

About Condo

PROPER AND IMPROPER LIENS

Not every cost or expense that a unit owner causes a condominium to incur can be collected by way of a condominium lien. The circumstances when a condominium can place a lien on an owner's unit (or, in the case of a common elements condominium corporation, on the owner's Parcel of Tied Land) are limited.

The fundamental criterion for a condominium lien is that there must be arrears of common expenses. No other type of debt will do. Therefore, the determination of whether an amount owing to the condominium corporation, or incurred by it on account of a unit owner's act or omission, relies entirely on whether that amount can be legitimately described as a common expense for which the owner had a particular obligation to pay.

The following are examples of situations in which the condominium's lien rights may be triggered pursuant to the *Condominium Act, 1998* (the "Act"):

1. A unit owner fails to pay the regular contribution to the common expenses owing on account of such owner's unit on the date they are due – *Sec. 85 of the Act.*¹
2. Where a condominium gets a court order against an owner, the damages and costs (if any) awarded by the judge are added to the common expenses for the unit and may be subject of a lien if not paid when required by the board – *Sec. 134(5) of the Act.*
3. Where a unit owner is required by the declaration to repair the owner's unit after damage and fails to do so in a reasonable time, the condominium corporation is required to do the repairs and to add the cost to the common expenses for the unit, so that if the same are not paid when required by the board they become the subject of a lien – *Sec. 92(1) and (4) of the Act.*
4. Likewise, where the owner has an obligation to maintain the unit and the failure to do so in a reasonable time results in a potential risk of damage to the property or assets of the corporation, or a potential risk of injury to persons on the property, then the corporation has the option of performing the work and if it does so must add the cost to the common expenses for the unit, so that if the same are not paid when required by the board they become the subject of a lien – *Sec. 92(3) and (4) of the Act.*

¹ Of course, once they are paid, if no lien action has commenced so that there are no reasonable expenses incurred in relation to the collection of the amount owing, the lien right immediately expires. If additional, reasonable expenses were incurred in relation to collection of the amount owing, then they are included in the amount owing under the lien and must be paid out by the unit owner.

5. Where a unit owner is required by the declaration to maintain a part of the common elements and fails to do so in a reasonable time, the condominium corporation has the option of performing the work and if it does so must add the cost to the common expenses for the unit, so that if the same are not paid when required by the board they become the subject of a lien – *Sec. 92(2) and (4) of the Act*.
6. If an owner's unit is damaged through an act or omission of the owner or a person residing in the unit with the owner's permission, the cost of repair up to the deductible limit of the condominium's insurance policy is to be added to the common expenses for the unit, so that if the same are not paid when required by the board they become the subject of a lien – *Sec. 105(2) of the Act*.²

The Act also provides that common expenses may be defined in the declaration of the condominium. Some declarations we know of include provisions that make the following types of costs common expenses attributed to a particular unit:

- damages or costs awards against the unit owner under mediation proceedings,
- payments required from the unit owner to indemnify the corporation,
- the costs of excess use of common services by the unit owner, or
- increases in insurance premiums caused by acts or omissions of the unit owner.

Where such (or other) costs are made common expenses attributed to a particular unit and are not paid when required in accordance with the declaration, they become common expenses in arrears and thus can be the subject of a lien.

However, there are other costs that are incurred by the condominium corporation on account of the conduct, acts or omissions of unit owners that are not inherently lienable. These include such things as the costs of enforcement letters and legal opinions to a condominium relating to an owners conduct or even threats of action. Such things are simply costs of managing a condominium corporation and cannot be the subject matter of a lien (even if there is a request or demand that the owner reimburse the condominium for the same).

It must be remembered that it is not often that a creditor is allowed to register a lien on a person's property without going through legal process. The *Condominium Act, 1998* (the "Act") permits a condominium in certain circumstances to do just that. This is an extraordinary power and should not be handled lightly. In any event, boards and managers of condominiums should be very careful to limit the application of lien rights to just those circumstances permitted by the Act. It is likely that, if a court were of the view this right was being used improperly, the condominium could be liable to significant damages, including for slander of title and possible harassment. It would certainly not be advisable to seek to enforce such a lien to the full extent of enforcement (i.e., power of sale proceedings) otherwise provided by the Act.

Michael H. Clifton (March 2008)

*This memorandum includes some information from materials previously prepared by Craig Robson.

² Pursuant to section 105(3) of the Act, the circumstances in which this debt may arise can be expanded by by-law of the corporation to include any time a unit is damaged provided the corporation or its directors, officers, agents or employees are not at fault.