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COURT FILE NUMBER	2303 06543
COURT OF KING'S BENCH OF ALBERTA	
JUDICIAL CENTRE	Edmonton
	IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, as amended
	AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF J.W. CARR HOLDINGS LTD., SPRUCE GROVE INDUSTRIAL PARK INC., 272649 ALBERTA LTD., 279896 ALBERTA LTD., GRANDE PRAIRIE PLACE ENTERPRISES (1996) INC., 1170292 ALBERTA LTD. and 627612 ALBERTA LTD.
APPLICANTS	J.W. CARR HOLDINGS LTD., SPRUCE GROVE INDUSTRIAL PARK INC., 272649 ALBERTA LTD., 279896 ALBERTA LTD., GRANDE PRAIRIE PLACE ENTERPRISES (1996) INC., 1170292 ALBERTA LTD. and 627612 ALBERTA LTD.
DOCUMENT	**BENCH BRIEF OF THE OWNERS: CONDOMINIUM PLAN NO. 872 2944, A CREDITOR OF J.W. CARR HOLDINGS LTD.**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	MILLER THOMSON LLP Barristers and Solicitors 2700, Commerce Place 10155-102 Street Edmonton, AB, Canada T5J 4G8 Phone: 780.429.1751 Fax: 780.424.5866 Lawyer's Name: Roberto Noce, K.C. and Michael Gibson Lawyer's Email rnoce@millerthomson.com File No.: 222016.53

BRIEF OF THE OWNERS: CONDOMINIUM PLAN NO. 872 2944, A CREDITOR OF J.W. CARR HOLDINGS LTD., IN RESPONSE TO THE COMMERCIAL LIST APPLICATION TO BE HEARD BY THE HONOURABLE JUSTICE J. J. GILL

Wednesday, April 19, 2023 at 10:00am
Virtual Courtroom 86

TABLE OF CONTENTS

PART I - Introduction

1. The Owners: Condominium Plan No. 872 2944 (o/a Central Park Condominiums) (the "**Corporation**") is the condominium corporation constituted pursuant to the provisions of the *Condominium Property Act* RSA 1980, c. C-22, the predecessor legislation to the currently in force *Condominium Property Act* RSA 2000, c. C-22 (the "**CPA**") **[TAB 1]**, upon the registration of condominium plan no. 872 2944 at the Land Titles Office for the North Alberta Land Registration District on December 31, 1987 (the "**Plan**").

2. The units and common property described by the Plan are hereinafter referred to as the "**Condominium Property**".

3. The Condominium Property is located at 9916 113 Street NW, Edmonton, AB.

4. The Applicant, J.W. Carr Holdings Ltd. ("Carr"), is a corporation incorporated pursuant to the laws of the Province of Alberta, and is the registered owner of twenty three (23) units located on the Condominium Property and legally described as:

   CONDOMINIUM PLAN 8722944
   UNIT 6
   AND 95 UNDIVIDED ONE TEN THOUSANDTH SHARES
   IN THE COMMON PROPERTY
   EXCEPTING THEREOUT ALL MINES AND MINERALS

   CONDOMINIUM PLAN 8722944
   UNIT 7
   AND 88 UNDIVIDED ONE TEN THOUSANDTH SHARES
   IN THE COMMON PROPERTY
   EXCEPTING THEREOUT ALL MINES AND MINERALS

   CONDOMINIUM PLAN 8722944
   UNIT 9
   AND 78 UNDIVIDED ONE TEN THOUSANDTH SHARES
   IN THE COMMON PROPERTY
   EXCEPTING THEREOUT ALL MINES AND MINERALS

   CONDOMINIUM PLAN 8722944
   UNIT 10
   AND 104 UNDIVIDED ONE TEN THOUSANDTH SHARES
   IN THE COMMON PROPERTY
   EXCEPTING THEREOUT ALL MINES AND MINERALS

CONDOMINIUM PLAN 8722944
UNIT 13
AND 88 UNDIVIDED ONE TEN THOUSANDTH SHARES
IN THE COMMON PROPERTY
EXCEPTING THEREOUT ALL MINES AND MINERALS

