Submissions to Expert Review of Ontario's *Construction Lien Act*

Submitted December 31, 2015

by the Joint Government Relations Committee of:

Association of Condominium Managers of Ontario

Canadian Condominium Institute Toronto & Area Chapter

ABOUT ACMO

The Association of Condominium Managers of Ontario was formed in 1977 to represent the collective aims of all condominium managers. ACMO's mission is to enhance the condominium management profession in Ontario by advancing the quality performance of condominium property managers and management companies.

ACMO provides formal educational programs which, coupled with experience and successful completion of an exam, culminate in the well-known Registered Condominium Manager (R.C.M.) designation. R.C.M. members are governed by a strict Code of Ethics which enhances conduct in the profession.

ACMO is committed to the recognition, promotion and support of Registered Condominium Managers across Ontario, through education, member services, public awareness and a strict adherence to the highest ethical standards.

ABOUT CCI and CCI-TORONTO

The Canadian Condominium Institute is a national, independent, non-profit organization formed in 1982 with sixteen chapters across Canada, including seven active chapters located throughout Ontario.

CCI is the only national condo association dealing exclusively with condominium issues affecting all of the participants in the condominium community. CCI's membership is comprised of condominium corporations, directors, professionals and business partners servicing the condominium sector in Canada, as well as individual unit owners in Canadian condominiums.

CCI assists its membership, particularly directors and unit owners, in operating successful condominium corporations through education, information dissemination, workshops and technical assistance. An integral component of CCI's education mission is to provide training to condominium directors, through the delivery of four progressive levels of educational courses.

CCI-Toronto is the largest chapter of CCI covering essentially Toronto and the GTA. It has more than 1,200 members of which over 750 are condominium corporations consisting of more than 145,000 residential units.

ACMO

ACMO/CCI-T Joint Legislative Committee

CCI

Association of Condominium Managers of Ontario
2233 Argentia Road, Suite 100, Mississauga, ON L5N 2X7
Tel: 905-626-6890 / 1-800-265-3263
Email: info@acmo.org / Website: www.acmo.org

Canadian Condominium Institute - Toronto & Area Chapter
2800 14th Avenue, Suite 210, Markham, Ontario L3R 0E4
Tel: (416) 491-6216 / Fax: (416) 491-1670
Email: info@ccitoronto.org / Website: www.ccitoronto.org

December 31, 2015

Expert Review of Ontario's *Construction Lien Act*
c/o Borden Ladner Gervais
40 King Street West, 44th Floor
Toronto, ON M5H 3Y4

Dear Expert Review Panel:

Re: Submission on *Construction Lien Act*
Construction liens against condominium common elements

We welcome the opportunity to make this submission to inform your expert review of the *Construction Lien Act* **("CLA")**. This submission will, we hope, address an issue receiving little or no attention but which deserves urgent consideration attention to help eliminate an injustice that affects thousands of Ontarians living in condominiums every year.

For the reasons described below, condominium unit owners in Ontario suffer serious and unjustifiable prejudice from the use of construction liens in relation to work performed on condominium common elements. We therefore submit that the *CLA* should be amended so that construction liens are not available in respect of services or materials supplied to or for condominium common elements at the request of a condominium corporation following its turn-over meeting.

CONTEXT

Condominiums account for half of all new homes built in Ontario today. With roughly 600,000 units in the province spread among some 9,000 residential condominium corporations, over 1.3 million Ontarians call a condominium their home. As the sector has expanded, so has this housing option, the size and complexity of the market, and the number of people affected. Included in this expansion is the number of professionals, contractors and service providers that serve the condominium industry.

Condominiums are composed of the units owned by the various owners and the common elements that comprise the balance of the property. The division as to maintenance and repair obligations are set in the *Condominium Act, 1998* **("Condo Act")** and may be varied by each individual condo declaration. Generally speaking, it is the condo corporation that oversees the maintenance and repair of the common elements. Unit owners will typically maintain and repair their own units.

As Ontario's condominium stock ages and the oldest corporations are now almost 50 years old, the volume of major repair and replacement to condo common elements undertaken by condo corporations is increasing exponentially and easily accounts for hundreds of millions of dollars of economic activity each year. In addition, each condominium undertakes varying degrees of routine maintenance, depending on its physical plant and the standards observed by its board of directors. Unexpected damages arising from fire, flood and other misfortune also require work or materials to be supplied. It is no surprise, then, that virtually every condominium corporation will consequently be working with multiple contractors or service providers at any given time.

While most condominiums are managed professionally, especially larger developments and those located in larger centres, the CLA regime is complex, even for managers and many condo lawyers who have studied its provisions. Many condominiums are self-managed and would typically have a tougher time grappling with the CLA. Condominium directors are typically unpaid volunteers whose educational and experiential backgrounds range from very sophisticated to extremely modest.

