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Builders Lien Basics III:
Work Stipulated in a Lease Agreement

In the last instalment of "Builders Lien Basics" we discussed s. 3(1) of the *Builders Lien Act*,[1] which provides that "an improvement done with the prior knowledge, but not at the request, of an owner is deemed to have been done at the request of the owner".[2] As one result, a landlord's interest in their property may be subject to a lien arising from work done for their tenant with the landlord's knowledge. Section 3(1) does not apply where an owner files a notice of interest in the land title office, which states that the owner's interest will not be bound by a lien in respect of an improvement not undertaken at the express request of the owner.[3]

An interesting question arises from this feature of the legislation: if a lease agreement requires a tenant to have particular work carried out, or if it requires that the landlord approve work to be undertaken for the tenant's use, does that mean that the work is done at the landlord's express request? If so, would s. 3(1) of the *Builders Lien Act* apply, even though the landlord had filed a notice of interest on title? These questions have not been definitively answered in BC, but there is reason to think that the answer to both is "no".

In the case of *Libero Canada Corporation v. Kwee*,[4] a company leased a property to establish a badminton gym. The landlord had previously filed a notice of interest on title, and the lease was unregistered. Under the lease agreement, which specified that the property would only be used for a badminton gym, the tenant company was required to obtain the landlord's written permission, "not to be unreasonably withheld", for its intended improvements. When the tenant failed to pay its contractor's invoices, the contractor filed a lien on title (that is, on the landlord's interest). Responding to an application to cancel the lien, the contractor argued that the approval requirement in the lease agreement amounted to an express request that the work be performed. Unfortunately, there was no resolution on this issue, as the court held that whether the landlord had expressly requested the improvements should be put to a trial. However, the court's decision indicates that the contractor's argument was not entirely without merit.

While there does not appear to be any subsequent British Columbia caselaw

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considering the issues in *Kwee*, other provinces' courts have frequently addressed a similar issue, albeit in their own somewhat different statutory contexts. For instance, under Alberta's *Prompt Payment and Construction Lien Act*[5] there is no equivalent to section 3(1) of the *Builders Lien Act*. In Alberta and elsewhere, when lien claims have been advanced against a landlord for work done for a tenant, the analysis has focused not on the narrow question of whether work was done at the landlord's request but on whether the landlord qualifies as an "owner", although whether work was implicitly or explicitly requested is a component of that analysis.[6]

In the case of *Xemex Contracting Inc. v. Aspen Properties (Northland Place) Ltd.*,[7] a decision of the Alberta Court of King's Bench, Xemex had been hired to complete renovations to property that Koor Energy Ltd. leased from Aspen. Koor failed to pay the invoices and Xemex registered a lien against Aspen's fee simple title. Aspen provided Koor a renovation allowance and a construction manual with expected standards for the completion of work. Aspen also required Koor to obtain its approval of drawings and directly involved itself in dealing with Xemex. The judge held that, while work was done at Aspen's *implicit* request, Aspen was not an owner for the purposes of the *Prompt Payment and Construction Lien Act*, because the work did not "directly benefit" Aspen, nor did Aspen's dealings with Xemex amount to "privity and consent".[8]

Despite important differences in the *Builders Lien Act*, it is not apparent that the end results would differ in British Columbia in a situation in which a landlord has filed a notice of intention. Despite the level of Aspen's involvement in the work in *Xemex*, the Court held that it had only implicitly requested work be done. Under the *Builders Lien Act*, the definition of "owner" can be met by (1) a registered owner, (2) at whose request, and (3) with whose knowledge *or* consent work is done or material is supplied, and the owner does not necessarily need to directly benefit from the work or material. Where the owner has filed a notice of interest, they will only be subject to a lien where they have made an express request, which would seem to necessarily imply that the work is done with their consent. Where a builder is performing work for a tenant of a property, its best option to protect its interest will be to seek out the express consent of the registered owner (or registered leaseholder if there is a subtenancy). Relying on an apparent request within a tenant's lease may backfire in the event the builder must later attempt to register a lien for its unpaid work.

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1 R.S.B.C. 1997, c. 45.

2 Recall that "owner" is a defined term under section 1 of the *Builders Lien Act*, which may include a tenant or lessee:

> "owner" includes a person who has, at the time a claim of lien is filed under this Act, an estate or interest, whether legal or equitable, in the land on which the improvement is located, at whose request and
>
> (a) on whose credit,
>
> (b) on whose behalf,
>
> (c) with whose knowledge or consent, or
>
> (d) for whose direct benefit
>
> work is done or material is supplied, and includes all persons claiming under the owner, but does not include a mortgagee unless the mortgagee is in possession of the land.

3 *Supra,* note 1, s. 3(2).

4 2013 BCSC 1297 [*Kwee*].

5 R.S.A. 2000, c. P-26.4.

6 The definition of "owner" under section 1(j) of the Alberta Act subtly differs from the *Builders Lien Act*:

> "owner" means a person having an estate or interest in land at whose request, express or implied, and
>
> (a) on whose credit,
>
> (b) on whose behalf,
>
> (c) with whose privity and consent, or
>
> (d) 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. (emphasis added)

7 2023 ABKB 577, aff'd 2025 ABCA 49 [*Xemex*].

8 The Alberta Court of Appeal noted that "privity and consent" does not require the existence of direct contractual relations, but there must be something "in the nature of a direct dealing" beyond mere knowledge or consent: 2025 ABCA 49 at para. 30.

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Aidan is an associate lawyer with the firm and maintains a general municipal law practice, with particular interest in land use planning, judicial review, and freedom of information and privacy matters. Aidan has provided advice to local governments about zoning compliance, use of park land, and the scope of easements. As well, he has drafted leases and section 219 covenants, advised on conflict of interest and code of conduct issues, and assisted with submissions to the Office of the Information and Privacy Commissioner for British Columbia. Aidan has assisted with the preparation of pleadings in bylaw enforcement matters and written submissions to the Court of Appeal for British Columbia. Aidan obtained his Juris Doctor from the University of Victoria and was called to the Bar of British Columbia in 2024, after articling with a municipal law boutique in Vancouver.

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