots.

[21] The contract provided that Georgetown was to provide marketing support to 167 for the sale of homes on the lots, but the only evidence in that regard is that Georgetown set up and maintained a website for the subdivision indicating that the single family dwellings in the subdivision were to be constructed by ReidBuilt Homes (167).

[22] Finally, the contract provided that Georgetown's approval was required for 167's onsite signage and advertising, but there is no evidence that such approval was ever sought or given.

[23] The lienholders argue that it is the expected arrangement at the outset that should count. In other words, the fact that Georgetown signed a contract giving them the authority to become extensively involved in the building process is what matters, not what in fact happened.

[24] I disagree. While Georgetown's contractual authority is a relevant factor to consider, to me it is not as significant as what in fact happened.

[25] For example, if a contract was silent as to the developer's authority to become involved in the building process, but the developer in fact became extensively involved, that would be of critical importance.

[26] I note that in ***K & Fung Canada Ltd. v N.V. Reykdal & Associates Ltd.***, 1998 ABCA 178, 1998 CarswellAlta 417, which was a category (i) case, the Court was looking at the degree of involvement of the landlord in construction by the tenant and upheld the ruling that the landlord was not an 'owner' for the purposes of section 1(j) of the BLA.

2018 ABQB 617 (CanLII)

[27] The Court noted that the landlord had reserved contractual rights to become involved in the construction, but had not exercised many of those rights. The Court commented:

> 8 Whether or not active participation is established is a question of fact. The learned Master held as follows:
>
> > ....the applicant (sic) participation in the substantial renovations consisted of:
> >
> > (a) approving concept plans and;
> >
> > (b) approving the selection of paint for the exterior of the building.
> >
> > The applicant did not select the general contractor, did not prepare a set of plans nor approve a set of construction plans, did not control funding for the construction, did not provide any on-site supervision or inspection; did not receive any participation rent, in summary there is not sufficient evidence that the landlord actively participated to the extent that the court ought to find that the applicant made an implied request of the respondents to do work or provide materials. ...
>
> 10 Our review of the record reveals no overriding or palpable error on the part of the adjudicators below. There is no question that the Landlord intended an arrangement whereby considerable control might have been exercised over tenant's improvements. And had that intended participation materialized, it might well have satisfied the test.

2018 ABQB 617 (CanLII)

[28] There are three cases which deal with the category (iii) situation involving developers who allow purchasers to begin building prior to conveyance to the purchaser, and I will now refer to them chronologically.

[29] In ***Stealth Enterprises Ltd. v Hoffman Dorchik***, 2000 ABQB 311, 2000 CarswellAlta 311, S & U Homes Ltd. (“S&U”) was the registered owner of an apartment building. They sold the building by agreement for sale to 632766 Alberta Ltd. (“632”) who intended to convert it into condominiums. In order to obtain financing to close the purchase, 632 refinished four of the apartment suites into show suites and spent other money on refreshing the lobby and improving other units. The deal collapsed and an unpaid contractor hired by 632 filed a lien against S&U’s title.

[30] S&U was aware that the work was being done by 632 but had no direct dealings with 632’s contractors. S&U had the following clause put into its written agreement to sell to 632:

> In the event the purchaser fails to complete on July 31, 1995 (or August 31, 1995 if extended) all work done by the purchaser shall become the property of the vendor without compensation and the vendor shall be entitled to all benefits and registrations and plans to stratify the building without compensation to the purchaser.

[31] S&U was held not to be an owner for the purposes of section 1(j) of the BLA. The Court reasoned as follows:

> 40 In this case, there was no active participation by either [of the principals of S&U]. [One of the principals of S&U] may have directed or given approval to [the lien claimant] to carry out certain work with respect to cleaning apartments so they could be re-rented; however, that work was relatively minimal. Certainly S&U obtained a benefit from the work which was done in that some of the suites had been upgraded and the lobby was expanded and made more visually appealing. Work had been done on the exterior. But none of the renovations were carried out at their request. They could have cared less about condominiumizing this building. They had no say in what was done, they gave no directions with respect to how anything should be done. The only way in which they stood to benefit was should the transaction not proceed, they would receive, without paying for them, certain upgrades. However, they were more interested in selling the building than reaping the so called benefits.

[32] The Court of Appeal dismissed an appeal from this ruling at 2003 ABCA 58, 2003 CarswellAlta 242.

[33] The second decision of note is ***E. Gruben's Transport Ltd. v Alberta Surplus Sales Ltd.***, 2010 ABQB 244, 2010 CarswellAlta 653. In that case the owner/developer (registered owner) was Alberta Surplus Sales Ltd. who agreed to sell 3 lots totalling 150 acres to1327923 Alberta Ltd. ("132"). In the agreement for sale Alberta Surplus allowed 132 to move ahead with development prior to closing, which involved 132 doing road work in order to further subdivide the land from 3 lots into 42 lots.

[34] Gruben's was a subcontractor doing road construction work needed for the further subdivion, and when the purchase fell through Gruben' filed a lien against Alberta Surplus' land.