Not surprisingly, misunderstandings or disputes as to the services and materials supplied to a condominium corporation's common elements periodically occur. While many such disputes are resolved at an early stage by good communication and the intervention of a professional condominium manager, a large number of disputes proceed into the CLA regime where the following things happen:

- A construction lien, for work done on the corporation's common elements, is registered against each of the units of the condo corporation;
- One or more units in the complex are slated to be sold or refinanced at any given time;
- The construction lien is bonded off in haste, so as to permit units to be sold or refinanced;
- An action to enforce the lien is commenced in Superior Court where the lien claimant's lawyers sometimes (and mistakenly) believe that naming each individual unit owner as a defendant is prudent or necessary to validate the lien.

Our members (including lawyers and managers) routinely observe this scenario playing out across Ontario.

PROBLEMS

The most notorious problems with this typical scenario are as follows:

1) Though it is an unnecessary exercise, the cost for a lien claimant's lawyer to search title to each unit is time-consuming and costly, with the Teranet disbursement approaching $40 per unit. For a 65-unit complex, the disbursements alone will cost $2,600. For a 650-unit complex, the disbursements would be $26,000. The value these searches add to the case is zero but unhelpfully adds to the claim for costs when it comes time to canvass resolutions.

2) Where the lien claimant's lawyer registers the lien against each unit, it seemingly becomes necessary when bonding off the lien to obtain a search for each liened unit to verify the absence of sheltering claims for lien. While a sensible option is to obtain and present subsearches for a small sampling of units, this is imperfect. First, the cost of more than one search is arguably unnecessary and, second, other lien claimants (including those with a claim against a single specific unit not among those arbitrarily selected to be searched) might shelter under blanket liens with a false sense of security. The prevailing practice in the legal profession regarding searches for multiple units is all over the map, and the bar has shown little or no leadership in establishing a workable solution and the CLA provides no helpful guidance.

3) The documentation for the lien and the subsequent action to enforce it is cumbersome by virtue of it including dozens or hundreds of PINs for all the individual units. Claims for lien, certificates of action, statements of claim and court orders often contain unwieldy or hastily-prepared schedules of the legal descriptions of the various units, often running many pages long. Including all these PIN pages further increases costs and the risk of errors made by lawyers, the land registrar or others.

4) It is patently unfair that the title of each unit owner is burdened with a lien related to services or materials supplied to condo common elements. The unit owners, not being party to the condominium corporation's arrangement with contractors for work on the common elements, have no knowledge of the work or the lien proceedings and are innocent victims whose titles are affected by the lien and who ultimately pay as common expense the cost paid by the condo corporation to bond off the lien and otherwise resolve the dispute.

5) Involving the unit owners as parties to the court action is highly disruptive in the condo community, causes needless concern among the ownership ("I've been sued!") and creates the avoidable problem and cost of dealing with potentially dozens or hundreds of defendants, making the administration of the lawsuit at the court office unnecessarily complicated.

6) The legal cost of these proceedings, including the usual "circuit" to bond off a lien hastily, invariably reaches several thousand dollars, which is money better spent on paying for the necessary repair work at issue than on lawyers to quarrel. Most distressing is that the value of the unpaid work secured by a lien might be as low as $5,000 to $20,000, in which case the typical legal costs quickly reach a staggeringly large proportion compared to the value of the work. In this age where our courts preach proportionality, the construction lien regime lags far behind and creates unnecessary process and cost for even the smallest and simplest disputes.

7) Unsophisticated condo directors and untrained non-professional property managers are at a major disadvantage in CLA actions and are unduly pressured and are more likely to capitulate or to negotiate a poor resolution of the dispute in the face of a construction lien claim.

8) The condominium concept does not integrate with the construction lien regime. Because section 11 of the Condo Act makes it impossible to separate a condominium unit from the common elements, it is inconceivable that a construction lien claimant could ever enforce a construction lien against condo common elements. The remedy has, to our knowledge, never once been used, and probably cannot ever be without the various mortgagees of the units contesting the priority of the construction lien.

While a seemingly good solution might be for condo corporations to include in their contracts a provision that construction liens are not available for the work at issue, section 4 of the CLA voids any such agreement and renders this simple option totally ineffective. We recommend that the committee closely explore whether creating an exception is appropriate.

As a best practice, trades and contractors associated with ACMO and CCI who serve condominium corporations typically rely on their relationships with the managers and directors and work hard to resolve disputes without recourse to construction liens or lawyers. The use of construction liens by the trades, contractors and professionals among our membership is very low, and those who do use that remedy might rightly find themselves risking their reputation among the rest of our membership and therefore less likely to be awarded work in the future.