CONDOMINIUM PLAN 8722944
UNIT 18
AND 95 UNDIVIDED ONE TEN THOUSANDTH SHARES
IN THE COMMON PROPERTY
EXCEPTING THEREOUT ALL MINES AND MINERALS

CONDOMINIUM PLAN 8722944
UNIT 19
AND 88 UNDIVIDED ONE TEN THOUSANDTH SHARES
IN THE COMMON PROPERTY
EXCEPTING THEREOUT ALL MINES AND MINERALS

CONDOMINIUM PLAN 8722944
UNIT 22
AND 104 UNDIVIDED ONE TEN THOUSANDTH SHARES
IN THE COMMON PROPERTY
EXCEPTING THEREOUT ALL MINES AND MINERALS

CONDOMINIUM PLAN 8722944
UNIT 23
AND 104 UNDIVIDED ONE TEN THOUSANDTH SHARES
IN THE COMMON PROPERTY
EXCEPTING THEREOUT ALL MINES AND MINERALS

CONDOMINIUM PLAN 8722944
UNIT 24
AND 95 UNDIVIDED ONE TEN THOUSANDTH SHARES
IN THE COMMON PROPERTY
EXCEPTING THEREOUT ALL MINES AND MINERALS

CONDOMINIUM PLAN 8722944
UNIT 25
AND 88 UNDIVIDED ONE TEN THOUSANDTH SHARES
IN THE COMMON PROPERTY
EXCEPTING THEREOUT ALL MINES AND MINERALS

CONDOMINIUM PLAN 8722944
UNIT 29
AND 104 UNDIVIDED ONE TEN THOUSANDTH SHARES
IN THE COMMON PROPERTY
EXCEPTING THEREOUT ALL MINES AND MINERALS

CONDOMINIUM PLAN 8722944
UNIT 30
AND 95 UNDIVIDED ONE TEN THOUSANDTH SHARES
IN THE COMMON PROPERTY
EXCEPTING THEREOUT ALL MINES AND MINERALS

CONDOMINIUM PLAN 8722944
UNIT 45
AND 78 UNDIVIDED ONE TEN THOUSANDTH SHARES
IN THE COMMON PROPERTY
EXCEPTING THEREOUT ALL MINES AND MINERALS

CONDOMINIUM PLAN 8722944
UNIT 63
AND 78 UNDIVIDED ONE TEN THOUSANDTH SHARES
IN THE COMMON PROPERTY
EXCEPTING THEREOUT ALL MINES AND MINERALS

CONDOMINIUM PLAN 8722944
UNIT 66
AND 95 UNDIVIDED ONE TEN THOUSANDTH SHARES
IN THE COMMON PROPERTY
EXCEPTING THEREOUT ALL MINES AND MINERALS

CONDOMINIUM PLAN 8722944
UNIT 69
AND 78 UNDIVIDED ONE TEN THOUSANDTH SHARES
IN THE COMMON PROPERTY
EXCEPTING THEREOUT ALL MINES AND MINERALS

CONDOMINIUM PLAN 8722944
UNIT 72
AND 95 UNDIVIDED ONE TEN THOUSANDTH SHARES
IN THE COMMON PROPERTY
EXCEPTING THEREOUT ALL MINES AND MINERALS

CONDOMINIUM PLAN 8722944
UNIT 73
AND 88 UNDIVIDED ONE TEN THOUSANDTH SHARES
IN THE COMMON PROPERTY
EXCEPTING THEREOUT ALL MINES AND MINERALS

CONDOMINIUM PLAN 8722944
UNIT 79
AND 88 UNDIVIDED ONE TEN THOUSANDTH SHARES
IN THE COMMON PROPERTY
EXCEPTING THEREOUT ALL MINES AND MINERALS

