



This article provides an overview of the power of sale process under the Condominium Act, 1998, S.O. 1998, c.19 and the Mortgages Act, R.S.O. 1990, c.M.40. A power of sale process is the common route to collect arrears, if a registered lien remains unpaid. There are generally ten (10) steps in this process.

### **Step 1 - Lien**

The Condominium Act, 1998, permits a condominium to register a lien against a unit, when a unit owner falls into arrears. Beside monthly common expenses, the unit owner may be responsible for other expenses incurred by the condominium, such as charge-backs or clean-up costs.

This lien right grants the condominium priority over almost every other claim against the unit. Consequently, for a lien to be registered, the Condominium Act, 1998, requires a formal procedure be followed. The process begins with the condominium sending a "Notice of Lien" or "Form 14". This prescribed form sets out the unpaid amount of common expenses, any interest, and all reasonable legal costs associated with the collection of the arrears. The form must be served upon all owners of the unit and their spouses. Upon the expiration of 10 days, the condominium then may register a Certificate of Lien on the unit's title. To discharge the lien, the full amount of arrears, interest and legal fees must be paid. The vast majority of unit owners who fall into arrears pay at some point during step one. What happens if a unit owner does not pay a lien? For those rare cases, a power of sale process awaits.

### **Step 2 – Notice of Sale Under Lien**

Technically, after 15 days of a lien being registered against a unit, a condominium may start a power of sale process. However, our firm generally recommends that a condominium wait 90 days before initiating a power of sale process.

After 90 days, our firm prepares a Notice of Sale under Lien, which is a prescribed form under the Mortgages Act. It sets out the particulars of the arrears, description of the property, details of the default, and the claim for principal, interest and other costs. Within the Notice of Sale under Lien is a "redemption date" which is 45 days from the date of the Notice. During the redemption period, the condominium is prohibited from taking any further enforcement steps against the unit owner. Upon the expiration of the redemption period, a condominium then issues a Statement of Claim with the Superior Court of Justice, to continue with the sale of the unit. Most power of sale processes end with the unit owner or lender redeeming prior to a final sale.

### **Step 3 – Issuance of a Statement of Claim (Action for Possession)**

After the redemption period has expired, the next step in the power of sale process is to draft a "Statement of Claim". The Statement of Claim is a court document which is required to obtain "possession" of the unit and legal authority to sell it.

The drafting of a "Statement of Claim" usually takes one (1) week to complete. To draft a Statement of Claim, our firm must review the unit's title, the declaration, by-laws and rules, the statement of account and the status of the unit's occupancy.

Once complete, the Statement of Claim is forwarded to the Ontario Superior Court of Justice where it is reviewed and received by the Court. This process is called "Issuing" the Statement of Claim.

Once issued, the Statement of Claim is forwarded to a process server and served personally on each defendant listed in the Statement of Claim. Generally, the only people named as defendants in the Statement of Claim are the unit owners.

To have the Statement of Claim drafted and served normally takes 7-21 days.



#### **Step 4 – Defence**

Once service of the statement of claim has occurred, a defendant has 20 days to issue a “Statement of Defence”. A Statement of Defence is a court document where a defendant explains why he or she does not owe the arrears.

In the majority of cases, the unit owner does not file a defence. In rare cases, a defence may include allegations of failure on the part of the condominium to fulfill its obligations under the Act and/or the unit owner’s inability to pay. If a defence like this is tendered, our firm prepares a motion for summary judgment and serves it on the unit owner. This would take an additional 6-8 weeks to conclude.

#### **Step 5 – Judgment**

When no Statement of Defence is filed, on the 21<sup>st</sup> day following service our firm brings a motion for default judgment before the court. The default judgment will provide the condominium corporation with;

- a. Judgment for the full amount outstanding; and,
- b. An order that possession of the unit be provided to the condominium corporation to effect the sale of the unit.

This entire step should take 4-8 weeks to complete. This delay is beyond our control as it takes time for the Court to review, approve and sign the judgment after the default has occurred. Once judgment has been granted, a copy must be served upon the defendants. Service is usually affected by mail.

#### **Step 6 – Writ of Possession**

Once 10 days have passed since the judgment was served, our firm then brings a motion for a “Writ of Possession”. A “Writ of Possession” is a court order requiring the local Sheriff to remove the unit occupants and deliver vacant possession to the condominium. The motion takes 1-2 days to complete and the court usually requires 1-2 weeks to issue the Writ of Possession.

Once the Writ of Possession has been obtained, it is forwarded to the Sheriff. Upon receipt of the writ, the Sheriff issues an “Eviction Notice” advising the unit occupant that the Sheriff will return in 10 days. Upon the expiration of the 10 days, the Sheriff will remove, forcibly if necessary, the unit occupants and their belongings from the unit.

At that juncture the Sheriff will contact our offices to finalize the eviction. Our offices coordinate with the Property Manager to have the locks changed and secure the unit. Once the locks are changed the condominium is “in possession” of the unit, and the condominium can move forward with its sale.

#### **Step 7 – Listing the Unit for Sale**

Once possession has been obtained the condominium proceeds to do two things: a. have a professional appraisal of the unit completed; and, b. hire a listing agent to market the Unit.

An appraisal is a comparative market analysis predicting the value of the unit. This process attempts to establish the fair market value of the Unit. This step is needed as the condominium corporation is required to obtain fair market value, and is liable if it completes an improvident sale (a sale for less than fair market value).

The listing agreement should be entered into with a local Real Estate agent licensed with the Real Estate Council of Ontario (RECO). The listing agreement should contemplate redemption while the unit is being sold, in addition to a fee for completing the sale. As most powers of sale do not go through to a sale, it would be unfair to have a listing agent spend time and incur expense without some fee or payment.



## Step 8 – Agreement of Purchase and Sale

Once a listing agreement is signed, the Agent will market the unit. When a purchaser is found, an Agreement of Purchase and Sale will be drafted by our firm. As this is a sale by “Power of Sale”, the agreement will be unique as the unit is being sold “as is”. This is a very important distinction and cannot be overstated. This often causes a downward pressure on the price of the unit since it is being sold in “distress”.

The Agreement of Purchase and Sale will set out a closing date upon which the transaction will close, and is signed by both the condominium's board of directors as vendor and the purchaser.

## Step 9 – Conveyance of Unit and Accounting

On the closing date, the unit is transferred by the condominium to the purchaser. Upon completion, the amount owing to the condominium is paid from the proceeds of sale. Any amounts remaining are paid to the now former unit owner. Within 90 days following closing, the lawyer will report to all parties on the sale, and disclose all payouts.

## Step 10 – Redemption

As mentioned, at any point in the process, the unit owner or mortgagee can pay out the arrears, disbursements, and fees, bringing the process to a close. This can happen right up until the point of sale. Redemption at some point in the process is very common and only a small percentage of powers of sale end in a sale of the unit.

## Costs

The legal fees associated with a power of sale are paid by the unit owner, not the condominium. To discharge the lien, all of the arrears, interest, and legal fees must be paid by the unit owner. If the unit owner does not redeem, the proceeds of sale are used first to discharge the lien, followed by mortgagees or other lien holders, and the remainder to the original unit owner.

## Summary

In total, the process for selling a unit is complicated, and normally takes between 4-6 months to complete. If the matter is opposed or the unit is difficult to sell, the process could take longer. Every file is unique and the timelines may vary depending on the circumstances.

For more information, please contact our condominium practice group chair:

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