We also find that contractors who do not understand condominium corporations are much more likely to rely on construction liens for the simple fact that "they can." Because most non-member contractors and their legal advisors have poor or inadequate knowledge of the various remedies against condominium corporations, the construction lien remedy is and will continue to be a first choice, especially as the volume of work commissioned by condo corporations increases. This will consequently increase the number of cases where construction liens are registered against condo units and give rise to needless legal work that ultimately adds no value to either side of the dispute and make settlement harder to achieve.

Because problems in collecting debts owed by condo corporations are so rare, it is productive to list the reasons why:

1. Section 23(6) of the Condo Act provides that a judgment against a condo corporation is a judgment against each unit owner to the extent of their proportionate interest.

2. Similarly, section 23(5) of the Condo Act provides that the corporation may, as representative of the owners of the units, be sued in respect of any matter relating to the common elements or assets of the corporation. Naming each unit owner as a defendant in a lien enforcement action is utterly unnecessary.

3. No condominium corporation in Ontario has ever gone bankrupt, likely because these corporations have the unlimited, unfettered ability to raise money from its unit owners, and because the potential personal liability of unit owners is unlimited.

4. Collecting a judgment against a condo corporation is remarkably easy and could be as simple as levying a writ of seizure and sale or, in an extraordinarily rare case, by garnishing the common expenses payable to the corporation by one or more unit owners.

5. Condo corporations must disclose in their status certificates and to their auditors any lawsuits and judgments to which they are subject, creating an imperative for directors to resolve such items promptly, lest they negatively impact market values. Condo boards are also usually keen to avoid unnecessary disputes that might give rise to legal costs that could impact their annual budget.

6. As stated above, we are unaware of any instance where a construction lien has ever been fully enforced against condo common elements for the simple reason that it cannot be. We submit that the construction lien is therefore a meaningless remedy in the context of condo common elements.

For these reasons, the value of a construction lien to a supplier of services or materials is dubious. In fact, the only tangible value of a construction lien is to bring tremendous pressure on a condominium board to decide between bonding off a lien or paying a potentially dubious or exaggerated lien claim entirely in order to permit innocent owners to convey or refinance their units. In this context, construction liens are tools that can easily be (and sometimes is) abused by poorly-informed or unscrupulous contractors, and there is no credible argument that contractors require the usual construction lien security to obtain payment. It is our strong view that the removal of the construction lien tool would not prejudice any lien claimant in relation to work for condo corporations on condo common elements.

In terms of finding ways to resolve disputes in a more positive, expeditious and economical manner, we submit that registering and enforcing construction liens is also counterproductive for the lien claimant. In addition to being confusing, the CLA process is complex, inefficient and highly adversarial. It is front-loaded with high costs that further reduce the too-few opportunities to resolve disputes early in a way that is economical and helps preserve relationships. Disputes of this nature do not belong in court and the precious resources intended for major repair and replacement of common expenses should go to those purposes, and not fighting disputes.

We also point out that the small claims court easily, efficiently and economically handles disputes of up to $25,000. This method removes small disputes from Superior Court, allowing the parties greater flexibility to self-represent or hire paralegals in Small Claims Court, and to prosecute their claims and potential counterclaims faster and more cheaply. As stated above, section 23 of the Condo Act gives judgment debtors an enviable security position that is as good as or better than any security under the CLA.

LAND REGISTRATION SYSTEM IS PROBLEMATIC

We recognize that the problems listed above do not arise solely from lien claimants exercising a statutory remedy with a legitimate purpose in most cases, but largely from the fact that our land registration system no longer adequately accommodates this remedy for multi-unit condominiums. Specifically, the abolition of the condo common element register is the reason for the regrettable and avoidable need for lien claimants to register their lien against all the individual units when in fact only the common elements are affected by the lien.

Bringing back the condominium common elements register would appear to be a simple and reasonable solution to permit registration of a lien claimant's interest without unduly interfering with the individual innocent unit owners. It would also be of considerable benefit for registering condo bylaws, change of address notices and other important documents, and to make those documents easier for unit owners and others to handle and to read. It is unclear, however, that the government or Teranet are willing to consider any such change.

Regardless of whether the common elements register returns, however, it remains our view that permitting registration of documents to preserve and perfect construction liens does not address the fact that the construction lien remedy is legally ineffective in the context of condo common elements and is prohibitive in terms of the complex procedure and resulting cost.

SOCIAL AND LEGISLATIVE CONTEXT

To provide some context on how the legislature has been dealing with condominium issues, we point out that on December 2, 2015, Bill 106, the *Protecting Condominium Owners Act, 2015,* was given third reading in the Ontario Legislature and received Royal Assent the next day.