CONDOMINIUM PLAN 8722944

UNIT 85
AND 88 UNDIVIDED ONE TEN THOUSANDTH SHARES
IN THE COMMON PROPERTY
EXCEPTING THEREOUT ALL MINES AND MINERALS

CONDOMINIUM PLAN 8722944
UNIT 97
AND 88 UNDIVIDED ONE TEN THOUSANDTH SHARES
IN THE COMMON PROPERTY
EXCEPTING THEREOUT ALL MINES AND MINERALS

CONDOMINIUM PLAN 8722944
UNIT 99
AND 78 UNDIVIDED ONE TEN THOUSANDTH SHARES
IN THE COMMON PROPERTY
EXCEPTING THEREOUT ALL MINES AND MINERALS

(collectively, the "**Units**", or any one of "**Unit 6**", "**Unit 7**", "**Unit 9**", "**Unit 10**", "**Unit 13**", "**Unit 18**", "**Unit 19**", "**Unit 22**", "**Unit 23**", "**Unit 24**", "**Unit 25**", "**Unit 29**", "**Unit 30**", "**Unit 45**", "**Unit 63**", "**Unit 66**", "**Unit 69**", "**Unit 72**", "**Unit 73**", "**Unit 79**", "**Unit 85**", "**Unit 97**", "**Unit 99**" when referring to one of the above-noted Units specifically)

5. The Corporation and the Condominium Property are governed by the bylaws of the Corporation, registered on November 14, 1996 as instrument number 962 313 929 (the "**Bylaws**").

6. In accordance with the powers granted to it pursuant to sections 39 and 42 of the CPA, the Corporation is entitled to assess and levy contributions against the units for the control, management and administration of the Condominium Property ("**Condominium Fees**"). In accordance with Articles 2A and 85 of the Bylaws, the Condominium Fees are payable by each unit owner, including Carr, in proportion to unit factors.

7. Further, and in accordance with the section 40 of the CPA and Articles 2A(i), 85(a) & (b), and 86(a) of the Bylaws, the Corporation is entitled to charge interest on outstanding Condominium Fees at the rate of twelve percent (12%) per annum, from the date due to the date payment is received.

8. The Bylaws further provide that in the event of default by an owner in the payment of Condominium Fees levied against his unit, which requires the Corporation to take proceedings to collect payment for such outstanding sums

owing, the owner would indemnify the Corporation for any and all costs and expenses incurred by the Corporation, including legal costs on a solicitor-and-own-client full indemnity basis.

9. The Corporation has assessed and levied Condominium Fees against the Units in proportion to the unit factors of the Units, as provided for by the CPA and the Bylaws.

10. Carr has either neglected or refused to make payment for the Condominium Fees when due, or at all, and as such the Condominium Fees, interest thereon and related costs of collection continue to accrue. Carr is therefore in default in the payment of Condominium Fees.

11. The Corporation has commenced foreclosure proceedings in Court of King's Bench Action No. 2203 18325 (the "**Foreclosure Action**") to enforce the collection of all outstanding Condominium Fees.

Statement of Claim, Action No. 2203 18325 [TAB 2]

12. The Corporation has further taken steps to garnish any rental income owing to Carr in respect of the Units, in accordance with its power to do so pursuant to s. 38.2 of the CPA, to credit those rental payments to Carr's arrears in Condominium Fees.

13. As set out under s. 39.2 of the CPA, the Corporation has a statutory, priority secured charge against the Units for all outstanding Condominium Fees.

14. In this action, Carr is seeking the Court's assistance and direction in respect of the implementation of, *inter alia*, the development and implementation of a Sales and Investment Solicitation Process, to allow Carr to sell its assets to satisfy the claims of secured creditors, whilst maintaining the cash flow sufficient to permit it and the related corporate entity Applicants to "…continue making payments of principal, interest, and property tax payments…"

15. Carr's proposal as set out in its form of Initial Order does not provide for the Corporation's secured, statutory priority charge against the Units for ongoing and outstanding Condominium Fees and interest. Carr's Originating Application in

this matter further lists "condominium corporation boards" as "unsecured creditors" of the Applicants, Carr included. This is contrary to the law in Alberta and the Corporation specifically asserts its security, as set out in more detail below.

