

Bulletin: Construction Act

When Is a Landlord an “Owner?”

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Marta O. Lewycky
Partner, Minden Gross LLP
T. 416.369.4104
mlewycky@mindengross.com

If you haven't already heard, Ontario is in the middle of a huge overhaul of its principal construction statute, now known as the *Construction Act* (“Act”).

Much has been written about the new requirements affecting landlords and the leasing world, such as the new holdback on allowances and the elimination of landlords' s.19(2) rights.

It is important not to lose sight of unchanged provisions that can impact landlords.

One such unchanged provision is the definition of “owner”. Can a landlord be an “owner” under the Act?

Section 19(5) of the Act now confirms what we always knew: a landlord may be an “owner” if it meets the definition under the Act. This opens up the landlord's leasehold and freehold interests to a construction lien for improvements made by the tenant.

Of course, this question only arises in the absence of privity between the landlord and the lien claimant. It is not unusual in lease negotiations for the parties to agree that the landlord undertake the construction of the tenant's work instead of the tenant performing the work. There may be many business reasons why, some include: the landlord has more extensive construction experience, the landlord can negotiate better pricing, or the landlord wants to ensure that the construction is completed on time and believes it can manage the construction process more effectively than the tenant. Whatever the reason, the landlord enters into a construction contract with the lien claimant for such work and is then the “owner” for the purposes of the Act.

In situations where the tenant is responsible for its work and contracts directly with the lien claimant, the landlord may assume it is not at risk of being an “owner” under the Act. This is not always the

case. There have been circumstances where courts have found a landlord to be a statutory “owner” even though it did not sign the construction contract.

Four Requirements of Ownership Test

There are four requirements for the ownership test, which must be met for a landlord to be an “owner” for the purposes of the Act.

First, the landlord must have an interest in the premises. Second, an improvement must be made to the premises. The first two requirements are not difficult to establish since the landlord usually owns the property and improvements are being made.

The last two requirements can be less clear and require careful analysis of the facts.

Third, the “owner” must make the request for the improvement in question. The courts have recognized that the request for work may be inferred from the totality of circumstances, viewed in light of the substance of the relationship between the parties. A landlord’s mere knowledge that improvements will be made or are being made to its property is insufficient to satisfy this test.

Fourth, in addition to an express or implied request by the landlord, one or more of the following factors must be established:

1. “upon whose credit”

Evidence of landlord providing financial support. The courts have said it is not enough for the landlord to have agreed with the tenant to pay for the tenant’s improvements in whole or in part. Even if the lease has provision for reimbursement, the courts have required additional evidence of financial support by the landlord.

2. “upon whose behalf”

Evidence that the tenant was acting as an agent of the landlord when contracting with the lien claimant.

3. “with whose privity or consent”

Evidence of a significant amount of direct dealing between the owner and the lien claimant. Standing alone, a landlord’s approval of a tenant’s plans for its improvements to the leased premises does not satisfy the privity and consent requirement. Key is the nature and extent of the direct dealing.

4. “whose direct benefit”

Evidence of landlord receiving substantial benefit. It is almost inevitable that a landlord will benefit if the tenant makes improvements to the leased premises. As such, there has to be more benefit than the benefit as a reversioner. Case law has supported this that any benefit to a landlord as a reversioner is not classified as being a direct benefit.



Business reasons may compel landlords to be involved with a tenant's construction, but landlords should be aware that a high level of involvement is not without risk.

It remains to be seen whether the courts will decide this question any differently going forward than they have in the past. To date, landlords who were able to demonstrate that they had not been active participants in the improvements were unlikely to be an "owner" for the purposes of the Act, especially without strong evidence by the lien claimant.

For more information or if you have any questions, contact lawyer Marta O. Lewycky at mlewycky@mindengross.com.