

Belt and suspenders never looked so good: Registering construction liens against condominium properties

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In the recent *Avli BRC Developments Inc v BMP Construction Management Ltd* decision, the Alberta Court of Appeal confirmed that the standard approach for a construction lien claimant to encumber the common property of a condominium building in Alberta is to register its lien against the certificates of title for all of the condominium units. Failing to do so may leave the lien claimant at the mercy of the Court's discretion to save a substantially compliant registration pursuant to section 37 of the *Prompt Payment and Construction Lien Act* (Alberta), which can only be applied when there is no prejudice caused by the failure of the lien to fully comply with the requirements of section 34 of the Act.

Background

In this case, the owner engaged a construction manager to construct an apartment style condominium project on land it owned in Inglewood, Calgary. The construction manager then engaged a number of subcontractors for construction. Part way through construction, the owner registered its condominium plan with Land Titles. Upon registering the plan, and in accordance with the *Condominium Property Act* (Alberta), the owner no longer owned its land in a single certificate of title. Rather, the owner then became the registered owner of all the individual condominium units as described in separate certificates of title created for each and each condominium unit included a fractional entitlement to ownership of the common property. Upon registration of the condominium plan, the condominium corporation was also created, but no board of directors was set up.

During the construction of the project, the relationship between the owner and the construction manager broke down. Payment stopped and liens were registered. However, the lien claimants took a number of different approaches to registering their liens. In short, some lien claimants opted to register against only what is referred to as the "Additional Condominium Sheet" (the "Additional Sheet"), another registered against the Additional Sheet and a specific unit, and others still registered against only specific units. The owner challenged the validity of the liens on the basis that they had been improperly registered and that those errors could not be cured.

Legislative framework

Pursuant to section 10 of the *Condominium Property Act Regulation* (Alberta), the Registrar of Land Titles may add an Additional Sheet to a condominium plan, which serves as a repository to record liens and other registrations. Section 78(2)(c) of the *Condominium Property Act* (Alberta) provides that liens registered against the Additional Sheet are, “deemed to be also registered against the certificate of title for each unit”. However, this deeming provision is only applicable where the condominium corporation requests the work. As in this case, where the owner and the condominium corporation are separate entities, lien claimants should be cautious about relying on section 78(2)(c) of the *Condominium Property Act* (Alberta).

Section 34 of the *Prompt Payment and Construction Lien Act* (Alberta) sets out the requirements for the proper registration of a lien. This includes, among other things, a proper description of the land to be encumbered. The *Prompt Payment and Construction Lien Act* (Alberta) is a business focused statute and is intended to be accessible to the average lien claimant. Accordingly, section 37 sets out that where a statement of lien is at least substantially compliant with the requirements of section 34 it may be validated. However, the section 37 saving provision is only applicable when no prejudice would be suffered by an affected party as a result of the lien failing to fully comply with section 34.

Decision

The Alberta Court of Appeal ultimately refused to interfere with the chambers judge’s decision to uphold the decision of the applications judge. The Court determined the liens to be valid against the whole of the project lands, including all the condominium units, pointing out that when the liens were registered no units had been sold and no board of directors for the condominium corporation had been appointed. The owner owned all the condominium units and was effectively in control of the condominium corporation.

However, the Court noted that the failure to register the liens against each unit individually in the first instance resulted in a loss of efficiency and deprived the lien claimants of the cost effectiveness that the *Prompt Payment and Construction Lien Act* (Alberta) aims to provide. Put simply, the “issue could have been avoided had [the lien claimants] registered their liens against the certificates of title for all the condominium units”.

Given that title searches and registering liens come at a cost, and depending on the number of units in question, there may be circumstances where this is not always the most cost-effective approach. However, in contrast to the time and cost incurred to obtain a decision from the Alberta Court of Appeal validating the liens, the lien claimants in this case would have very likely been better off taking the Court’s recommended standard approach.

Registering liens on condominium projects can be complicated, especially after the condominium plan is registered and titles begin to transfer to purchasers. Seeking legal advice early in the process is recommended.

Key takeaways

- Properly registering a builders' lien requires careful attention to the surrounding circumstances;
- Among other things, reviewing title to the lands, confirming who requested the work be done, and the interest to which the lien is intended to attach are critical;
- Section 33 of the *Prompt Payment and Construction Lien Act* (Alberta) provides a statutory right for applicable persons to request information;
- When in doubt, it is always prudent to take a belt and suspenders approach to ensure lien rights are preserved.

For more information on this case and construction liens against condominium properties in Alberta, please reach out to any of the key contacts listed below.

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