PART II - Background Facts

16. The essential facts are set out in the Affidavit of Roman Soltykevych, sworn on February 7, 2023 and filed in the Foreclosure Action on March 2, 2023 (the "**Affidavit of Default**").

17. The Corporation specifically relies on the Affidavit of Default in this action and seeks this Honourable Court's permission to submit the said evidence in this action in accordance with Rule 6.11(1)(f).

18. In accordance with section 39.2(7) of the CPA, Article 86 of the Bylaws, and by virtue of the following Caveats, registered at the Land Titles Office for the North Alberta Registration District, the Corporation claims an interest in the Units for outstanding Condominium Fees levied but unpaid:

Unit Number	**Registration No. for the Caveat**	**Registration Date**
Unit 6	212 038 461	February 8, 2021
Unit 7	212 038 434	February 8, 2021
Unit 9	212 038 440	February 8, 2021
Unit 10	212 038 504	February 8, 2021
Unit 13	212 038 494	February 8, 2021
Unit 18	212 038 448	February 8, 2021
Unit 19	212 038 431	February 8, 2021
Unit 22	212 038 506	February 8, 2021
Unit 23	212 038 492	February 8, 2021
Unit 24	212 038 450	February 8, 2021
Unit 25	212 038 731	February 8, 2021

Unit Number	**Registration No. for the Caveat**	**Registration Date**
Unit 29	212 038 499	February 8, 2021
Unit 30	212 038 466	February 8, 2021
Unit 45	212 038 457	February 8, 2021
Unit 63	212 038 436	February 8, 2021
Unit 66	212 038 497	February 8, 2021
Unit 69	212 038 465	February 8, 2021
Unit 72	212 038 458	February 8, 2021
Unit 73	212 038 734	February 8, 2021
Unit 79	212 038 442	February 8, 2021
Unit 85	212 038 433	February 8, 2021
Unit 97	212 038 459	February 8, 2021
Unit 99	212 038 438	February 8, 2021

19. As of January 17, 2023, the total unpaid Condominium Fees, chargebacks, administrative charges and interest, but excluding legal fees, amounts to $594,073.16, and can be further summarized as follows:

Contributions under s. 39.2 (including monthly condominium fees, Special Assessments, interest and caveat registration charges)	$569,707.70
Administration Collection Charges	$12,117.00
Chargebacks	$2,399.25
Caveat Registration Fees	$9,660.00
TOTAL AMOUNT OWING:	**$593,883.95**

20. Accordingly, as per the above calculation, there is now due and owing the sum of $593,883.95 as at March 30, 2023. This is reflected in the per Unit statements of

indebtedness appended to the Consent Redemption Order Condominium, pronounced in the Foreclosure Action on April 12, 2023 (which has been submitted for filing, but has not been returned as entered in the Foreclosure Action as at the date of submitted this Bench Brief).

Consent Redemption Order Condominium, pronounced in the Foreclosure Action on April 12, 2023 [TAB 3]

21. Further, and in accordance with its powers pursuant to s. 39.2(4) of the CPA, on or about December 1, 2022 the Corporation served notices to Carr's tenants in the Units, requiring them to pay any rent owing to Carr to the Corporation so that that rent can be applied against the Condominium Fees, including any interest owing, that are in arrears (the "**Notice**").

22. It is the Corporation's understanding that Carr has retained the services of Braden Equities Inc. ("**Braden**") to act as the landlord's property manager in managing the rental of the Units and the collection of rental income. After receiving the Notice, Braden contacted the Corporation's counsel and arranged to continue collecting rent from the tenants in the Units, in exchange for Braden's normal percentage based fee for doing so, and remitting the balance to the Corporation instead of Carr, so same could be applied to the outstanding Condominium Fees and interest.

23. Having initiated the statutory process to garnish Carr's rental income in respect of the Units, the Corporation is finally receiving some funds that can be credited towards Carr's arrears. In this regard, the garnished rental income amounts to approximately $22,500 per month.