[35] The Court disallowed Gruben's lien, reasoning as follows:

> Alberta Surplus Sales accommodated 1327923 in its effort to have the land subdivided. Though it had a reason for itself wanting the land subdivided, and though its approval of the subdivision documents was required to effect the subdivision, it had no direct or indirect involvement in arranging for the road work to be done. Its participation in the road work was entirely passive. It did not request that work either expressly or impliedly. It was not an "owner" within the meaning of s. 1(j) of the Builders' Lien Act. Gruben's lien is invalid.

[36] The third decision on point is ***Acera Developments Inc. v Sterling Homes Ltd.***, 2010 ABCA 198, 2010 CarswellAlta 1928, a decision which cited neither the ***Stealth Enterprises*** decision nor the ***Gruben's Transport*** decision.

[37] In ***Acera***, Acera Developments Inc. was the developer/vendor (registered owner of land) who agreed to sell land to Sterling Homes Ltd. and allowed Sterling to build on the land prior to completion of the purchase, in fact, prior to finalization of the subdivision of the land.

[38] When subdivision approval of the land was refused, Stirling filed a builders' lien for the value of the work done.

[39] Dealing with the first requirement under section 1(j) of the BLA that the work done by Stirling was done at the request, express or implied, of Acera, the Court of Appeal focussed on the degree to which Acera became involved in the construction. The Court stated at para 36 of its decision:

2018 ABQB 617 (CanLII)

> ... there was, in my opinion, sufficient interaction between the builder and the developer to support the conclusion that the construction proceeded prior to subdivision at the owner's request. Indeed, the liened party who was actively involved in the supervision of the construction was fully aware that the construction was proceeding prior to subdivision approval. The lien claimant was contractually bound to construct improvements to a specific standard and scope. Indeed, Acera's architectural and construction guidelines required that Acera approve the construction plans, elevations, finished grades, finishing materials and colours, final grade slips, setbacks, foundation designs, auxiliary buildings and fencing, and landscaping. All such plans were approved prior to construction. The construction was inspected by Acera as work progressed. In my opinion, that is sufficient to conclude that the homes were constructed at the request of the liened party.

2018 ABQB 617 (CanLII)

[40] Dealing with the second requirement under section 1(j) that the work done by Stirling was for the direct benefit of Acera, the Court of Appeal stated at paragraphs 37, 38, and 39 of its decision:

> 37 It remains, accordingly, to consider whether the work done and the material furnished by Sterling accrued to the "direct benefit" of Acera. Acera allowed Sterling to improve its lands. In law, the improvements become attached to the land and are owned by the owner of the freehold. Until the subdivision plan is registered Acera is prohibited from selling the lots, so it must be taken to have invited Sterling to improve the lands "for its [Acera's] direct benefit". Acera owns the freehold, therefore it owns the improvements, therefore it is directly benefitted. Having allowed Sterling in as a tenant-at-will it cannot argue the improvements were done against its will, i.e. that they were "not requested". Paragraph (iv) of the definition of "owner" is satisfied.
>
> 38 Acera has failed to transfer the lots in accordance with the lot purchase agreement. Accordingly, Sterling cannot sell the homes to interested third parties. It follows that Acera has directly gained the value of the improvements to the lands and will continue to hold that increase in value to its benefit as long as it retains title to the lands. In other words, were it not for Sterling's lien, Acera would keep the benefit of the improvements. Therefore, until such time as Sterling is able to acquire title to the homes, the direct benefit from the entirety of the work accrues to Acera.
>
> 39 In addition, the contractual arrangement whereby Sterling would build homes in advance of acquiring title to the land included, as I have found, the implied request by Acera of Sterling to do just that. All of this, as I have indicated, took place under the watchful eye and subject to the stringent building requirements imposed by Acera. It is apparent, by way of illustration, that strict adherence to Acera's architectural and construction guidelines were intended to facilitate and enhance the development of Acera's lands. In that sense, mindful that it was anticipated that construction would begin before sub-division approval and transfer of the lots was obtained, such construction was of direct benefit to Acera.

Conclusion

[41] In my view, considering the three decisions cited above, and based on the observations contained in paragraphs 17 to 22 of this decision, it is clear that Georgetown did not become sufficiently involved in 167's construction process so as to render Georgetown an 'owner' for the purposes of section 1(j) of the BLA.

[42] Another observation I would make, but not one upon which I make my decision, is that it seems one of the factors leading to upholding the lien filed by the builder in ***Acera*** was the unfairness of the developer encouraging and participating in construction by the builder prior to subdivision taking place, and then the developer through its own default (failing to meet a municipal requirement for subdivision) not accomplishing subdivision. That is not a factor in the present case.

[43] I rule that the liens filed by the respondent lien claimants are invalid and that the $245,045.21 paid into court to discharge the liens be paid out to the solicitors for Georgetown.

Costs

[44] If the parties cannot agree on costs they may seek a ruling from me in that regard.

Heard on the 15th day of August, 2018.
Dated at the City of Calgary, Alberta this 20th day of August, 2018.

J.T. Prowse
M.C.C.Q.B.A.

