KEEPING CURRENT

March 4, 2025

Super Priority Liens: What Commercial Mortgage Lenders Need to Know

By Zev Zlotnick

Founded in the 1920s, Gardiner Roberts LLP has grown to become a strategically placed mid-sized business law firm with a diverse client base which includes several of Canada's largest banks, public companies including mining, high tech and software companies, real estate enterprises, lenders and investors.

Zev Zlotnick
Partner
416.865.6601
zzlotnick@grllp.com

In Ontario, the concept of super priority liens refers to certain types of liens that take precedence over other claims on a property, even rights arising from a mortgage. These liens are of significant concern to commercial mortgage lenders due to their potential to disrupt the priority order of debt repayment in the event of enforcement. Super priority liens most commonly include unpaid property tax, GST/HST, source deductions and in some instances, environmental liens, among others.

For commercial mortgage lenders, understanding and managing super priority liens is critical to safeguarding your financial interests. The risk is particularly high in cases where a borrower may have neglected to settle outstanding debts or statutory obligations, leading to a super priority lien being placed against their property. In such instances, even if the commercial lender holds a registered mortgage on the property, these liens will take, or overtake, priority over the mortgage security resulting in priority payment in the event of mortgage enforcement, foreclosure or liquidation.

Lenders can take several steps to mitigate the risks associated with super priority liens:

1. **Due Diligence**: Before finalizing a loan agreement, lenders through their counsel should conduct thorough due diligence, including a detailed title search to check for any existing liens or encumbrances on the property. Special attention should be given to any potential unpaid tax liabilities or environmental issues that could trigger a super priority lien.
2. **Compliance and Indemnity Clauses**: Lenders should include compliance with all laws terms within their mortgage terms and borrower indemnities, holding them accountable for any super priority liens that arise after the mortgage is registered. These terms will hold the borrower accountable and shift the risk to the borrower should any unforeseen lien issues arise.
3. **Legal Advice**: Consulting with legal professionals who specialize in Ontario's property and lien laws is essential. Legal counsel can provide guidance on specific risks related to super priority liens and help structure loan agreements in a way that minimizes exposure.
4. **Title Insurance**: One of the most effective ways for lenders to manage super priority lien risk is by obtaining title insurance with an endorsement that specifically covers super priority lien risks. Title insurers generally provide this coverage for an additional fee, which protects the lender in case such liens are discovered after the mortgage is registered. This coverage acts as a safety net, allowing the lender to recover losses from any super priority lien claims that could jeopardize the mortgage priority.

Super priority liens are an important consideration for commercial mortgage lenders in Ontario. By conducting proper due diligence, seeking legal advice, and utilizing title insurance, lenders can significantly mitigate the risk associated with these potentially disruptive liens. Title insurers often offer endorsements to cover the risk of super priority liens, providing a valuable tool for lenders to protect their investments. Ensuring that these precautions are in place helps maintain the stability and security of commercial mortgage transactions.

For any related questions, please contact the writer. To see my previous 1-Minute Reads for Commercial Mortgage Lenders, please visit the Blog portion of my profile at https://www.grllp.com/profile/zevzlotnick

Contact Us

If you are in need of legal advice, please do not hesitate to contact Zev Zlotnick, at 416.865.6601 or zzlotnick@grllp.com.

(This newsletter is provided for educational purposes only, and does not necessarily reflect the views of Gardiner Roberts LLP.)