24. Carr served its Originating Application and supporting materials in this action on the Corporation on April 10, 2023. As set out in more detail in Carr's application materials, including the Bench Brief of the Applications (Initial CCAA Order), Carr and its affiliated corporate entity Applicants in this action propose an initial order under the *Companies' Creditors Arrangement Act* (the "**CCAA**") which, if granted, would, among other things:

(a) Grant a stay of proceedings against the Applicants in respect of all present or future proceedings and enforcement processes affecting Carr's (and affiliate's) business and property, in order to facilitate the restructuring and/or orderly wind down of their business interests – this would apparently include the stay of the Foreclosure Action;

(b) Permit Carr and affiliates to continue to make certain principal and interest payments which become due and owing on secured debt obligations secured by first charge mortgages on cash flowing/income generating properties – which would apparently include the Units;

(c) Approve a court-ordered charge on the assets of the Applicants in order to secure payment of the professional fees and disbursements;

(d) Authorize and empower the Applicants to borrow up to $2,700,000 from an interim lender pursuant to a proposed interim financing credit facility, in order to finance the their operations and restructuring costs during these proceedings; and

(e) Approve a court-ordered priority charge on the assets of the Applicants, ranking subordinate only to the Administration Charge and the First Charge Encumbrances, as defined in Carr's materials, in order to secure repayment of the amounts advanced to the Carr Group by the Interim Lender advanced under the Interim Financing Credit Facility.

(the "**Interim Order**").

25. Carr's application materials herein specifically provide that Carr's need for CCAA proceedings is required to ensure, among other things, that enforcement efforts by <u>unsecured creditors</u> of the Applicants (including judgment creditors, <u>condominium corporation boards</u> and others) are stayed while the Applicants develops and implements a sales and investment solicitation process.

26. The Corporation is not an unsecured creditor of Carr and the Corporation's security for Condominium Fees pursuant to the CPA ranks in priority to the claims of mortgagees and municipal tax authorities. The Interim Order does not

provide for the payment of the Corporation's secured claims against the Units and the Applicants' proposal and the form of Interim Order must be amended accordingly.

PART III- Issues

27. In addition to the issues set out in the Applicants' Bench Brief, the Corporation raises the following, additional issues:

(a) Pursuant to Rule 6.11(f), the Court's permission is required for a party to rely on evidence taken in another action and the Corporation specifically seeks to rely on the Affidavit of Default, taken in the Foreclosure Action, in this action and should the Court accordingly grant such permission;

(b) Is the Corporation a secured creditor of Carr in respect of outstanding claims for Condominium Fees; and

(c) Does the Corporation's statutory security have priority over the secured debt obligations as set out in the Applicants' proposed form of Initial Order?

PART IV - Law and Argument

28. As a legal construct, condominiums are simply a system of collective ownership and administration of property. A condominium may be seen as a vehicle for holding land which combines the advantages of individual ownership with those of multi-unit development. In a sense, the unit owners make up a democratic society in which each has many of the rights associated with sole ownership of real property, but in which, having regard to their co-ownership with the others, some of those rights are subordinated to the will of the majority. The condominium construct has been described as consisting of three main features:

(a) a portion of the condominium property is divided into individually owned units;

(b) the balance of the property is owned in common by all the individual owners; and

(c) a statutory vehicle for managing the condominium property as a whole is established in accordance with the provisions of the CPA.

2475813 Nova Scotia Ltd. v. Rodgers, 2001 NSCA 12, at para 3 [TAB 4]

29. Condominium corporations are creatures of statute, constituted by and subject to the provisions of the CPA. Condominium legislation reflects the combination of several legal concepts and relies on, and to a degree incorporates by reference, principles drawn from several different areas of law. The law relating to individual ownership of real property is, of course, central because the owners of the individual units are, subject to certain limits, entitled to exclusive ownership and use of their units. The common property comprised in a registered condominium plan is held by the owners of all the units as tenants in common in shares proportional to the unit factors for their respective units, so the law of joint ownership of property is also significant **[*See for example*: s. 6(2) of the CPA].**

***Condominium Property Act,* RSA 2000, c. C-22 [TAB 1]**

30. There is to be assigned to each unit a unit factor so that the total of the unit factors for all the units in the parcel is equal to 10 000.

