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Condominium Law Update

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Collections - What Options Does a Condominium Corporation Have if an Owner Defaults on Payment?

Condominium Law Update

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COLLECTIONS
WHAT OPTIONS DOES A CONDOMINIUM CORPORATION HAVE IF AN OWNER DEFAULTS ON
PAYMENT?

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The *Condominium Property Act*, RSA 2000, c-C 22 (“CPA”) governs the interactions between Condominium Corporations (“CC”) and owners of Condominium Units, and provides remedies to be available to CC upon the default in payment of a condominium owner. Condominium corporations are created by the *Condominium Property Act* and derive their powers from that statute: *Condominium Corp No 042 5636 v Chevillard*, 2012 ABQB 131. These remedies and powers can be expanded upon by the Bylaws of the CC. However, the Condominium Corporation cannot get indirectly what the legislation specifically does not permit directly. Where there is a conflict between the legislation and the Bylaws, the legislation prevails: CPA s 32(7).

If an owner defaults in paying their condo fees, chargebacks, or fines, the Condo Corporation may have a variety of options for recovery, or may be limited, depending on the wording of the Bylaws. The options are often dependent on the CC first distinguishing whether the unpaid debt is a Condominium fee or special assessment, a chargeback, or fine. For the highest level of protection, and greatest number of options, the CC would want to be permitted to file a caveat against the unit’s certificate of title.

CAVEATS

Unpaid condominium fees, and special assessments, plus interest are caveatable under the CPA (s. 39 and s. 41). A caveat will remain with the Unit such that future owners would assume responsibility for the unpaid fees and interest upon purchase of the unit (CPA, s. 39(12)) (although usually they are paid as part of the sale). The maximum interest permitted to be charged on unpaid condo fees is 18% per annum (*Condominium Property Act Regulations*, s.76. Many Bylaws contain a requirement that a caveat cannot be placed on title until the amount owing is over 30 days in arrears. Upon filing, the caveat for condo fees or contributions is of the highest priority and upon foreclosure, will be enforced prior to the mortgage and before unsecured creditors.

Chargebacks *may* be caveatable, depending on the wording of the CC Bylaws. If the Bylaws provide specifically that costs undertaken on behalf of the owner, and/or chargebacks (for deductibles or otherwise as allowed by the Bylaws) can be charged back to the unit as a *contribution owing to the condominium (aka condominium fee)*, then these amounts may also be caveatable. These amounts could also potentially be in priority to the mortgage.

However, the law on these points is currently in a state of indecision. The Courts in Edmonton appear to be taking one approach (from the recent case of *Bank of Montreal v Bala* 2017 CarswellAlta 51 (“*Bala*”)) and the Courts in Calgary appear to be following the line of case law that has come from *Condominium Plan No. 8210034 v King* 2012 ABQB 127 (“*King*”).

However, before either the *Bala* or *King* decision were considered, the law in this area was based largely on the Masters decisions of Condominium Corp. No. 0425177 v. *Jessamine*, 2011 ABQB 644 (“*Jessamine*”) and Condominium Plan No. 872287 v. *Callaghan*, 2011 ABQB 638 (“*Callaghan*”).

In *Jessamine*, Master Smart (in Edmonton) heard an application by the CC for summary judgment for outstanding condo fees, special assessment, interest and costs with a six-month redemption order against *Jessamine*, a unit owner. In dispute in the CC’s action was an increase in monthly condo fees to \$525 commencing January 1, 2008 and a special assessment requiring additional monthly payments of \$222 commencing February 1, 2008 for six months. *Jessamine* complained he had not been provided with notice of the increases in accordance with the corporation's bylaws. Master Smart determined that the CC’s ledger properly established the amounts due from *Jessamine* for condo fees. The resolutions were properly affected as reflected by the minutes provided for condo board meetings. There was nothing in the corporation's bylaws requiring particular notice to unit owners of the passing of resolutions regarding changes in contributions. There was no indication that the board included improper expenses in establishing the regular assessment.

Master Smart held that *Jessamine* was not relieved of his obligation to pay condo fees because he believed the board acted improperly and ordered that the condo fees, special assessment, and interest (at the statutory amount because no interest rate was specified in the corporation's bylaws or any board resolution) be paid by *Jessamine*.

In respect of costs, he wrote:

Section 42(1) permits the Condo Corp to recover from the person against whom steps were taken all reasonable costs including legal expenses in collecting the amount owing for condominium contributions. Despite language in Bylaws 4.09 and 4.10 which purports to expand liability for costs, I am of the view that the Act governs. Costs on a solicitor and client basis are payable for the action only. Legal expenses are not permitted by s.42(2) for preparation, registration, enforcement and discharge of the caveat but only reasonable expenses may be recovered. Those expenses must be claimed as part of the action with the appropriate evidence. Outstanding contributions constitute a charge against the property under s.39(7) and interest is deemed a charge by virtue of s.41. Legal costs are not given the same characterization under the Act. Despite wording in the Bylaws which purport to capture legal costs as a charge under their caveat, the Act governs.

In *Callaghan*, Master Schlosser (in Edmonton) heard an application with respect to bedbugs, and a caveat that had been placed on an Owner’s unit as a result of dealing with same. The CC dealt with a bedbug infestation which it said originated in the Defendant's unit and spread to an adjacent unit. The Condominium Corporation charged him with clean-up and extermination costs of \$8,420.64,