

“WITH GREAT POWER COMES GREAT RESPONSIBILITY”

Section 85 and 86 of the Condominium Act, 1998 (the “Act”) set out a condominium corporation’s power and authority to have, register and enforce a lien against a unit owner’s property on account of non-payment of common expense contributions without any form of judicial process. In short, this is an extraordinary power.

The condominium is given an incredible amount of power to use a very effective collection mechanism

In addition, the entitlement to carry on that enforcement to the point of exercising power of sale against the owner’s unit, with priority over almost all other registered and unregistered charges, is highly unusual. In short, the condominium is given an incredible amount of power to use a very effective collection mechanism that almost no other entity enjoys.

Consequently, it is to be expected that the courts will take a very strict view of the exercise of such powers. Any uncertainties in the interpretation and application of them are likely to be interpreted against the condominium and in favour of the delinquent unit owner. In certain cases, the condominium could be found liable for significant damages for slander of title if a lien is improperly registered.

The condominium board has the responsibility to take special care that the corporation’s lien enforcement powers are carefully and responsibly exercised. It is important not to rush headlong toward exercise of its full rights, but to make every effort to help ensure that there is no overstepping of reasonable standards of conduct.

Additionally, the condominium should not seek to use its lien powers to enforce payments that are not clearly the proper subject matter of a lien. The condominium should never seek to use its lien powers to threaten or bully unit owners into paying amounts it wants them to pay.

Demand letters in the form of polite warning are preferred

Even where there are legitimate circumstances for a lien, it is preferred in most cases that demand letters are drafted in the form of a polite warning without a hint of threat or coercion. Although the condominium board might like to take a “strong hand,” from the start, in most cases this is a short sighted approach that does not consider how the board will be perceived if its conduct in this regard ends up being reviewed by a judge.

That is not to say that the condominium should not be strict and ensure it does not fail to register a Certificate of Lien against a delinquent owner, but there is usually no need to do so too far in advance of the statutory deadline, now should a condominium ordinarily undertake power of sale proceedings too soon once it is registered.

WHAT YOU CAN AND CAN’T LIEN FOR

A lien only arises where a unit owner has not paid legitimate common expenses

It is very important in the first place that the board of directors and management of the condominium understand what can and cannot be the subject matter of a condominium lien. Briefly stated, a lien only arises where a unit owner has not paid legitimate common expenses. The lien arises instantly on the date that such common expenses are in arrears.

Under the Act, common expenses are defined as *“the expenses related to the performance of the objects and duties of a corporation and all expenses specified as common expenses in this Act or in a declaration.”*

Note that this does not cover amounts charged in accordance with condominium by-laws and rules; it only covers amounts that are specified in the declaration or Act. Some condominium corporations attempt to get around this restriction by stating in the by stating in the declaration that common expenses may be defined in the other

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condominium documents, but we are unaware of whether the efficacy of this provision or practise has been tested by a court with a correct understanding of condominium law.

Common expenses also do not include late fees or other penalties imposed by the condominium corporation, nor (generally) legal fees for opinions or even for letters to unit owners demanding compliance with condominium rules (unless there are clear provisions in the declaration that impose such costs on the unit owner as common expenses, and the board has not been unreasonable in relying upon the same.

The Act specifies common expenses that can arise based upon the conduct of a unit owner

However, in addition to the regular common expenses relating to the performance of the objects and duties of the corporation, the Act specifies other common expenses that can arise based upon the conduct of a unit owner. These include, for example:

- ◆ damages and costs awarded by the courts against a unit owner and in favour of the condominium and related costs (section 134(5) of the Act);
- ◆ costs and other expenses arising in connection with a unit owner's failure to comply with a Section 98 Agreement (section 98(4) of the Act); and
- ◆ costs of the condominium performing repair work on behalf of the unit owner, where it was the unit owner's responsibility to do such work and such work was not done by the unit owner within a reasonable time (sections 92(1) and 92(4) of the Act).

This is not an exhaustive list. It is the responsibility of the board and property manager, with the assistance of legal counsel, to become familiar with what can and cannot be the subject matter of a lien, and to ensure that the lien powers of the condominium are never improperly used.