Condominium Property Regulation, Alta Reg 168/2000, s. 6 [TAB 5]

31. Accordingly, when the Corporation, or any condominium corporation for that matter, prepares its annual budget or levies a special assessment, that budget is divided by 10,000 to determine a per unit factor amount, then that amount is multiplied by the unit factors assigned to an owner’s unit (as reflected on the certificate of title to the unit) to determine that owner’s proportionate share of the budget or special assessment, as the case may be.

32. Condominium corporations are constituted pursuant to the provisions of the CPA upon the registration of a condominium plan at Alberta Land Titles **[s. 25(1) of the CPA].** Nothing further is required, at law, for the constitution of a condominium corporation. No filings with Alberta corporate registry are required and the condominium corporation comes into being, as a legal entity, immediately upon the registration of a condominium plan.

33. The condominium corporation is not an independent entity. It consists of all unit owners acting collectively through the statutory vehicle. It exists because of the owners and on behalf of the owners. It does not carry on business on its own. It is a creature of the owner who, for convenience and efficiency, elect a board of directors at the pleasure and under the control of the owners.

The Owners: Condominium Plan No. 9422336 v. The Queen, 2004 TCC 406, para. 15 [TAB 6]

34. In this regard, condominium legislation may be said to be remedial legislation, making possible and facilitating the marketing of a special type of property ownership that is not known at common law.[1]

35. The common property comprised in a registered condominium plan is held by the owners of all the units as tenants in common in shares proportional to the unit factors for their respective units **[CPA, s. 6(2)].** Unit factors, accordingly, represent the proportional ownership interest each owner has in the Corporation and are used to determine the voting rights of each owner in resolutions to be considered by the Corporation **[CPA, s. 26(1)],** as well as forming the basis for calculating each owner's proportionate contributions to the Corporation's common expenses **[CPA, s. 39(1)(a)(i)]**.

36. As set out at s. 1(1)(g.1) of the CPA, "contributions" are the amounts levied pursuant to s. 39 for the purposes of the operating account and the reserve fund and may be levied on the owners at regular intervals or as a special levy under s. 39.1. Contributions are, accordingly, the legal term under the CPA for the Condominium Fees.

37. With the power to levy contributions/Condominium Fees, condominium corporations essentially have a taxation power over the unit owners. The power to raise money to pay for the ongoing costs of the corporation is set out in s. 39 of the CPA.

Tutt v The Owners: Condominium Plan No. 7822572, 2020 ABQB 213, para. 34 [TAB 7]

[1] See the discussion of Justice Krever (as he then was) in: Carleton Condominium Corp. No. 11 v. Shenkman Corp. Ltd.; Grainger et al., Third Parties, 1985 CanLII 2056 (ON SC).

38. The CPA further provides that at s. 39.2(6) that a condominium corporation may file a caveat against the certificate of title to an owner's unit for the amount of a contribution levied on the owner and interest payable but unpaid by the owner. Sections 39.2(7) & (8) go on to provide that the filing of such a caveat, the condominium corporation has a charge against the unit equal to the unpaid contributions and any interest, which charge has the same priority as a mortgage under the *Land Titles Act* and may be enforced in the same manner as a mortgage.

39. With respect to the priority of a condominium corporation's caveat in this regard, s. 39.2(11) finally provides that, notwithstanding s. 39.2(8) in particular, the condominium corporation's caveat remains registered against the certificate of title of the unit until the amount owing is paid to the corporation, as follows:

