

# Condominiums & Construction Liens

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Registering construction liens against condominiums presents some unique challenges.

This article will outline some of those challenges and present some check-lists that can be used to ensure a lien is properly registered. The article will also outline some of the significant changes introduced by Ontario's new *Construction Act*<sup>[1]</sup> that relate specifically to condominiums.

For organizational purposes, this paper is divided into the following topics:

1. Understanding How Land is Held Under the *Condominium Act, 1998*;
2. Liening a Unit under the *Construction Act*;
3. Liening Common Elements under the *Construction Act*; and
4. Liening the Condominium Before Registration of the Declaration and Description

## **1. Understanding How Land is Held Under the *Condominium Act, 1998***

Before discussing the *how*, *what* and *when* issues that are unique to registering a lien against a condominium improvement, it is important to first review the legal constitution of a condominium and how that constitution interfaces with the provisions of the *Construction Act*.

First, condominiums are a system of landholding that is created and governed in Ontario by the *Condominium Act, 1998* (the "**Condominium Act**").<sup>[2]</sup>

Condominium corporations that were created under the predecessor legislation (the *Condominium Act*, R.S.O. 1990, c. C-26) are simply continued as corporations under the new *Condominium Act*. Prior to the registration of the declaration and description under the *Condominium Act*, the condominium corporation does not exist at law and, therefore, title to units cannot be transferred to individual unit purchasers.<sup>[3]</sup>

Sections 2 through 6 of the *Condominium Act* deal with the registration and creation of a condominium corporation. In particular, s. 2(3) of the *Condominium Act* provides as follows:

### **Effect of registration**

**2.(3)** Upon registration of a declaration and description,

a) this Act governs the land and the interests appurtenant to the land, as the land and the interests are described in the description;

b) the land described in the description is divided into units and common elements in accordance with the description; and

c) a condominium corporation is created.

Once created, the condominium corporation can only be terminated in accordance with the provisions of the *Condominium Act*.

Upon registration, the condominium is composed of two distinct types of “property”. The first type of property is the individual “units”. The term “unit” is defined under the *Condominium Act* as follows:

“unit” means a part of the property designated as a unit by the description and includes the space enclosed by its boundaries and all of the land, structures and fixtures within this space in accordance with the declaration and description.<sup>[4]</sup>

Thus, the unit naturally includes the individual dwelling spaces. In addition to the individual dwelling spaces, “units” may also include other non-residential types of “units” such as parking spaces or storage lockers. In either event, whether residential or non-residential, each “unit” is assigned its own distinct PIN<sup>[5]</sup> and is owned or leased exclusively by an individual owner.

The second type of property that a condominium is comprised of is the “common elements”. “Common elements” are defined under the *Condominium Act* as “all the property except the units”.<sup>[6]</sup> Accordingly, “common elements” refer to the portions of the condominium that are not included in the “units” such as landscaped areas, parking lots, guest suites, recreational facilities, hallways, elevators and foyers. “Common elements” may also include exclusive common elements that are enjoyed by a particular “unit”, such as a balcony or front or backyard. What is important to understand is that the “common elements” of a condominium are “owned” by all of the units on an undivided share basis.

What portions of the condominium property constitute the “common elements” will be determined by the declaration and description of a particular condominium and they will vary from one condominium project to another.<sup>[7]</sup>

## **2. Liening a Unit under the Construction Act**

Where an improvement is made to a particular unit for a particular unit holder (e.g., a renovation or retrofit of a unit), then the condominium will have, by necessity, already been registered and, as a result, the registration of a construction lien in respect of that improvement would follow the normal practice of registering a lien against title to any other residential premises so improved. That is to say, the lien is against the “unit” (and perhaps any lands “enjoyed therewith”<sup>[8]</sup>), but not against the “common elements”.

What lands are “enjoyed therewith”, and how might this concept apply in the context of a lien registered against an individual condominium unit?

To begin, it is necessary to revisit the statutory creation of a construction lien as set out in s. 14 of the *Construction Act*, which provides as follows

### **Creation of lien**

**14(1)** A person who supplies services or materials to an improvement for an owner, contractor or subcontractor, has a lien upon the interest of the owner in the premises improved for the price of those services or materials.<sup>[9]</sup> [Emphasis added]

Regardless of whether the improvement involves a condominium project or not, liens must be

registered against the “premises”.