Appearances:

Jeffrey Wreschner
Masuch Law LLP
for the Applicant Georgetown

Glen Hickerson
Wilson Laycraft
for the Respondent lienholders

2018 ABQB 617 (CanLII)

Tab 10

Court of Queen's Bench of Alberta

Citation: Davidson Well Drilling Limited (Re), 2016 ABQB 416

2016 ABQB 416 (CanLII)

Date: 20160725
Docket: 1303 08651
Registry: Edmonton

In Bankruptcy and Insolvency

In the matter of Davidson Well Drilling Limited

And in the Matter of Recognition of the Order of the Ontario Superior Court of Justice Dated April 16, 2013

Applicant Pricewaterhousecoopers Inc. in its Capacity as Court-Appointed Receiver of Davidson Well Drilling Limited

Respondent Bank of Montreal

Corrected judgment: A corrigendum was issued on July 26, 2016; the corrections have been made to the text and the corrigendum is appended to this judgment.

Reasons for Decision
of the
Honourable Madam Justice J.M. Ross

Introduction

[1] The Court-appointed Receiver of Davidson Well Drilling Limited [Davidson] seeks approval of its proposed distribution of lien funds. Lien claimants Century Wireline Services [Century], Clean Harbors Energy and Industrial Services Corp [Clean Harbors], 72619 Alberta Ltd (o/a Roughrider International) [Roughrider], Bruno's Trucking Ltd [Bruno's] and Acme

liens other than the issue of whether the lien period was 45 days (in which case the liens were filed out of time) or 90 days (in which case the liens were conceded to be valid).

[64] As I have found that the applicable lien period was 90 days, the Clean Harbors liens are declared valid in the claimed amounts.

Roughrider

[65] Roughrider provided site services related to repair and maintenance of Davidson's rigs and support equipment. Roughrider registered a lien in the amount of $38,525.55 on April 16, 2013. It last provided services on January 16, 2013. As the lien period is 90 days, Roughrider's lien was filed in time.

[66] The Receiver withdrew its objection to the Roughrider lien based on whether a prevenient arrangement had been established. The sole remaining issue regarding the Roughrider lien is whether its work was provided "in respect of an improvement".

[67] The equipment that Roughrider provided maintenance services to was not affixed to the lands or intended to become part of the lands. The Receiver relies on the case of ***Orban Industries Ltd v Gauntlet Energy Corporation***, 2004 ABCA 20, at paras 8 and 13 [***Orban***] for the proposition that labour and materials provided to structures that are not in themselves improvements, are not properly included in the lien.

[68] ***Orban*** is a decision of a single Justice of the Court of Appeal on a leave to appeal application. The chambers judge below held that the provision and installation of sour gas line heater/separator packages, used to extract natural gas, were not improvements. On the leave application, the issue was described as:

> …whether the chambers judge erred in determining that this equipment, its use, its method of installation and the method of affixation satisfied the definition of improvement under the *BLA*. In arriving at her conclusion that it did not, she considered the evidence before her, the purpose and use of the equipment and the specific method of affixation. She concluded, on the evidence before her, that the separator packages in this case were not intended to be or to become part of the land in question. She rejected what she called "the bald proposition" advanced by ***Orban*** that anything done to recover minerals is an improvement to the mineral interest under the *BLA*.

[69] The Appeal Justice held that the issue of whether ***Orban*** had a valid lien under the *BLA* was a question of mixed fact and law, and the standard of review was high. No sufficient error on the "fact specific" issue of whether there was an improvement was shown. The chambers justice had also not erred in law. The Appeal Justice held that the "proposition that a drilling well is an improvement and thus materials supplied or services render in connection with a well are, without more, entitled to a builder's lien" was not supported by the case law.

[70] There are important distinctions between ***Orban*** and this case. In this case it is clear that the Work constituted an improvement to the Syncrude lands. The existence of an improvement was conceded when the Receiver approved payment of liens registered within 45 days. The Receiver did not revoke this concession at the hearing. From the facts provided regarding the nature of the Work, there is no reason to question that it constituted an improvement, which includes "<u>anything</u> constructed, erected, built, placed, <u>dug or drilled or intended to be</u>

2016 ABQB 416 (CanLII)

constructed, erected, built, placed, dug or drilled, on or in land except a thing that is neither affixed to the land nor intended to be or become part of the land": *BLA* s 1(d).

[71] The connection, if any, between the separators and any improvement to the land is not clear from the decision in ***Orban***. In contrast, the connection between the equipment and rigs maintained by Roughrider, and the improvement constituted by the Work, is clear. "Roughrider supplied and rendered on-demand (continual) mechanical maintenance services for Davidson's oil and gas drilling and exploration rigs, loader and support equipment essential to exploration drilling (the "Services"). The Services supplied by Roughrider were absolutely essential to the exploration and drilling operations and improvements to the lands" (Affidavit of Laura Secord).

[72] The issue is whether this connection is sufficient to show that the Roughrider services were performed "on the improvement": *BLA* s 1(p).

