



About Condo

CONDOMINIUM LIENS

“WITH GREAT POWER COMES GREAT RESPONSIBILITY”

Sections 85 and 86 of the *Condominium Act, 1998* (the “Act”) set out a condominium corporation’s power and authority to have, register and enforce a lien against a unit owner’s property on account of non payment of common expense contributions without any form of judicial process. In short, this is an extraordinary power.

In addition, the entitlement to carry on that enforcement to the point of exercising power of sale against the owner’s unit, with priority over almost all other registered and unregistered charges, is highly unusual. In short, the condominium is given an incredible amount of power to use a very effective collection mechanism that almost no other entity enjoys.

Consequently, it is to be expected that the courts will take a very strict view of the exercise of such powers. Any uncertainties in the interpretation and application of them are likely to be interpreted against the condominium and in favour of the delinquent unit owner. In certain cases, the condominium could be found liable for significant damages for slander of title if a lien is improperly registered.

The condominium board has the responsibility to take special care that the corporation’s lien enforcement powers are carefully and responsibly exercised. It is important not to rush headlong toward exercise of its full rights, but to make every effort to help ensure that there is no overstepping of reasonable standards of conduct.

Additionally, the condominium should not seek to use its lien powers to enforce payments that are not clearly the proper subject matter of a lien. The condominium should *never* seek to use its lien powers to threaten or bully unit owners into paying amounts it wants them to pay.

Even where there are legitimate circumstances for a lien, it is preferred in most cases that demand letters are drafted in the form of a polite warning without a hint of threat or coercion. Although the condominium board might like to take a “strong hand” from the start, in most cases this is a short sighted approach that does not consider how the board will be perceived if its conduct in this regard ends up being reviewed by a judge.

That is not to say that the condominium should not be strict and ensure it does not fail to register a Certificate of Lien against a delinquent owner, but there is usually no need to do so too far in advance of the statutory deadline, nor should a condominium ordinarily undertake power of sale proceedings too soon once it is registered.

WHAT YOU CAN AND CAN'T LIEN FOR

It is very important in the first place that the board of directors and management of the condominium understand what can and cannot be the subject matter of a condominium lien. Briefly stated, a lien only arises where a unit owner has not paid legitimate common expenses. The lien arises instantly on the date that such common expenses are in arrears.

Under the Act, common expenses are defined as *“the expenses related to the performance of the objects and duties of a corporation and all expenses specified as common expenses in this Act or in a declaration.”*

Note that this does not cover amounts charged in accordance with condominium by-laws and rules; it only covers amounts that are specified in the declaration or the Act. Some condominium corporations attempt to get around this restriction by stating in the declaration that common expenses may be defined in the other condominium documents, but we are unaware of whether the efficacy of this provision or practice has been tested by a court with a correct understanding of condominium law.

Common expenses also do not include late fees or other penalties imposed by the condominium corporation, nor (generally) legal fees for opinions or even for letters to unit owners demanding compliance with condominium rules (unless there are clear provisions in the declaration that impose such costs on the unit owner as common expenses, and the board has not been unreasonable in relying upon the same).

However, in addition to the regular common expenses relating to the performance of the objects and duties of the corporation, the Act specifies other common expenses that can arise based upon the conduct of a unit owner. These include, for example:

- damages and costs awarded by the courts against a unit owner and in favour of the condominium and related costs (section 134(5) of the Act);
- costs and other expenses arising in connection with a unit owner's failure to comply with a Section 98 Agreement (section 98(4) of the Act); and
- costs of the condominium performing repair work on behalf of the unit owner, where it was the unit owner's responsibility to do such work and such work was not done by the unit owner within a reasonable time (sections 92(1) and 92(4) of the Act).

This is not an exhaustive list. It is the responsibility of the board and property manager, with the assistance of legal counsel, to become familiar with what can and cannot be the subject matter of a lien, and to ensure that the lien powers of the condominium are never improperly used.

Once the lien arises, then it will also cover the interest incurred on the common expenses in arrears (if any – the condominium by-laws should be checked to determine if any and how much interest can be imposed) and any actual, reasonable expenses of the condominium (including legal costs) incurred in connection with the collection or attempted collection of the arrears. However, it is important to note that entitlement to these amounts might be lost if the lien is not properly preserved by registration of a Certificate of Lien prior to the statutory deadline.

ISSUES IN PROCESSING OF CONDOMINIUM LIENS

Once a lien arises, there are specific steps that must be taken in order to preserve and enforce the condominium's lien rights.