The definition of “premises” in the *Construction Act* includes not only the “the land occupied by the improvement” but also the land “enjoyed therewith [...]”.<sup>[10]</sup> Generally, the relationship between the “land” and land that is “enjoyed therewith” is governed by proximity and use. In the context of a condominium, the land is the “unit” while lands that are “enjoyed therewith” could be a specifically allocated parking space or storage locker.

Using an example of a unit and a parking space, the properties listed in the registered claim for lien might appear as follows:

<b><i>Properties</i></b>	
<i>PIN</i>	13396 – 0108 LT
<i>Description</i>	Unit 8, Level 9, MTC Plan No. 1187 and its appurtenant interest. The description of the condominium property is: parcel 8-1 section Y-1, Part of Lot 10 S/T as set out in Schedule “A” of Declaration No D327812, City of Toronto
<i>Address</i>	Suite 908, 1 Main Street, Toronto
<i>PIN</i>	13396 – 0124 LT
<i>Description</i>	Unit 5, Level A, MTC Plan No. 1187 and its appurtenant interest. The description of the condominium property is: parcel 8-1 section Y-1, Part of Lot 10 S/T as set out in Schedule “A” of Declaration No D327812, City of Toronto
<i>Address</i>	Toronto

In the above illustration, the first PIN represents the residential dwelling unit while the second PIN represents the parking space, both of which are owned by the same individual owner. No other individual unit owners’ properties are affected by the registration of this lien.

Similarly, in the subsequent lien action that will be brought to perfect the lien, the Statement of Claim will name only the individual registered owner of the unit (or units, as the case may be) and not the other unit holders or the condominium corporation. In that sense, the lien is advanced in the same manner as it would be had the lien been registered against an individual residential property.

### ***3. Liening Common Elements under the Construction Act***

Where an improvement is made to the common elements (e.g., landscaping, hallways, elevators, balconies, etc.), then, as above, the condominium will have by necessity already been registered.

Part III of the *Condominium Act* deals with the concept of “ownership”. The key provisions provide as follows:

**10.** Units and common elements are real property for all purposes.

**11.(1)** Subject to this Act, the declaration and the by-laws, each owner is entitled to exclusive ownership and use of the owner’s unit.

**(2)** The owners are tenants in common of the common elements and an undivided interest in the common elements is appurtenant to each owner’s unit.

**(3)** The proportions of the common interests are those expressed in the declaration.

(4) The ownership of a unit shall not be separated from the ownership of the common interest and an instrument that purports to separate the ownership of a unit from a common interest is void.

(5) Except as provided by this Act, the common elements shall not be partitioned or divided.

[Emphasis added]

Unlike a “unit”, the common elements are not individually owned and do not have a unique PIN associated with them. As such, and by virtue of sections 10, 11(2) and 11(5) of the *Condominium Act*, registering a lien against the common elements requires a lien claimant to list all of the units in the “Properties” section of the claim for lien—thereby liening each unit in the condominium for its proportionate share in the common elements.

By way of example, using a fictitious 200 unit condominium, a registered claim for lien may appear as follows:

<b><i>Properties</i></b>	
<i>PIN</i>	11677 – 0001 LT
<i>Description</i>	Common elements of Metropolitan Toronto Condominium Plan No. 123; LT 20 and PT LTS 18 & 19 N/S Main St PL 11B, PT LT 51 PL 203, PTS 1, 2 & 3 66R17411, As in Schedule “A” of Declaration B9876564 As amended by B987659; Toronto, City of Toronto <input checked="" type="checkbox"/> Affects Part of Property
<i>Address</i>	Toronto
<i>PIN</i>	11677 – 0002 LT
<i>Description</i>	Common elements of Metropolitan Toronto Condominium Plan No. 123; LT 20 and PT LTS 18 & 19 N/S Main St PL 11B, PT LT 51 PL 203, PTS 1, 2 & 3 66R17411, As in Schedule “A” of Declaration B9876564 As amended by B987659; Toronto, City of Toronto <input checked="" type="checkbox"/> Affects Part of Property
<i>Address</i>	Toronto
[.....]	[.... continued listing of units 0003 through 0200 would follow....]
<i>PIN</i>	11677 – 0200 LT
<i>Description</i>	Common elements of Metropolitan Toronto Condominium Plan No. 123; LT 20 and PT LTS 18 & 19 N/S Main St PL 11B, PT LT 51 PL 203, PTS 1, 2 & 3 66R17411, As in Schedule “A” of Declaration B9876564 As amended by B987659; Toronto, City of Toronto <input checked="" type="checkbox"/> Affects Part of Property
<i>Address</i>	Toronto

In this example, the units will be listed (all 200 of them) in numerical order based on their respective PINs. The reader will also note that, unlike where a lien is registered against an individual unit, an additional box is selected in the registration process, namely:

“Affects Part of Property”.