[73] Roughrider relies on the Saskatchewan Court of Appeal decision in ***Grey Owl Engineering Ltd v Propak Systems Ltd***, 2015 SKCA 108, at paras 22-26:

> [22] …Cameron J.A. stated he [preferred] instead to consider whether the reconstruction of the rail line constituted an improvement to the land and then [ask] the question whether Brewster did any work upon that improvement or render any services for it…[citing *Clarkson Company v Hansen* (1983), 22 Sask R 126 (CA) (*Hansen*)]
>
> [23] This approach, which focuses on the main contract or contracts rather than its individual subcontracts and the work being done under them, has been consistently followed and applied in this jurisdiction. In *Pritchard Engineering Company v Coronach*, [1983] 30 Sask R 137 (QB), the main contract was between the owner, the town of Coronach, and Wes-Can Underground Ltd. and involved the construction of a water supply line and associated tasks within the water treatment plant. Wes-Can hired Ray's Transport Ltd. to transport equipment to the job site at Coronach and upon termination of the work to return the equipment to Saskatoon. Applying *Hansen*, Sirois J. found first that the construction work under the main contract was an "improvement" (para. 5) and second that Ray's Transport had provided services "in respect of" that improvement (para. 16). He concluded by saying, "The hauling of the equipment by Ray's Transport to a point on the improvement site was solely to enable Wes-Can Underground Ltd. to carry out its contract with the Town of Coronach."
>
> [24] Similarly, in *BWV Investments Ltd. v Saskferco Products Inc.* (1993), 114 Sask R 306 (QB), MacPherson C.J.Q.B. applied *Hansen* to uphold a claim of lien for the rental of 29 trailers located on the building site and used in the construction of the Saskferco fertilizer plant. As part of his reasoning, MacPherson C.J.Q.B. noted that neither the trailers, nor any part of them, were consumed by or integrated into the actual construction of the fertilizer plant, but that such a finding did not determine the validity of the lien (para. 14). He held that the supply of the trailers constituted a "service performed on or in respect of" the construction of the fertilizer plant (para. 24).
>
> [25] Finally, in *Royal Bank of Canada v Saskatchewan Power Corporation* (1990), 1990 CanLII 7611 (SK QB), 84 Sask R 277 (QB), counsel for the Bank

2016 ABQB 416 (CanLII)

> argued that steel poles modified and delivered by subcontractors, for use in Saskatchewan Power's transmission lines, could not be considered improvements because the poles were movable. MacLean J. rejected this argument, finding that the improvement in question was not the poles but the transmission line itself. This Court affirmed the decision in brief oral reasons (see (1990), 84 Sask R 275 (CA)). Neither the Court of Queen's Bench nor this Court referred to *Hansen*, but both Courts appear to have taken it as self-evident that the improvement was the work the owner was performing on the land and not the work performed by the various subcontractors and others contracting with them.
>
> [26] In [] *Hansen*, Cameron J.A. stated, "the principal object of this Act is to better ensure that those who contribute work and material to the improvement of real estate are paid for doing so" (para. 30). This approach to builders' lien legislation has a long provenance in this jurisdiction.

2016 ABQB 416 (CanLII)

[74] The Receiver submits that ***Grey Owl*** should be distinguished, as the Saskatchewan legislation defines "improvement" more broadly than the *BLA*.

[75] The *Builders' Lien Act*, SS 1984-85-86, c B-7.1, s 2(1)(h) provides:

> (h) "improvement" means a thing constructed, erected, built, placed, altered, repaired, improved, added to, dug or drilled or intended to be constructed, erected, built, placed, altered, repaired, improved, added to, dug or drilled on or into, land, except a thing that is not affixed to the land or intended to become part of the land and includes:
>
> (i) landscaping, clearing, breaking, excavating, digging, drilling, tunnelling, filling, grading or ditching of, in, on or under land;
>
> (ii) the demolition or removal of any building, structure or works or part thereof;
>
> (iii) services provided by an architect, engineer or land surveyor ...

[76] I reject this proposed distinction. The *BLA* definition of "improvement" is virtually identical. The additional express inclusions under s 2(1)(h)(i) of the Saskatchewan Act do not detract from the breadth of the basic definition under both Acts. In any event, the issue is not whether the Work constituted an improvement, but whether Roughrider's services were "on the improvement" (s 1(p)). This language in the *BLA* is similar to s 22 of the Saskatchewan Act considered in ***Grey Owl***, which gave lien rights to those providing services "on or in respect of an improvement".

[77] Further, the approach in ***Grey Owl*** is fully in accord with the approach in a number of Alberta Court of Appeal cases, including ***Schlumberger***, discussed above, and ***PTI Group Inc v ANG Gathering & Processing Ltd***, 2002 ABCA 89 at para 11 [***PTI Group***], citing ***Alberta Gas Ethylene Co Ltd v Noyle***, 1979 ABCA 334, 20 AR 459 [***Alberta Gas***].

[78] In paragraphs 8-10 of ***Alberta Gas***, the Court of Appeal held:

> [8] It is apparent that the work done by Burmac was done directly upon the portable buildings and the propane supplied by Cigas was used in those buildings.

This in itself does not create the basis for a lien against the land, as there is no evidence that the portable buildings were improvements. Their description as "mobile" makes it apparent that they were "neither affixed to the land nor intended to be or become part of the land". Further, the respondents do not contend that the portables were improvements.