Under the Act, the condominium has until three months from the date of the arrears subject of the lien to register a Certificate of Lien. If a Certificate of Lien is not registered within that three month period, the condominium's lien rights expire. While the condominium might still be able to enforce the unit owner's obligation to pay the common expenses through regular court proceedings, it will not have the priority, power or privileges related to lien enforcement under the Act. It is also possible that a court will be unwilling in at least some circumstances to award the condominium where it has carelessly failed to exercise its lien rights to protect itself from its losses.

The first step in enforcing the condominium's lien rights (after sending usual demand letters or speaking with the owner to attempt to resolve the arrears in a private and amicable manner without causing the unit owner to incur the additional costs of lien proceedings) is to send the unit owner a Notice of Lien. This notice must be in the proper form (Form 14, under O.Reg 48/01, one of the regulations under the Act) and set out a claim for only the amounts expressly covered by the lien in accordance with the Act, namely:

- the unpaid amount of common expenses;
- interest thereon; and
- all reasonable legal costs and reasonable expenses incurred by the corporation in connection with the collection or attempted collection of the unpaid amount.

Including any other amounts in the notice might taint its validity, which could also undermine later enforcement action if any is taken.

It is also important to consider the manner in which the Notice of Lien is served. The Act provides for only two methods of service of a Notice of Lien:

1. personal service on the unit owner; or
2. prepaid mail addressed to the unit owner at the address for service that appears in the record of the corporation maintained under subsection 47(2) of the Act. (Note that mailing the notice to any other address, even the address of the unit, although this is sometimes done, is not proper service.)

No other methods of service of a Notice of Lien are available. This is the case, even if those methods would ordinarily be available in other contexts, such as court action or enforcement of a mortgage.

Also note that the Notice of Lien must be served upon all of the unit owners. It is not sufficient to serve only one or some of them where there are multiple owners of a unit. It is also not sufficient to rely upon the condominium's records (including the section 47(2) record) to identify the unit owners. Such records might not be accurate or complete. It is advisable to search title to the unit before serving a Notice of Lien to help ensure that all of the actual owners of the unit are properly identified.

Failure to correctly serve the Notice of Lien could significantly interfere with later enforcement of the lien, effectively forcing the condominium to settle the case after a great deal of expenses are incurred, or causing it simply to lose the claim.¹ In such events the condominium could be subjected to significant, unrecoverable costs.

Not less than 10 days after the Notice of Lien is served, the condominium may register a Certificate of Lien with respect to the subject arrears. The Certificate of Lien cannot be registered earlier than this; therefore, it is important to carefully time delivery of the Notice of Lien. In this regard the following points must also be considered:

1. Neither the day on which the notice is sent nor the date on which it is received should be counted as part of the 10-day period. Therefore, the notice should be served at least 12 days prior to the day on which the Certificate of Lien is to be registered.
2. The condominium by-laws might specify a notice period for service of documents by mail. They may be deemed served on the day it is mailed; however, a more usual provision requires several business days. If service of the notice is to be effected by mail, the amount of days specified in the by-laws of the corporation should be added to the notice period. If no specific period is set out in the by-laws, it may be appropriate to add about 5 business days. In this case, the latest the Notice of Lien would be sent is 17 days prior to the last day of the month.
3. Finally, it would also be appropriate to allow a couple of days for the condominium's solicitor to prepare the Certificate of Lien for registration. Your lawyer might have many liens to register at the end of the month. It is not safe or reasonable to presume that all those that are set for registration on the last possible day will get registered. A short period of time for the lawyer's work to be completed should be added on to the 12- or 17-day notice periods suggested above.

Once a Notice of Lien is sent, and particularly once a Certificate of Lien is registered, all payments made by a unit owner should generally be paid to the solicitor for the condominium in trust. This would allow the solicitor to help determine when the lien is fully repaid and have legal costs and other expenses relating to the collection or attempted collection of the lien paid immediately (where the condominium has not already paid the same). If the board or manager wishes to consider any kind of payment plan with the unit owner, legal counsel should be consulted and all legal fees then owing should be paid by the condominium and not left to wait until the owner has completed all payments.

Having payments made to the solicitor in trust should also be helpful in reducing the time between payment of the amounts owing under the lien and discharge of the Certificate of Lien. The Certificate of Lien must be discharged once the lien amount is fully paid. Note that a lien is not fully paid up simply because the arrears of common expenses are paid. All amounts covered by the lien must be paid before the lien should be discharged.

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*This memorandum includes information based in part on materials previously prepared by Craig Robson.

¹*Christiansen v. York Condominium Corporation No. 482* states that irregularities in the notice of lien will not necessarily void a lien or power of sale proceeding. However, it is not advisable to rely on this. This case should only be looked to in the last resort. The better advice is to avoid non compliance with the Act.