#### ***On Providing Notice***

Under the new *Construction Act*, a lien claimant who wants to register a lien that relates in whole or in part to an improvement to the common elements must give notice of the lien's preservation to the condominium corporation and to every unit owner or every owner of a common elements condominium corporation ("CEC")<sup>[11]</sup><sup>[12]</sup>. The *Construction Act* has prescribed a form that will be used for providing this notice.<sup>[13]</sup>, the prescribed form by the *Construction Act's* regulations (form no. 13) includes the lien claimant's name, address, a description of the premises, a short description of the services or materials supplied and the amount claimed.

This poses a significant change as all unit owners will now be notified of a lien against the common elements. It also poses practical considerations for the lien claimant regarding how they will obtain the names of all the unit owners without pulling title to every unit (which can be prohibitively expensive).

#### ***On Perfecting the Lien***

When it comes time to perfect the lien by commencing an action, it is not necessary to name every unit holder as a defendant in the Statement of Claim. Under the *Condominium Act*, it is sufficient to name only the condominium corporation.<sup>[14]</sup>

#### ***On Settling with Individual Unit Owners***

After the common elements have been successfully liened, another peculiar issue may arise if one unit holder wishes to unencumber its property (i.e., settle out).

Now, under the new *Construction Act*, an individual unit owner (or an owner of a CEC) can make a motion to court to vacate the registration of the lien as against their unit.<sup>[15]</sup> This is a significant change as it provides individual unit owners with an opportunity to quickly clear title if they need to sell or refinance their unit. As with some of the other new changes, it poses some interesting practical questions for the lien claimant and the other parties in the litigation. Specifically, if many unit owners vacate a portion of the lien from their individual unit, it could become difficult to track who has paid what amounts into court to clear title.

It is also worth mentioning here that, as of January 11, 2016, changes to the electronic land registration system were introduced that affect releases of liens. Previously, a document called a "Discharge of Construction Lien" was available for selection on Teraview when a construction lien was to be deleted from a property's title. To some, the name of this document was considered to be misleading if the lien was in fact being released or vacated, rather than discharged.

A new document type has been introduced in Teraview called an "Application to Delete Construction Lien". When this document is registered on title, it will advise that a construction

lien was deleted from the property. However, in order to determine how the lien was "deleted"

from title (i.e. by being discharged, vacated or released), the "Application to Delete Construction

Lien" will still have to be pulled from title and examined.

#### ***4. Liening the Condominium Before Registration of the Declaration and Description***

Of vital importance is liening before the registration of the declaration and description. Failure to do so may extinguish a lien claimant's lien rights by virtue of the statutory creation of a lien (i.e., the lien is against the "owner's" interest in the "premises") and the definitions of a "home buyer" and "owner" under the *Construction Act*.

Under the *Construction Act*, a “home buyer” means,

“a person who buys the interest of an owner in a premises that is a home, whether built or not at the time the agreement of purchase and sale in respect thereof is entered into, provided,

(a) not more than 30 per cent of the purchase price, excluding money held in trust under section 81 of the *Condominium Act, 1998*, is paid prior to the conveyance, and

(b) the home is not conveyed until it is ready for occupancy , evidenced in the case of a new home by the issuance of a municipal permit authorizing occupancy or the issuance under the Ontario New Home Warranties Plan Act of a certificate of completion and possession;

Under the *Construction Act*, an owner “does not include a home buyer”.

Thus, if a lien is registered against the “premises” after the condominium declaration and description has been registered and title to the “units” and “common elements” have been transferred from the developer to individual owners, the lien will most certainly be defeated.

In the decision of *Kostolnik v. Vanbots Construction Corp.*, 2000 CarswellOnt 4902 (Ontario Master), the general contractor (lien claimant) registered a lien against eight units in a new condominium building where the registration of the declaration and description had taken place just days before the lien was registered. The unit owners moved successfully to discharge the liens on the basis that they were, by definition, “home buyers” and the liens could therefore not attach to their interests. In *Kostolnik* the issue was one of whether the “homes” were “ready for occupancy”. The Court was satisfied that the unit owners had met the onus with the presentation of the City of Toronto municipal permit authorizing occupancy as well as the certificate of completion and possession under the *Ontario New Home Warranties Plan Act*. In fact, only one of those two documents was necessary to discharge the onus.