[9] The improvement involved in this case was the construction of a gas extraction plant. The issue is whether Burmac's work and Cigas' materials were work and materials done or used "upon or in respect of" that improvement. In essence this amounts to a determination of whether work done and materials used to provide sleeping accommodation and food services for persons who labour upon an improvement are work done and materials used "in respect of" an improvement.

[10] As I see the problem, the respondents' work and materials must be examined in relation to **the overall project**, rather than in relation to the rented chattels on which they were directly expended. This approach is in line with that taken by Darling, Co. Ct. J. in *Cigas Products Ltd. v. Tamarisk Developments Ltd. and Young* [1976] 6 W.W.R. 733. In that case the lien claimant had rented propane tanks and heaters to a general contractor for use in drying out concrete and for heating the building during construction. It also installed the equipment and supplied fuel for it. The plaintiff was not allowed a lien for the rental amount of the units, as the British Columbia Mechanics' Lien Act contains no equivalent to our s.4 (4). However, the liens in respect of the cost of the fuel and for the installation of the heating equipment were allowed. The learned County Court judge said at page 735:

> The evidence satisfies me that Cigas qualifies as a materialman suppling materials to or for the improvement, that is, the propane gas for the making of this improvement. Drying out cement and walls is a necessary part of the building procedure. Without getting technical, the chemical process, I understand on the evidence, is equivalent to its being consumed and incorporated in the course of construction. The same reasoning applies to the item of labour and materials to install the tanks, pipes and heaters. Cigas, as I find, is in the position of a subcontractor to do such work and, in a limited sense, to do such work upon and to furnish such materials as the pipes, the fittings and the blocks for the installation of the equipment. Cigas supplied its own workmen under its supervision and paid them for the installation labour. Next, the blocks, pipes and fittings are not recoverable or re-usable, but remain on the lands of the defendant Tamarisk."

[79] I conclude that both the Alberta Court of Appeal and the Saskatchewan Court of Appeal consider "improvement" from the perspective of the "overall project" involved. In other words:

(i) the "overall project" is the "improvement";

(ii) the "overall project" constitutes the "thing constructed, erected, built, placed, altered, repaired, improved, added to, dug or drilled or intended to be constructed,

2016 ABQB 416 (CanLII)

erected, built, placed, altered, repaired, improved, added to, dug or drilled on or into, land"; and

(iii) the "overall project" would also be the thing that is "affixed to the land or intended to become part of the land."

[80] To the extent that ***Orban*** is inconsistent with this approach, and I am not sure that it is inconsistent, it has less weight as the decision of a single Justice, while the other decisions cited were by full panels of the Court of Appeal.

[81] The focus is thus not whether the equipment serviced by Roughrider was an improvement affixed to the land, but whether the services provided by Roughrider were on the improvement constituted by the Work.

[82] ***PTI Group*** makes it clear that "services need not be physically performed upon the improvement to fall within the meaning of the Act. They must, however, be 'directly related to the process of construction'": para 16. "[I]t is the degree of proximate connection to the process of construction that must be evaluated": para 17. Relevant inquiries include (para 18):

a) whether the contractors, sub-contractors and owners contemplated that the services provided were necessary to expedite the construction of the improvement;

b) whether the off-site services could have been provided on the site;

c) whether the improvement could have been carried out absent such off-site services; and

d) whether in all of the circumstances, the off-site services were so essential to the construction of the improvement and so directly connected with it, that it can be said that the services in question were "primary" in nature.

[83] I am satisfied that the connection of Roughrider's services to the Work established by the evidence – essential on-demand maintenance services for equipment that was in turn essential to the drilling operations – demonstrates the required connection to the improvement. Some of the services were provided "out in the field where drilling and exploration operations were being performed". The services were requested by Davidson's field managers and site supervisors when a piece of equipment broke down. "Were it not for Roughrider's essential and timely services, Davidson's drilling and exploration work on the Sites simply would have stopped entirely" (Affidavit of Laura Secord).

[84] Roughrider's lien is declared valid in the claimed amount.

Bruno's

[85] Bruno's rented a gen set and a transformer to Davidson. Bruno's removed most of its equipment on March 8, 2013. Bruno's lien in the amount of $92,817.35 was registered on May 14, 2013. As the lien period is 90 days, Bruno's lien was filed in time.

[86] Again, the Receiver is not pursuing the argument that the lien was registered against the wrong Syncrude lease.

2016 ABQB 416 (CanLII)

Tab 11

Court of Queen's Bench of Alberta

Citation: Northern Dynasty Ventures Inc v Japan Canada Oil Sands Limited, 2020 ABQB 275

Date: 20200420
Docket: 1403 06762
Registry: Edmonton

2020 ABQB 275 (CanLII)

Between:

Northern Dynasty Ventures Inc. and Tyalta Industries Inc.

Plaintiffs

- and -

Japan Canada Oil Sands Limited formerly Japan Oil Sands Alberta Limited

Defendant

- and -

Highway Rock Products Ltd.

