



# Directors' Best Practices in the Collection Process

## Being Elected to the Board Means Making Difficult Decisions



Condominium Directors have the responsibility of ensuring that the condominium corporation is diligent in the collection of common expenses. It is important for boards to be aware of the process and to ensure that steps have been taken to protect the Condominium Corporation in the event that unit owners fail to pay their common expenses on time. A condominium director who fails to exercise his or her duty to carry out the collection process either by failing to give property management or the corporation's legal counsel instructions to do so, or by acting in a manner which favours one owner over another in collecting common expense arrears, would be in breach that the director's duty to act honestly and in good faith with the potential for personal liability. These actions or inactions, could also expose the condominium corporation to potential liability. Often, Corporations have a Director's Code of Ethics (either incorporated as part of the Corporation's

by-laws or as a separate document) in place to maintain a set of standards and guidelines for directors which sets out the basic duties of Directors. This would include a Director's responsibility to use his/her best efforts to ensure the financial viability of the Corporation remains intact whether or not it impacts individual owners. Directors should take a consistent approach with all owners, whether or not there is a personal relationship with any owner, understanding that as a director, they represent the Condominium Corporation and relationships with owners and/or concern about an individual's personal hardships (although difficult to do) must not influence the decision to take action when required. Being elected to the Board means making difficult decisions, always acting in the best interests of the Corporation as a whole.

It is imperative that each Director take a hands-off approach when and if any

owner requests any leniency or any special treatment relating to payment of any outstanding amounts owing, such as common expenses, special assessments, charge-backs or any other amounts owing by owners.

Often, based on owner's personal requests to Board members for leniency or additional time for payment of outstanding amounts, Directors have facilitated such requests and have found themselves in the unenviable position of putting the Corporation's financial health at risk resulting from such a "favour". Any owners who request special treatment should be told to put all special consideration requests in writing to the Board via Management so that no one particular Board member is left feeling pressured to compromise their duty as a Director.

Condominium lien proceedings should always be commenced in a timely fashion

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ion in accordance with the Condominium Act. No Director should interfere with the collection of monies owed to the Corporation. Further, Directors should ensure that property management has authority, without undue personal interference by Directors, to fulfill their management duties. Most management agreements will provide for the responsibility of property management to collect arrears and provide direction to legal counsel. If Management is prevented from carrying out their duties, then any failure to collect common expenses, could fall back on the Corporation and individual Directors for interfering with the collection process. A collection process should be established by the Corporation together with management which clearly outlines what steps should be taken to collect arrears. This will assist the Corporation, individual Directors and Property Management in establishing a clear procedure for collection and removing the ability to provide preferential or discretionary actions.

A sample of such guidelines for information purposes only is set out below:

### **Recommended Condominium Lien Procedures With Explanation**

1. After fifteen days of unit owner arrears, it is recommended that the property manager send or deliver to the defaulting unit owner/s, an arrears notice detailing the charges outstanding - i.e. arrears of common expenses, special assessments, NSF funds, charge-backs and/or other related costs.
2. Further reminders with updated charges should be forthcoming thereafter if the arrears are not paid in full or payment arrangements made with the owner(s).
3. If no payment or response is received by Management to these arrears notices, the property manager could try to make verbal contact directly with the unit owner, if possible; however, it should be noted that managers are under no legal obligation to contact owners in person, or by telephone or e-mail, but could do so as a courtesy only. Unit owners have an obligation



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- to ensure that their accounts are up to date and to monitor their own personal bank accounts to ensure that the payments are being processed and funds withdrawn. Management cannot monitor owners' personal bank accounts as it is the duty of all owners to handle their own financial affairs.
4. Interest, at the rate specified in the Corporation's by-laws, should be charged and added to the outstanding arrears after the first month of arrears.
5. The property manager should provide the Board, on a monthly basis, with a list of outstanding common expenses/charges together with particulars of any notices sent to date. Also, management should advise Directors (and when necessary, the Corporation's solicitors) whether there has been any personal contact with any defaulting unit owner. That way, management is able to ensure they are carrying out their obligations and are in a position to commence any required lien ac-

tion directed by the Board. Management may also have authority, based on their Management Agreement, to proceed to collect arrears as required on an ongoing basis without ongoing Board authority.