Refer to condominium documents

Once the lien arises, then it will also cover the interest incurred on the common expenses in arrears (if any – the condominium by-laws should be checked to determine if any and how much interest can be imposed) and any actual, reasonable expenses of the condominium (including legal costs) incurred in connection with the collection or attempted collection of the arrears. However, it is important to note that entitlement to these amounts might be lost if the lien is not properly preserved by registration of a Certificate of Lien prior to the statutory deadline.

Notice of Lien

Failure to correctly serve the Notice of Lien could significantly interfere with later enforcement of the lien, effectively forcing the condominium to settle the case after a great deal of expenses are incurred, or causing it simply to lose the claim.¹ In such events the condominium could be subjected to significant unrecoverable costs.

Certificate of Lien

Not less than 10 days after the Notice of Lien is served, the condominium may register a Certificate of Lien with respect to subject arrears. The Certificate of Lien cannot be registered earlier than this; therefore, it is important to carefully time delivery of the Notice of Lien. In this regard the following points must also be considered.

1. Neither the day on which the notice is sent, nor the date on which it is received should be counted as part of the 10-day period. Therefore, the notice should be served at least 12 days prior to the day on which the Certificate of Lien is to be registered.
2. The condominium by-laws might specify a notice period for service of documents by mail. They may be deemed served on the day it is mailed; however, a more usual provision requires several business day. If service of the notice is to be effected by mail, the amount of days specified in the by-laws of the corporation

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Allow sufficient time for solicitor to prepare Certificate of Lien

should be added to the notice period. If no specific period is set out in the by-laws, it may be appropriate to add about 5 business days. In this case, the latest the Notice of Lien would be sent is 17 days prior to the last day of the month.

3. Finally, it would also be appropriate to allow a couple of days for the condominium's solicitor to prepare the Certificate of Lien for registration. Your lawyer might have many liens to register at the end of the month. It is not safe or reasonable to presume that all those that are set for registration on the last possible day will be registered. A short period of time for the lawyer's work to be completed should be added on to the 12- or 17-day notice periods suggested above.

Once a Notice of Lien is sent, and particularly once a Certificate of Lien is registered, all payments made by a unit owner should generally be paid to the solicitor for the condominium in trust. This would allow the solicitor to help determine when the lien is fully repaid and have legal costs and other expenses relating to the collection or attempted collection of the lien paid immediately (where the condominium has not already paid the same). If the board or manager wishes to consider any kind of payment plan with the unit owner, legal counsel should be consulted and all legal fees then owing should be paid by the condominium and not left to wait until the owner has completed all payments.

Discharge of the Certificate of Lien

Having payments made to the solicitor in trust should also be helpful in reducing the time between payment of the amounts owing under the lien and discharge of the Certificate of Lien. The Certificate of Lien must be discharged once the lien amount is fully paid. Note that a lien is not fully paid up simply because the arrears of the common expenses are paid. All amounts covered by the lien must be paid before the lien should be discharged.

¹ Christiansen v. York Condominium Corporation No. 482 states that irregularities in the notice of lien will not necessarily void a lien or power of sale proceeding. However, it is not advisable to rely on this. This case should only be looked to in the last resort. The better advice is to avoid non-compliance with the Act.

* This memorandum includes information based in part on materials provided by Craig Robson.

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Michael has a very impressive and community-involved life. He is a co-author of two books on Ontario condominium law: A Planners' and Municipalities' Guide to the Condominium Act, 1998 and Essential Issues for Realtors in the Condominium Act, 1998. He has also had numerous articles on condominium law published in trade periodicals including the Condo News and Condominium Manager, assisted in the preparation of the most recent version of the Level 200 Course materials for Canadian Condominium Institute – Golden Horseshoe Chapter and has been an instructor at various CCI forums and courses. In September 2006, Michael was elected to the board of directors of the Golden Horseshoe Chapter of the Canadian Condominium Institute. In May, 2008, Michael was awarded the designation of Associate of the Canadian Condominium Institute (ACCI).

Michael continues to be an excellent resource on condominium law, and supports the CCI-London & Area Chapter as a writer and seminar presenter.