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Let's Talk Condo...

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in this issue...

The Collection of Unpaid Common Expenses by Managers

by
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The collection of unpaid common expenses, whether it is the monthly contribution payable by each unit owner or the extra payments which can be collected pursuant to the *Condominium Act, 1998* or a corporation's governing documents, is one of the primary responsibilities of a board of directors and the management company.

We had noticed some trends recently which are causing us concern on behalf of our clients where management companies are registering liens themselves. In light of the frauds which are alleged to have occurred recently by one or more condominium management companies, it is a simple step for boards to ensure that their collections are properly handled and no funds go missing or remain uncollected.

Here are some examples of the matters which we have encountered and about which boards of directors should be aware.

1. Mistakes are made by managers. We see situations where the proper Form 14 was not used, it was not sent in the prescribed time frame and/or the registration of the lien was completed beyond the three months permitted under the *Condominium Act* or not registered at all. This results in amounts not being collectable by the Corporation. When management does the collection based on its own Form 14 and/or Notice of Lien, there is no independent oversight to bring to a board's attention the mistakes that have been made and so the loss of the amounts due ends up being absorbed by the condominium owners, without the board of directors realizing that perhaps the management company should be responsible.
2. If the lien is not registered by the corporation's solicitor and an error has been made resulting in a defect in the lien registration process it will impact the ability to proceed by power of sale and the corporation's losses will be even greater.
3. When a management company's services are terminated and that company has been doing the collections, including the lien work, the corporations have been unable to obtain the records of what units are in arrears and what procedures have been carried out

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pursuant to the *Condominium Act*, to collect those arrears. The cost of obtaining these records from a management company is rarely worth the legal fees to obtain them. We recently encountered a situation where the management company charged the condominium corporation for the registration of a lien which it never registered, so not only did the condominium lose its priority for the arrears but it paid a fee to the management company that did not do the work for which the corporation was billed.

4. The *Condominium Act* sets out specific requirements with which a condominium corporation must comply in order to ensure its lien priority over other registered encumbrancers like mortgagees on title. The failure to properly serve those mortgagees or other encumbrancers with the required notices, may invalidate the lien and will certainly affect the priority. If that occurs those losses are rarely recoverable from the management company either because the board of directors is not made aware of the reason for the problem, since the manager should be financially responsible for it, or it is never brought to the board's attention as it is not in the management company's interest to do so.
5. Management companies should not be making decisions on whether collections, other than monthly common expenses and special assessments, are properly recoverable by way of a lien. In addition to the provisions of the *Condominium Act*, each corporation has different provisions in its documents governing the ability to collect charges owing by a unit owner by way of a lien. Often legal review is necessary to make these determinations. Sometimes management companies fail to consider registering a lien because they do not think the corporation has the authority to do so or lien when there is no authority to do so.
6. Finally, our concern with management companies registering liens, is that S. 85(3) (c) of the *Condominium Act* allows, in addition to the recovery of arrears of common expenses, "all interest owing and all reasonable legal costs…". That phrase was included in the legislation to ensure that the registration of liens was only done by members of the legal profession. There is a strong argument that the fees charged for registering liens by management companies are not recoverable by a condominium corporation.

As board members, good governance mandates that someone other then the management company be retained to register liens on behalf of the corporation. We urge you to review the practice in your condominium and ensure that your board is following best practices.

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NEWSLETTER TIPS

1. **Are you receiving your Ontario Clean Energy Benefit (OCEB) rebate of 10%? Under the *Ontario Clean Energy Benefit Act, 2010*, condominiums are eligible to receive a rebate of 10% on their bill, regardless of their level of electricity consumption or demand. It has recently come to light that many condominium corporations eligible for the OCEB may not be receiving the 10% OCEB rebate. The rebate is retroactive to January 1, 2011. Condominium corporations that have not been receiving this 10% rebate should contact their local electricity utility and request a self-declaration form to confirm they are eligible for the OCEB.**
2. **We recommend that when issuing status certificates, which include an indication that there are arrears of common expenses in paragraph 6, surcharges in paragraph 8 or additional payments in paragraph 12, the following statement be added after the amount disclosed in any of these three paragraphs: "*Please contact the management office, prior to closing, for a statement as to the amount of arrears owing at the time of closing*."**
3. **Condominium corporations should seek expert advice before entering negotiations with a neighbouring development. How negotiations should be handled depends on the specific facts of each case. Boards of directors need to fully understand the relevant facts involved before entering negotiations so that the corporation's residents are fully protected.**

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AODA – O.Reg 429/07: The New Year is Near

by
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This is a good time of the year to remind condominium corporations and property managers about the January 1, 2012 deadline for compliance with accessibility standards for customer service, as provided in a regulation (O. Reg. 429/07) made under the *Accessibility for Ontarians with Disabilities Act, 2005 ("AODA")*.