6. If the arrears continue into the third month, it is imperative that a Notice of Lien to Owner (formerly referred to as a Form 14), in accordance with the Condominium Act, 1998, be prepared and delivered personally or by (regular) mail to the defaulting unit owner at the address of service according to the Corporation's records. Often, Management undertakes this task rather than the Corporation's solicitor. If this is the case, it should be noted that often Management sends this Notice by Registered Mail and this is not always effective. If the Notice is sent by Registered Mail, Management should also send a copy by regular mail as most often owners do not pick up Registered Mail. It is common that the Notice to pick up a registered letter is left by Canada Post in owners' mailboxes and owners fail to arrange such pick-up. Owners have often made the unfounded excuse that they did not receive such Notice.
7. Management should complete and forward to its solicitors lien instructions by, at the very latest, the tenth day of the third month of default, instructing the solicitors to commence the lien proceedings by issuing the required Notice of Arrears to Owner, if not done by Management.
8. The Corporation's solicitors should then issue the Notice of Lien to Owner on the Corporation's behalf. This Notice must show the amount of arrears and other charges owing, plus interest and any reasonable legal costs incurred to date. Having this Notice issued and sent by the Corporation's solicitors often results in full payment without the need for more costly further lien collection proceedings which form part of the arrears owing by the owner. The Corporation's solicitors can proceed with lien registration proceedings if full payment of the arrears set out in the Notice of Lien to





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For more information contact:  
Sandro Zulliani, B.A., CPM, R.C.M.  
President & Chief Operating Officer  
szulliani@brookfieldcs.com  
T. 416 354 1926 F. 416 510 8880



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Owner have not been paid within the ten-day period specified in the Notice. Full payment must be made by certified funds, bank draft or money order (to ensure funds are not returned NSF) to avoid lien registration.

9. If Management issues the Notice of Lien to Owner and the full amount owing as detailed in their Notice is not paid by the end of the notice period, Management must provide its solicitors with instructions to proceed with lien registration proceedings. Management should also provide copies of the Notice of Lien to Owner issued by Management, with an accounting history, copies of any prior demands and anything else of relevance to ensure the solicitors are in a position to accurately respond to any challenges by owners to the subject lien action.
10. To ensure the ability to collect all arrears, the condominium lien must be registered within three months after the default has occurred. Management has a duty and an obligation to ensure this is adhered to or they may have to make the corporation whole by paying any shortfall uncollectible due to Management's negligence.
11. Timing is paramount. Often managers agree to withhold sending instructions to solicitors based on owners' requests for more time but it should be noted that lien registration is not instant. The Corporation's solicitors cannot be left out in the cold until the last day of the month to register the required Condominium Lien. The Registry Office electronic system has business hours - Monday to Friday, from 8:30 a.m. to 5:00 p.m. Title searches must be done to obtain owner and mortgagee information and Notices sent by solicitors by registered mail to all parties (Mortgage lenders, other lien holders, etc.,) having an interest in the property as detailed on the Parcel Registers obtained confirming ownership, etc. Title documents must also be obtained via the Registry Office System so if there is not enough time for all these prerequisites to get done, the Condominium Lien may not get registered until the



- following month, thereby perhaps causing a short-fall in collection of the total arrears. This is dangerous situation, so all Directors and Managers should ensure there are no last-minute lien registration requests.
12. When a lien has been registered and the arrears (including legal costs and interest) are not paid within a two-month period after registration of the lien, it is recommended that the Board consider further legal action, such as power of sale under lien or a foreclosure action or, where the unit is rented, a demand to the tenants to pay the rent on an ongoing basis on account of arrears until fully paid.
  13. Management should not accept payment after registration of a lien without first checking with their solicitors as all funds should flow through the solicitors' office to ensure full and final payment inclusive of costs.
  14. It is imperative that if a Status Certificate is requested for a lien unit, that a Director and/or Management contact their solicitors to ensure the Status Certificate accurately discloses the arrears relating to the unit.


#### Power of Sale

If the arrears owing have not been paid, on behalf of the Condominium Corporation, a Notice of Sale under Lien can be prepared and served upon all owners

and any other parties who may have an interest in the property. Once the time period set out in the Notice of Sale under Lien expires, the Corporation could be in a position to list the property for sale. It should be noted that under a Power of Sale action, the Corporation is obligated to obtain the best possible sale price for the property in the circumstances. Therefore, it is recommended that the Corporation arrange to have three real estate agents each give independent written letters of opinion or appraisals prior to listing the unit so that proof is available, if necessary, that the ultimate sale price is sold at fair market value. The Board can then proceed with listing the property for sale with a realtor of their choice. If necessary, an Order for Vacant Possession may have to be obtained through the Courts in order to ensure delivery of vacant possession is available on the closing date of a sale.

#### Foreclosure

Also, alternatively, the Condominium Corporation could proceed by way of Foreclosure through the Courts with the expectation that the Corporation will become the owner of the property by way of Court Order. If the Corporation chooses to proceed by Foreclosure, the Corporation would, once the Foreclosure has been completed, become the legal owner of the property and could sell or rent or retain ownership. Any excess funds obtained on a sale after the Corporation becomes the legal owner, remain the property of the Corporation.

Having the process for collection set out in writing and ensuring that Property Management and the Board follow these procedures, will clearly benefit the community and assist in the running of an effective condominium corporation. 



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