The onus then shifted to the lien claimant to prove that, notwithstanding, the production of the municipal permit and certificate of completion and possession, the homes were not ready for occupancy. The general contractor was unable to satisfy this onus.

What is a lien claimant to do where an improvement is made to a condominium project that has not yet had its declaration and description registered? The answer is found in s. 33.1 of the *Construction Act* which requires that notice be published that a project is on the cusp of being registered as a condominium. Section 33.1 reads as follows:

#### **Notice of intention to register in accordance with the Condominium Act, 1998**

##### **Notice Required**

**33.1 (2)** An owner of land described in a description that is intended to be registered together with a declaration in accordance with the *Condominium Act, 1998* shall publish notice of the intended registration in the manner set out in the regulations.

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(3) The notice shall be in the prescribed form and shall include,

(a) the owner’s name and address for service;

(b) a concise overview of the land described in the description, including reference to the lot and plan number and the parcel number or numbers of the land; and

(c) if, to the best of the owner's knowledge, information and belief, a contractor supplied services or materials to an improvement in respect of the land during the 90-day period preceding the day on which the description is to be submitted for approval under subsection 9 (3) of the *Condominium Act, 1998*, the contractor's name, address and, if known, address for service.

#### **Liability for failure to comply**

(4) An owner who fails to comply with this section is liable to any person entitled to a lien who suffers damages as a result.

The *Construction Lien Act* required the notice of the intended registration to be published within five (and not more than 15 days) days (excluding Saturdays and holidays) before the description was submitted for approval under the *Condominium Act*. The new *Construction Act* has dispensed with these prescribed deadlines and replace them with "in the manner set out in the regulations". The regulations currently prescribed the form of the notice and state that the notice is to be published in a construction trade newspaper.<sup>[16]</sup>

#### **5. Conclusion**

Those advising potential lien claimants on the *how*, *what* and *when* of registering a lien against a condominium must pay heed to a series of additional considerations that arise as a result of the peculiar nature of condominium property. Perhaps most importantly, a strong understanding of the relevant provisions of the *Condominium Act* and the *Construction Act*, and the statutes' interrelationship, is necessary to ensure that lien rights are properly preserved.

<sup>[1]</sup> The requirement to provide notice applies to normal unit owners but also to owners of a parcel of land under section 139(1) of the *Condominium Act*, which refers to common elements condominium corporations ("CECs"). CECs are condominiums that consist only of common elements, not units.

<sup>[2]</sup> *Construction Act*, s. 34(9).

<sup>[3]</sup> *Construction Act*, O. Reg. 303/18 Forms, s. 2(13).

<sup>[4]</sup> *Condominium Act*, s. 23(5).

<sup>[5]</sup> *Construction Act*, s. 44(2.1) to (2.2).

<sup>[6]</sup> *Construction Act*, O. Reg. 304/18 General, s.10.

<sup>[7]</sup> *Construction Act*, R.S.O. c. C.30. (the "*Construction Act*"), which amends the old *Construction Lien Act*. Some changes of the *Construction Act* came into force on July 1, 2018 while some do not come into force until October 1, 2019.

<sup>[8]</sup> *Condominium Act, 1998*, S.O. 1998, Chapter 19, as amended (the "*Condominium Act, 1998*").

<sup>[9]</sup> Audrey Loeb, *The Condominium Act: A User's Manual*, 4th ed. – Ontario (Toronto: Carswell, 2013) at 73.

[\[10\]](#) *Condominium Act, 1998*, s. 1 – Definitions: “unit”.

[\[11\]](#) PIN” stands for “Property Identification Number”. This identification number is assigned to each parcel of land under the land registry system.

[\[12\]](#) *Condominium Act, 1998*, s. 1 – Definitions: “common elements”.

[\[13\]](#) *Peel Standard Condominium Corporation No. 668 v Dayspring Phase I Ltd.*, [2006] OJ No 523, 2006 CanLII 3661 (ON SCJ) at para 30.

[\[14\]](#) *Construction Act*, s. 1 – Definitions: “premises”.

[\[15\]](#) *Construction Act*, s. 14(1).

[\[16\]](#) *Construction Act*, s. 1 – Definitions: “premises”.

***The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.***

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