Third Party Defendant

Reasons for Decision
of the
Honourable Madam Justice G.D.B. Kendell

Appeal from the Decision by
L.R. Birkett Q.C., Master in Chambers

Pronounced the 22nd day of May, 2019

2020 ABQB 275 (CanLII)

Background

[1] The Appellant, Northern Dynasty Ventures Inc. (“NDV”), appeals the order of Master Birkett granted on May 22, 2019, where she ordered and declared the validity of NDV’s lien in the amount of $1,260,312.75, as well as the validity of lien of the Respondent, Tyalta Industries Inc. (“Tyalta”), in the sum of $721,830.68, and directed the payment of Tyalta’s pro rata share out of the lien fund. Tyalta was awarded the sum of $244,493.23.

[2] The background facts as set out in NDV’s Special Brief, which were not disputed, are as follows:

> Japan Canada Oil Sands Limited, (“JACOS”), is the operator of an oil sands project known as the Hangingstone Expansion Project near Fort McMurray, Alberta (“Hangingstone Project”).
>
> On or about August 28, 2013, JACOS entered into a Master Purchase Agreement with Highway Rock Products Ltd. “HRP”.
>
> NDV and Tyalta were subcontractors to HRP in respect of the Master Purchase Agreement.
>
> On or about September 16, 2013, NDV entered into a written agreement with HRP (the “Gravel Contract”), whereby NDV granted HRP an exclusive license to remove sand and gravel from a gravel pit which was located approximately 30 kilometers away from the Hangingstone Project site, accessible by road a driving distance of 89 kilometers. The consideration for the Gravel Contract was payments to be made by HRP to NDV.
>
> Tyalta rented to HRP equipment used to crush and screen sand and gravel at the gravel pit.
>
> All of the gravel was provided to JACOS for its use in connection with the Hangingstone Project.
>
> The Gravel Contract was terminated by NDV due to unpaid accounts owing by HRP to NDV.
>
> NDV and Tyalta filed liens against JACOS’ lease for unpaid accounts rendered to HRP.
>
> The lien fund was set in the sum of $671,684.70.
>
> $403,010.02 has been paid to NDV. The entitlement to the balance of the lien fund was the subject of the Application before Master Birkett. At all relevant times, the Tyalta equipment was located at the gravel pit and not at the Hangingstone Project site.

Standard of Review

[3] The standard of review from an appeal of a Master to a Justice is correctness, and the appeal is a hearing de novo: ***Bahcheli v Yorkton Securities Inc***, 2012 ABCA 166 at para 30.

Analysis

[4] This appeal involves the interpretation of Section 6(4) of the *Builders' Lien Act*, RSA 2000, c B-7, which provides:

> 6(4) For the purposes of this Act, a person who rents equipment to an owner, contractor or subcontractor is, while the equipment is on the contract site or in the immediate vicinity of the contract site, deemed to have performed a service and has a lien for reasonable and just rental of the equipment while it is used or is reasonably required to be available for the purpose of the work.

[5] NDV argues that Tyalta's lien is invalid because it cannot satisfy this provision. It submits that the "contract site" is the Hangingstone Project site, and argues that the gravel pit is not in the immediate vicinity of the Hangingstone Project site.

[6] Tyalta replies that: "having the rental equipment be used in the specific areas covered by a mineral lease is not required to establish lien rights. All that is necessary is a sufficient nexus to the use of the rental equipment and improvements to the estate or interest to which the lien attaches".

[7] Our Court of Appeal has set out the interpretive approach to be followed in respect of this Act, and explained that a liberal approach may be taken to determining the scope of a lien right, but a strict interpretation is placed on the procedure that is required to enforce a lien: ***Tervita Corporation v ConCreate USL (GP) Inc***, 2015 ABCA 80 at para 5; see also ***E Construction Ltd v Sprague-Rosser Contracting Co Ltd***, 2017 ABQB 99 at para 47; ***Davidson Well Drilling Limited (Re)***, 2016 ABQB 416 at para 22. Our Court of Appeal also explored the purpose of this Act in ***Maple Reinders Inc v Eagle Sheet Metal Inc***, 2007 ABCA 247 at para 22, aff'g 2006 ABQB 150.

A. Where is the Contract Site?

[8] The contract site was not defined in the Master Purchase Agreement or in the Gravel Contract.

[9] The reference to "contract site" only appears in s 6(4) of the *Builders' Lien Act*. Counsel advised that there has been no judicial consideration of "contract site" in the *Builders' Lien Act*.

[10] I find that the Hangingstone Project site is the "contract site". The Tyalta equipment was used to crush and screen gravel and sand for use in constructing the Hangingstone Project. Although NDV reaped the financial benefits, given the exclusive lease of the gravel pit granted to HRP, the gravel pit was not improved: nothing was constructed at the gravel pit. The off-site work performed using the rental equipment resulted in gravel and sand that was used in constructing the Hangingstone Project, and directly contributed to the actual physical construction of the improvement. As argued by counsel for Tyalta, the rental equipment was part of the overall project or common purpose in relation to the Hangingstone Project.

2020 ABQB 275 (CanLII)

[11] As Master Prowse found in ***MJ Limited (MJ Trucking) v Prairie Mountain Construction (2010) Inc***, 2016 ABQB 395 at para 53: "… a builders' lien under current Alberta legislation can be validly registered on land, even though the improvement was not made on that land, provided that there is a common purpose, including at least some geographical proximity, between the site where the work was done and the land upon which the lien was registered".