The purpose of the AODA is to identify, remove and prevent barriers for persons with disabilities, in key areas of day-to-day living, such as access to goods and services, employment, transportation and access to buildings, by developing accessibility standards with which persons or organizations that provide goods or services must comply. The accessibility standards for customer service apply to such providers of goods and services on and after January 1, 2012.

Is a condominium corporation a provider of "goods" or "services" and thereby required to comply with these accessibility standards? In the human rights law context there appear to be no cases which have clearly defined the term "goods". However, Canadian courts have used the term "service" interchangeably with the terms "facility" and "accommodation" and have interpreted all of these terms very broadly. In our opinion, there is a strong argument that condominium corporations provide "services", as contemplated by the *AODA*, for the simple reason that section 97 of the *Condominium Act, 1998* refers to changes in a "service" that a condominium corporation provides to owners. Such services include the use and enjoyment of recreational facilities, among other things.

If this position is correct, it means that corporations must establish policies, practices and procedures governing the provision of its goods or services to persons with disabilities, and this is what the remainder of this article deals with..

Condominium corporations are required to use "reasonable efforts" to ensure that its policies, practices, and procedures are consistent with several principles noted in the *AODA* regulation. One such principle is that persons with disabilities must be given an opportunity, equal to that given to others (namely those without a disability), to obtain, use and benefit from the goods or services.

The requirement to establish "policies" is best achieved through the enactment of appropriate rules and regulations for that purpose. However, the requirement for the establishment of "practices" and "procedures" (and these terms are not defined in the *AODA*) means that corporations may be required to go beyond the passing of rules or other formal policies. More specifically, if corporations are required to establish practices and procedures so that persons with disabilities are given an equal opportunity to "use" and "benefit" from services (such as recreational facilities), it is

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NEWSLETTER TIPS

4. **Unit owners can better protect themselves by insuring their units with the same company that insures the condominium corporation. This will result in both the standard unit and betterments and improvements being insured and avoid any "holes" in coverage. In the event of a loss, whatever is not covered by the corporation's insurance, including the deductible and other expenses for which the unit owner may be responsible, will be covered by the unit owner's policy. If both the corporation's insurance for the unit and the unit owner's insurance are with the same company, there will be no dispute as to coverage if the damage is the result of an insured peril.**
5. **STOP! Are you still using one of our old precedents?** We are constantly updating and improving our documents and our clients should not be relying on older documents prepared by Miller Thomson. A client recently used an old tie-back agreement as a starting point and it took more time and expense to make the required updates to the agreement than if we had started with our updated precedent. Always check with us before preparing your own documents to ensure you are using our most recent precedents.

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possible that corporations may be required to take proactive steps towards the removal of any physical barriers that prevent those with disabilities from using and benefiting from any such services.

Does this mean that corporations must now rush to carry out modifications to the common elements in order to remove any such physical barriers before January 1, 2012? In our opinion, the answer is: "no". This is where the requirement for the corporation to use "reasonable efforts", in respect of any such practices or procedures, becomes relevant and important. We feel that it would be unreasonable for corporations to be required to carry out common element modifications in order to remove any and all barriers to any and all persons with disabilities before the New Year. However, it is possible that "reasonable efforts" may be interpreted to mean that corporations should develop some form of plan for the future funding of barrier-removal modifications to "services", such as recreational facilities, over a reasonable period of time.

This should be accomplished by incorporating these items into the corporation's next reserve fund study. S. 97(1) of the Act contains a relatively broad and flexible statement of what could constitute a repair, as opposed to an addition, alteration or improvement, to any such "services". The courts have also noted that this definition of repair should not be construed in a narrow or overly legalistic manner.

In light of the foregoing, we feel that corporations should be permitted to comply with the *AODA* regulation requirements, outlined in this article, by way of addressing the removal of any physical barriers to services in reserve fund studies and associated plans for future funding. This does not mean that corporations must rush to have a reserve fund study update performed before the New Year. However, in our opinion, condominium boards of directors should pass a resolution, before January 1, 2012, committing to the inclusion of barrier-removal work in the corporation's next reserve fund study.

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