> 39.2(6) A corporation may file a caveat against the certificate of title to an owner's unit for the amount of a contribution levied on the owner and interest payable but unpaid by the owner.
>
> 39.2(7) On the filing of the caveat under subsection (6), the corporation has a charge against the unit equal to the unpaid contributions and any interest owing.
>
> 39.2(8) On and from the date of filing of the caveat, a charge under subsection (7) has the same priority as a mortgage under the Land Titles Act and may be enforced in the same manner as a mortgage.
>
> 39.2(11) Notwithstanding subsection (8), if
>
> (a) a corporation has filed a caveat under this section,
>
> (b) subsequent to the caveat's being filed another person gains title to the unit pursuant to
>
> (i) a foreclosure action,
>
> (ii) an action for specific performance, or
>
> (iii) a tax recovery proceeding under the Municipal Government Act,
>
> and
>
> (c) an amount remains owing to the corporation with respect to the contribution and interest for which the caveat was filed,
>
> the caveat remains registered against the certificate of title of the unit until the amount owing is paid to the corporation.

40. Section 423(c) of the *Municipal Government Act* further provides that a person who purchases a parcel of land at a public auction with respect to the

enforcement of municipal tax arrears acquires the parcel of land free of all encumbrances, except caveats referred to in section 39.2(11) of the CPA.

Municipal Government Act, RSA 2000, c M-26, s. 423 [TAB 8]

41. A condominium corporation's statutory charge under s. 39.2 has been referred to as a "super-priority" in the applicable case law, by virtue of the fact that the caveat grants an *in rem* right of enforcement against the land itself, which is not discharged in the sale of the property, or the enforcement of a mortgage foreclosure or municipal tax recovery action.

Condominium Plan No 8722887 v Callaghan, 2011 ABQB 638, paras 7-9 [TAB 9]

Condominium Plan No.7822583 v Asiedu, 2022 ABKB 745, para. 18 [TAB 10]

Toronto-Dominion Bank v Bachand, 2021 ABQB 271, paras. 62, 78 and 87 [TAB 11]

42. In addition to the Corporation's powers under the CPA to enforce on its statutory security for unpaid contributions, s. 39.2 provides for other enforcement mechanisms in addition to proceeding by way of caveat. These include the power to seek recovery for unpaid contributions by way of an action for debt **[s. 39.2(2)]** or the power to garnish rents. In this latter regard, s. 39.2(4) provides as follows:

> 39.2(4) Where
>
> (a) a person other than the owner is in possession of a unit and pays rent to the owner in respect of the unit, and
>
> (b) contributions, including any interest owing in respect of that unit, are in arrears,
>
> the corporation may require the person in possession of the unit to pay the rent owing to the owner in respect of that unit to the corporation so that that rent can be applied against the contributions, including any interest owing, that are in arrears.

43. The subsections of s 39.2 CPA accordingly provide for multiple avenues of recovery in respect of contributions and do not require the Corporation to elect either to proceed solely by way of debt action; to proceed by way of caveat; or to proceed by way of garnishment of rents, nor do they require one remedy to be

exhausted prior to commencing another. The enforcement powers coexist at law and may be pursued independently of the other **[Bachand, para. 91 – TAB 11].**

44. Accordingly, the Corporation has exercised its statutory right to garnish Carr's rental income from the Units and apply that income to the outstanding Condominium Fees owing in respect of Carr's Units. This rental garnishment is only a partial solution, though, as the garnished rents are not paying off the arrears that have built up and are insufficient to bring Carr current. The Corporation has therefore has exercised its independent right to commence the Foreclosure Action and enforce on its statutory, priority security under the caveats registered against the Units.

45. Condominium unit owners who do not pay their assessments on a timely basis and who ignore other responsibilities under the CPA and Bylaws create an unfair burden on those owners and residents who do comply **[Tutt, para. 74 – TAB 7].** This is a fundamental principle of the shared property ownership structure of condominiums: as a non-profit entity, there is no surplus revenue over expenses and all owners must pay their proportionate share to ensure the common expenses are covered, for the benefit of all owners.

46. Carr's Units represent approximately 20% of the total unit factor holdings in the Corporation. Carr's failure to pay its Condominium Fees puts a significant and unfair burden on its fellow unit owners, who are predominantly individual resident owners. The Corporation is not only entitled to enforce its security and take all steps available to it to collect on the unpaid Condominium Fees, but it has a positive duty to do so.