[12] It is clear that the removal of gravel did not improve the gravel pit. The common purpose in this case is the construction of the Hangingstone Project.

[13] It is clear on the record before me that the Hangingstone Project required gravel, which was not available on the Hangingstone Project site, and thus had to be transported to the site.

[14] I find on the facts of this case that the gravel pit and the Hangingstone Project site had some geographical proximity as set out in MJ Trucking above. However, s 6(4) of the *Builders' Lien Act* requires more that geographic proximity: it requires the equipment to be in the immediate vicinity of the contract site.

2020 ABQB 275 (CanLII)

B. What is the Meaning of Immediate Vicinity?

[15] No authority was provided to establish that the immediate vicinity means the closest gravel pit available. Both "immediate" and "vicinity" are synonymous with near.

[16] I must interpret "immediate vicinity" in the context of the factual matrix.

[17] In oral submissions, NDV argued that there was another gravel pit which was 49 kilometers away from the Hangingstone project, thus closer, by road, than the gravel pit chosen. No evidence was provided that this gravel pit was suitable for Hangingstone's purpose.

[18] NDV argued that immediate vicinity in the builders' lien context was canvassed in the Ontario case of ***1508270 Ontario Ltd v Laudervest Developments Ltd***, 2007 CanLII 79364, [2007] OJ No 5434, 2007 CarswellOnt 10017 (SCJ), in reference to the *Construction Lien Act*, RSO 1990, c 30, which states at s 1(2):

> 1 (2) For the purpose of this Act, materials are supplied to an improvement when they are,
>
> > b) placed upon land designated by the owner or an agent of the owner that is in the *immediate vicinity* of the premises, but placing materials on the land so designated does not, of itself, make the land subject to a lien;

[19] In ***Laudervest Developments***, the Court found that the producer of kitchen cabinets intended to be installed in a condominium project was not entitled to a lien for cabinets which had been directed to be stored at the contractor's warehouse. Storing the cabinets at an off-site warehouse did not meet this definition.

[20] ***Laudervest Developments*** is distinguishable on its facts. This is not a case of materials stored off-site, such as lumber placed on an adjacent property. Further, the Court explained the rationale of the *Act* (at para16):

> ... When a contractor or material supplier provides work and materials are incorporated into the owner's land or placed in the owner's control, the owner receives a benefit, whether it is paid for or not. The contractor is not in a position to takeback the materials and deprive the owner of the benefit because they have

> become part of the owner's improvement to the property. The lien remedy stands in the place of the contractor's ability to retrieve his work product and gives him a higher priority than other creditors…

[21] In that case, the cabinets never became part of the owner's improvements and there was nothing for the contractor to takeback since it retained control of the cabinets.

[22] In this case, the renting of equipment is considered 'work' under s 6(1) of the *Builders' Lien Act*. The rental equipment was used to crush, screen and extract gravel, which was used in the constructions of the Hangingstone Project, resulting in an improvement. Tyalta cannot "takeback" the rental use of the equipment or the sand and gravel that has been used in the construction of the Hangingstone Project: it has become part of the owner's land. As submitted by Tyalta in its Brief before the Master, at para 17:

> Furthermore, the BLA [*Builders' Lien Act*] distinguishes between when materials are supplied and when work is supplied. The BLA recognizes that "work" is lienable when it supplied on or in respect to an improvement (Section 6(1)(a)), as opposed to materials, which are lienable when they are furnished in respect of an improvement Section 6(1)(b).

[23] I find on the facts of this specific case that the gravel pit and the Hangingstone Project site are in the immediate vicinity of each other. Thus, as the rental equipment was at all relevant times located at the gravel pit, the rental equipment was in the immediate vicinity of the contract site (the Hangingstone Project site). The gravel was not obtained out of country, out of province, or even in central or southern Alberta. Given the nature of gravel pits, immediate vicinity must be considered in context.

[24] Take, for example, Tim Hortons. If someone was located in the centre of the City of Edmonton and argued that a Tim Hortons restaurant 30 kilometers away, as the crow flies, or a driving distance of 89 kilometers was in their immediate vicinity, I would dispute that claim, because there are numerous Tim Hortons locations that are much closer than the distance described. The same cannot be said for a gravel pit. Immediate vicinity must be considered on the specific and unique facts of a particular case.

C. Is There a Common Purpose Between the Two Sites? Is This a Case of an Overall Purpose?

[25] Although I have found that the Hangingstone Project site is the "contract site", it is not necessary to determine same, as I am satisfied the two sites are in the immediate vicinity of each other. I accept Tyalta's argument that there is a common purpose in the work being done at the gravel pit and at the Hangingstone Project, as the work being done at the gravel pit is part of the "overall' Hangingstone Project.

[26] In ***Trotter and Morton Building Technologies Inc v Stealth Acoustical & Emission Control Inc (Stealth Energy Services)***, 2017 ABQB 262 Master Prowse stated at para 57:

> In other words, even where the lien is filed on the 'wrong' land it is the "overall project" (to use the language found in the D*avidson* decision) which is considered, and thus work may be considered to have been done on an improvement even where the work was done on another parcel of land and not the parcel that was liened."