ACMO and CCI-T and its members were closely and deeply involved in the genesis, review process and the evolution of that bill and actively supported its underlying goals of preserving financial value, protecting consumers and avoiding unnecessary costs and burdens, notably by making dispute resolution simpler and less expensive.

In applying those same principles in the context of construction liens, we submit that the CLA regime is diametrically opposite and does not serve the public interest. The time has come for significant change to the CLA in terms of condominium common elements.

CONCLUSION

This Committee should closely examine whether it makes sense for construction liens to remain available for services or materials supplied to condo common elements at the request or for the benefit of condominium corporations. We submit that construction liens in such circumstances create a needless cost that unnecessarily burdens condo unit owners and creates a drag on the economy while providing little or no legitimate protection for suppliers of services or materials.

The continued availability and periodic abuse of construction liens in respect of condo common elements is diametrically opposed to the concepts underlying Bill 106 that reform our condominium law. It also defies common sense and the new mantra of proportionality in how disputes and lawsuits are dealt with and resolved.

On account of the obvious disconnect between the land registration system and the construction lien regime presumably arising from the automated land registry conversion and consequent elimination of condo common element register, the construction lien remedy has become burdensome, obsolete and no longer strikes the balance it might have in the distant past.

The fact that the construction lien remedy (dating back to 1873) does not interact well with the condominium concept (created almost 100 years later, in 1967) is obvious. Some change should be made now to allow these legal constructs to remain separate before some unlucky parties are doomed to expend substantial resources on the test cases needed to clarify these dueling and incompatible legal concepts.

Last, as the stock of condominiums grows older, it becomes increasingly important that condo corporations and unit owners devote sufficient resources to carrying out major repair and replacement of their common elements. For those precious dollars to be diverted to an antiquated legal remedy is a travesty for both sides, and further burdens our ailing justice system and brings it into disrepute. Such needless expenditure also hurts working families by hitting them right in the pocketbook, in the form of unnecessary condo common expenses.

SUMMARY OF RECOMMENDATIONS

For all these reasons, we recommend that:

> Construction liens should not be available in respect of services or materials supplied for or to condominium common elements at the request of a condominium corporation following its turn-over meeting under s.43 of the Condo Act.
>
> One potential way to easily implement this recommendation and solve a complex problem may be to clarify that section 4 of the CLA does not apply to written agreements entered into with a condominium corporation that has held its turn-over meeting under s.43 of the Condo Act in relation to services or materials supplied to condominium common elements. This change would permit condo corporations and suppliers to agree amongst themselves in writing whether the lien remedy is available. Permitting parties to negotiate and contract freely amongst themselves strikes a good balance and places the onus on parties to be diligent in making bargains to suit their respective circumstances and obligations.
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> Another potential solution might be to restore the condominium common element register which would allow registration of construction liens against condo common elements. While the enforceability of construction liens against common elements is speculative, permitting registration against common elements rather than all the units in the corporation preserves existing lien rights while eliminating the most damaging impact on innocent unit owners.

By way of clarification:

A. While we would reluctantly support the concept of construction liens being available if the condo common element register is brought back into use, we think using construction liens in this context is legally unnecessary and disproportionately complex and costly, especially for disputes about $25,000 or less.

B. We agree that construction liens should remain available for the construction of new condominiums (or phases thereof) or for work performed by a condominium corporation while controlled by its developer prior to turn-over of the corporation by the developer to the unit owners (as per s.43 of the Condo Act).

C. We also agree that construction liens should remain available in respect of services or materials supplied to individual units or nearby common elements at the request of or for the benefit of the occupant or owner of such units. It is both simple and appropriate for a lien claimant to use the CLA in that context.

D. We have no problem with the construction lien remedy remaining available in respect of services or materials supplied to units owned by condo corporations, such as superintendents' suites, guest suites and other amenity units such as recreation centres. Registration of construction liens in such cases does not affect innocent unit owners.

We would be glad to be of further assistance and to suggest wording for potential amendments to the CLA to give effect to these recommendations.

Thank you for considering our submission.

Yours very truly,

Christopher J. Jaglowitz
Member, ACMO/CCI-Toronto Government Relations Committee
416-363-2614 x247
chris.jaglowitz@gmalaw.ca

Armand Conant
Co-Chair, ACMO/CCI-Toronto Government Relations Committee
416-214-5207
aconant@shibleyrighton.com

Dean McCabe
Co-Chair, ACMO/CCI-Toronto Government Relations Committee
416-642-2807 x423
Dean.McCabe@wilsonblanchard.com