

## Lien on Me

*“Lien on me, when you're not strong  
And I'll be your friend  
I'll help you carry on  
For it won't be long  
'Til I'm gonna need  
Somebody to lien on”*

Okay, needless to say my mother was more proud of my accomplishments as a lawyer rather than a songwriter. However, whenever I hear this song, as a lawyer I immediately think of “Lien” as opposed to “Lean”.

There is nothing that raises more angst among unit owners than having a condominium lien registered against their unit, and the corresponding legal fees that go along with it. One of the most difficult but most important jobs that the condominium corporation has is the collection and enforcement of the payment of common expenses.

When the condominium corporation sets its yearly budget, it determines the amount of common expenses that must be paid by each unit owner on a monthly basis for the coming year. While the majority of unit owners pay as and when the common expenses are due, there are those unit owners that are unable to make the common expense payment or a problem arises with respect to the account where the common expenses are paid from and thus the unit falls into arrears. The condominium corporation is now put into a position where they have to recover these arrears. It is important for the unit owners to understand the position of the board of directors when they must enforce common expense arrears and that they really have no choice but to register a lien.

The entire process of enforcement of common expense arrears and the registration of a condominium lien is governed by section 85 of the *Condominium Act, 1998*. The condominium corporation has very little discretion or “wobble room” when it comes to negotiating a resolution of the outstanding arrears. As such their hands are tied and they must seek recovery of the entire amount including all legal fees in order to resolve an issue of outstanding arrears.

Once an owner falls into arrears of common expenses, the condominium corporation must set their wheels of motion into progress. The lien rights expire three months after the first arrears become due. In other words, for the owner who is in arrears of common expenses for the month

of January, the condominium corporation has until March 31 to register a lien to recover the January arrears. Some condominium corporations have decided that they will begin enforcement proceedings immediately upon the first month going into default. Others wait for the second month and some wait for the third month of arrears to arise before they commence enforcement proceedings. This gives the unit owner the opportunity to bring the arrears into good standing with out having to pay legal or administrative fees that are due once enforcement proceedings are commenced. Once the condominium corporation has decided to enforce the recovery of the arrears, the first step that must be done is at least 10 days before the lien is registered against title to the unit, a notice entitled, "Notice of Lien to Owner", is sent to the unit owner advising of the common expense arrears and advising them that they have 10 days to make all outstanding payments or a lien will be registered. This notice only has to be sent out by regular mail and the condominium corporation is entitled to charge a fee for sending out of this notice, which is usually in the area of \$125.00 to \$150.00 as well as charging interest on the outstanding amount based on the interest rate set out in the by-laws for the condominium corporation. Following ten days after the notice is sent out if the entire amount has not been paid, the condominium corporation is free to register their lien.

At that stage the condominium's lawyer is given instructions to register a lien for the outstanding arrears. This is where the fees start to mount. Generally, the legal fees for the registration of a lien vary from \$850.00 to \$1,000.00. This is a significant amount of money. This amount is regardless of the amount of the outstanding arrears. In many cases the legal fees for registering a lien may exceed the actual amount of arrears outstanding. Unfortunately, the condominium corporation has no choice but to still go ahead and register the lien. They must preserve their right to secure the outstanding arrears. On the day of the registration of the lien, a notice of this lien is also sent to all subsequent encumbrancers on title, specifically the mortgagee. The benefit of the lien provisions in the *Condominium Act, 1998* to the condominium corporation is that these liens have a priority over any other encumbrance registered on title, regardless of when they were registered. In other words, these liens take priority over the mortgages that are registered on title. Financial institutions that provide these mortgages are generally not happy when a lien takes priority over their mortgage. Many times, they will contact the condominium corporation's lawyer to try and have this amount paid out to maintain their priority and they will

simply take the money they paid out and tack it on to the outstanding mortgage for the unit owner. In many cases, that's the best scenario for all involved. The condominium corporation receives its arrears and fees and the lien is discharged to the satisfaction of the mortgagee.

The most important thing a unit owner should be aware of is that under Section 85(6), the lien may be enforced in the same manner as a mortgage, which means that the condominium corporation has power of sale rights. Unfortunately some financial institutions will not take any steps to pay out the lien until such time as the condominium corporation has commenced power of sale proceedings. Once these proceedings are commenced, in most cases there will be an additional \$2,000.00 in legal fees incurred in order to launch the power of sale. So what started as a minor common expense arrear has now ballooned into a significant payment by the unit owner to the condominium corporation.

Owners have to understand that the Act is very strict about collection of these arrears, because without this money, they cannot pay their bills and operate the condominium corporation.

Many times, the unit owners would like to take the position that the condominium corporation owes them money and, therefore, feel justified in offsetting that amount against their monthly common expenses, or that they take the position that they will not pay their common expenses until the Corporation fixes a problem in their unit. I cannot stress enough that this is the wrong approach to take. The courts will not look favourably on a unit owner that tries to set off these arrears. The common expense fees are crucial to the operation of the corporation and therefore, they must be paid regardless of any other claim that the unit owner may have against the Corporation. My recommendation has always been for the unit owner to pay the arrears, avoid the excess legal fees charged for enforcement and then to pursue the corporation in small claims court for any damages they feel they have suffered as a result of any problems with their unit.

Many times, arrears will occur because the unit owner changes bank accounts or there is a problem with the unit owner's bank and the automatic withdrawal did not occur. Once again, this is not the fault of the corporation but rather the unit owner, and it is the unit owner's responsibility to ensure that this type of problem does not occur. The obligation is on the unit

owner to ensure that all banking procedures are in place. The unit owner should make sure that they have arrangements with their bank to notify them immediately that there may be a problem with their account and a certain monthly payment was not made. It is not sufficient for the unit owner to say to the condominium corporation, that their bank screwed up. That will not work. The condominium corporation will still go ahead and register the lien. Every unit owner has an obligation to pay their common expenses.

My advice to a unit owner that receives that initial notice warning of a pending lien: pay the arrears immediately. It is a lot easier to swallow a \$125.00 administrative charge than an additional \$850.00 legal bill. After all, unlike me, when you hear that great song, you do not want to be reminded of an unpleasant experience.