2020 ABQB 275 (CanLII)

2020 ABQB 275 (CanLII)

[27] Even if I am incorrect in finding that the Hangingstone Project site is the "contract site", ***Trotter and Morton*** stands for the proposition that a lien filed against the wrong parcel of land may still be valid, as long as the "work" performed at the wrong land (i.e. the gravel pit) is found to be part of the overall project.

[28] In her oral decision, the Learned Master referred to the Alberta Court of Appeal decision in ***PTI Group Inc v ANG Gathering & Processing Ltd***, 2002 ABCA 89, where Berger J.A. had stated at para 18:

> The remedy contemplated by the Act, as both Moir and Lieberman JJ.A. recognized *(in Hett et al. v. Samoth Realty Projects Ltd. (1977) 3 Alta. L.R. (2d) 97 at 105)*, must be subject to some limit. That limit will largely be determined by the factual matrix of each case that presents for adjudication. The relevant inquiries will include:
>
> a) whether the contractors, subcontractors and owners contemplated that the services provided were necessary to expedite the construction of the improvement.
>
> b) whether the off-site services could have been provided on the site.
>
> c) whether the improvement could have been carried out absent such off-site services.
>
> d) whether in all of the circumstances, the off-site services were so essential to the construction of the improvement and so directly connected with it, that it can be said that the services in question were "primary" in nature.

[29] It is not contested that the sand and gravel were necessary for the Hangingstone Project construction. It is not contested that the Hangingstone Project site did not have the sand and gravel necessary for the project. I heard no evidence the Hangingstone Project site could have been improved without the sand and gravel, thus I am I am prepared to find that the improvements could not have been carried out in the absence of the sand and gravel.

[30] The final question is, were the services of Tyalta so integral and essential to the construction of the project, that it can be said to be primary in nature? The Learned Master below stated at page 60 of the Proceedings Transcript:

> Now I understand Mr. Kirwin's [Counsel for NDV] argument that this case is not directly on point. They are talking about primary versus secondary services, but I think the analysis of off-site and the focus on the factual matrix of each case presented for adjudication is applicable to this situation where we have -- obviously the aggregate is necessary. We have got over a $6 million contract to provide aggregate to this Hangingstone Project. The off-site services could not have been provided on site. The evidence is there were other gravel pits around but certainly not on the Hangingstone site itself.

[31] I find that the test in ***PTI Group Inc*** is applicable in this case, and has been met. The two sites clearly have a common purpose: the construction of the Hangingstone Project site. The "work" performed is an integral part of the overall project.

D. The Floodgates Argument

[32] NDV argued that in the event that Tyalta was entitled to a lien for its equipment not on the Hangingstone Project contract site, then the lessors of any vehicles used by HRP to transport gravel to the Hangingstone Project site would also be entitled to a lien; so too would be the lessors of equipment to any other subcontractors or material suppliers, not at the contract site, but whose equipment was used to produce products at the site.

[33] With respect, the leased equipment in this case is not the same as a truck which simply transports gravel from the gravel pit to the Hangingstone Project site. The rented crushing and screening equipment were a Cone Crusher, a Jaw Crusher, a Conveyor, a Telescoping Conveyor, a Screener and a Nor-Tech Feeder. While I do not profess to know what each of the pieces of equipment actually do, the equipment was used to extract, crush and screen the sand and gravel so that it was suitable for the Hangingstone Project.

[34] As per s 6(4) of the *Builders' Lien Act*, a person who rents equipment on the terms set out in the section is deemed to have performed a service and has a lien for reasonable and just rental of the equipment while it is used or is reasonably required to be available for the purpose of the work.

[35] Further, the key is that the equipment has to be at the contract site or in the immediate vicinity of the contract site.

[36] It would be speculative to discuss the potential rights of other persons under the *Builders' Lien Act* without a proper factual matrix. In considering NDV's argument, material suppliers who are not at the contract site would have to be in the immediate vicinity in order to claim a lien. Immediate vicinity would have to be assessed in the context of each material supplier, and each material supplier would have to establish that they fall under s 6(4) of the *Builders' Lien Act* as a person who rents equipment to an owner, contractor, or subcontractor, and that the rented equipment is being used or is reasonably required to be available for the purpose of the work. In my view, it would be unjust to use this argument to defeat Tyalta's legitimate claim for a lien under s 6(4).

Conclusion

[37] In my view, Tyalta has satisfied the requirements of s 6(4) of the *Builders' Lien Act* and its lien is therefore valid. The appeal is dismissed.

2020 ABQB 275 (CanLII)

[38] If the parties are unable to agree on costs, they may provide written submissions to me within 60 days after the release of this decision.

Heard on the 15th day of January, 2020.
Dated at the City of Edmonton, Alberta this 20th day of April, 2020.

G.D.B. Kendell
J.C.Q.B.A.

2020 ABQB 275 (CanLII)

Appearances:

Patrick D. Kirwin
Kirwin LLP
For the Appellant, Northern Dynasty Ventures Inc.

Bradley J. Smith
Verhaeghe Law Office
for the Respondent, Tyalta Industries Ltd.