



# Common Expenses – Recent Cases

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Common expenses are a lifeline for condominiums. In order for a condominium to be properly operated and maintained, it needs the funds generated by the common expenses to be paid on a timely basis by all owners in accordance with their share of common expenses as set out in the declaration. The following cases dealt with situations where this did not happen.

## **CIBC Mortgages Inc. v. YCC No. 385**

As set out in section 85 of the *Condominium Act*, 1998 (the “Act”) when a unit owner defaults in the payment of common expenses, the condominium corporation has a lien against the owner’s unit for the unpaid amount. The corporation’s lien has priority over any mortgage registered against the unit. However, the lien expires three months after the default has occurred unless the corporation has registered a lien.

In addition to the usual monthly common expenses to which all owners contribute, section 134 of the Act provides that any damages and addi-

tional actual costs (i.e., legal costs) incurred by the corporation in obtaining a compliance order against a unit owner are added to the common expenses for the unit of the non-compliant owner.

This case was a priority dispute between the corporation and the holder of the mortgage on the unit.

The corporation had commenced compliance proceedings against the unit owner for violations of the Act. The Court issued restraining orders against the owner and also ordered the owner to pay the corporation’s costs fixed in the amount of \$15,000, payable within 30 days of the Court order, which was February 14, 2011. On August 15, 2011, legal counsel for the corporation sent a demand letter to the owner demanding payment of \$15,000 plus an additional \$29,272 in costs, due within 30 days of the date of the demand letter. (Those amounts had only been entered in the corporation’s unit ledger on August 3, 2011.) A certificate of lien was registered on December 12, 2011.

The owner’s unit was sold by power of sale. The proceeds of sale were not sufficient to pay in full either the corpo-

ration’s common expense claims or the amount owing under the mortgage on the unit. If the corporation’s lien was validly registered, then the proceeds of sale would go to the corporation. If the corporation’s lien had expired before the lien was registered, then the proceeds of sale would go to the mortgagee.

The question before the Court was when does the default occur and the time limit for registering a lien start to run where the corporation has added to common expenses legal costs following enforcement/compliance proceedings.

The mortgagee took the position that the corporation’s lien had expired, as it was not registered within three months after the default (which occurred once the \$15,000 payment was not paid by the due date set out in the Court order).

The corporation argued that the amounts owing did not become common expenses until they had been entered as such in the corporation’s unit ledger, and that as the corporation was entitled to give the owner extensions of time to make payment, the default did not occur until that extended time period had

passed without payment being made.

The Court completely rejected the corporation's arguments:

"The common-sense meaning of default when used in relation to an obligation to pay is that default occurs when the payment is due but not made. Payment of the court-ordered costs by the unit holder was first due but not paid on March 17, 2011"

Not only was the corporation unable to collect any of the common expenses owing, but it was also ordered to pay the mortgage holder's legal costs, which amounted to more than \$62,000.

This case illustrates that it is crucial to determine when a default has occurred, as the time to register a lien runs from that date. If the lien is not registered within three months after the default, then the corporation loses its priority position, which could result in devastating financial consequences for the corporation.

### Trez v. Wynford

In this case, Wynford Professional Inc., which was controlled by Mr. and Mrs. Walton, purchased 83 commercial units and 297 parking units. Mr. and Mrs. Walton were elected to the corporation's board of directors and another company controlled by them was appointed property manager for the condominium. Although there were three other directors, Mr. and Mrs. Walton took control over the board and the condominium affairs.

When the Wynford units were being financed, a status certificate signed by Mrs. Walton as president was delivered to the lender, indicating that there were no arrears of common expenses attributable to the Wynford units.

After Mr. and Mrs. Walton were removed from the board amidst alle-

gations of fraud, the new board of directors learned that the Wynford units were in arrears of common expenses in the amount of almost \$812,000 at the time that the clear status certificate was delivered to the lender. Not surprisingly, no lien had been registered, as Mr. and Mrs. Walton were running the board and property management. These arrears ultimately grew to almost \$1.3 million.

In an effort to gain priority over the mortgage, the condominium corporation brought a motion seeking either an equitable lien that would have priority over the mortgage or, alternatively, a revival of the corporation's lien rights. Despite the extenuating circumstances, the corporation's motion was dismissed. As section 85 of the Act very clearly sets out the lien rights to which a corporation is entitled, the Court declared that it would not be proper to create an equitable lien for the same purpose. The Court also refused to allow the lien rights to be revived.

This case illustrates, once again, that the provisions of section 85 of the Act must be strictly adhered to and that the Courts are not inclined to allow any flexibility where a corporation has not registered a lien within three months after the default.

### Middlesex Condominium Corp. No. 195 v. Sunbelt Business Centres (Canada) Inc.

After years of paying all of the hydro accounts and including all of those costs in the common expenses charged to all of the owners, the condominium corporation discovered that 11 meters supplied hydro exclusively to the commercial units and the common elements separating the commercial units. The corporation

then stopped paying those accounts and claimed reimbursement of the amounts it had previously paid, as the corporation's declaration provided that utilities were to be included in common expenses unless separately metered.

The owner of the commercial units took the position that the corporation's claim was statute-barred as the hydro accounts went back to 2006 and the legal proceedings were not commenced until 2014.

The corporation successfully argued that it only became aware that the hydro accounts were "properly chargeable" to the owner of the commercial units in 2013, after it sought legal advice. In accepting this argument, the Court noted that the prior decisions of the board who had paid the accounts in the past did not estop the corporation from now seeking payment for these accounts, as the corporation was obliged to enforce the declaration, which provided that separately metered utilities were not to be included in common expenses.

The conclusion of the Court in this case confirms that the provisions in the condominium declaration prevail. Actions taken by a prior board that were not consistent with the declaration will not estop the current board from now enforcing the declaration. Errors such as this are frequently discovered when there is a change in management or the board. ■



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