47. The Corporation is a secured creditor of Carr and its security is specifically provided for pursuant to the CPA and the Bylaws. That security is enforceable in accordance with the caveats registered against Carr's Units and as a statutory security, granted pursuant to the provisions of the CPA, the Corporation has a priority charge over the Units.

48. In view of all of the foregoing, it is clear and obvious that Carr's proposed Sales and Investment Solicitation Process and the Initial Order <u>must</u> provide for the

payment of Condominium Fees, both in terms of bringing all arrears current as well as staying current on the Condominium Fees as they continue to accrue. The Corporation is under no obligation to discharge the caveats registered against the Units until Carr's Condominium Fees are brought current, even in the event of a sale and the Corporation will maintain its caveats and seek enforcement of the Redemption Order granted in the Foreclosure Action in the event Carr's proposal in this action is insufficient to redeem its debt to the Corporation for Condominium Fees, and for which debt the Corporation has a secured, priority charge over other encumbrancers, including Carr's mortgagee and the municipal tax authority.

PART V - Conclusion

49. For all of the foregoing reasons, the Corporation seeks:

(a) An Order pursuant to Rule 6.11(f), providing the Court's permission to file and rely on the Affidavit of Default, taken in the Foreclosure Action, in this action, if necessary;

(b) Provision in the Initial Order and any approved Sales and Investment Solicitation Process that protects the Corporation's position as a secured creditor of Carr in respect of outstanding claims for Condominium Fees, with the statutory priority for that security as provided for in accordance with the CPA and as set out in the proposed, revised Initial Order attached hereto as Schedule "A" (a blackline comparison has been further attached hereto as Schedule "B," detailing the proposed revisions to the form of Initial Order as submitted by the Applicants); and

(c) Costs against Carr on a solicitor-and-own-client full indemnity basis in accordance with the Bylaws.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 14th DAY OF APRIL, 2023.

MILLER THOMSON LLP

Per: ______________________

Roberto Noce, K.C., solicitors for The Owners: Condominium Plan No. 872 2944

LIST OF AUTHORITIES

1. *Condominium Property Act* RSA 2000, c. C-22.

2. Statement of Claim, Action No. 2203 18325.

3. Consent Redemption Order Condominium, pronounced in the Foreclosure Action on April 12, 2023.

4. 2475813 Nova Scotia Ltd. v. Rodgers, 2001 NSCA 12.

5. Condominium Property Regulation, Alta Reg 168/2000.

6. The Owners: Condominium Plan No. 9422336 v. The Queen, 2004 TCC 406.

7. Tutt v The Owners: Condominium Plan No. 7822572, 2020 ABQB 213.

8. Municipal Government Act, RSA 2000, c M-26.

9. Condominium Plan No 8722887 v Callaghan, 2011 ABQB 638.

10. Condominium Plan No.7822583 v Asiedu, 2022 ABKB 745.

11. Toronto-Dominion Bank v Bachand, 2021 ABQB 271.

SCHEDULE "A" – MT PROPOSED REVISED FORM OF INITIAL ORDER

	Clerk's Stamp:
COURT FILE NUMBER	
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE OF	EDMONTON
	IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, as amended AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF J.W. CARR HOLDINGS LTD., SPRUCE GROVE INDUSTRIAL PARK INC., 272649 ALBERTA LTD., 279896 ALBERTA LTD., GRANDE PRAIRIE PLACE ENTERPRISES (1996) INC., 1170292 ALBERTA LTD. and 627612 ALBERTA LTD.
APPLICANTS:	J.W. CARR HOLDINGS LTD., SPRUCE GROVE INDUSTRIAL PARK INC., 272649 ALBERTA LTD., 279896 ALBERTA LTD., GRANDE PRAIRIE PLACE ENTERPRISES (1996) INC., 1170292 ALBERTA LTD. and 627612 ALBERTA LTD.
DOCUMENT	**<u>CCAA INITIAL ORDER</u>**
CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT:	**MLT AIKINS LLP** Suite 2200, 10135 – 101st Street NW Edmonton, AB T5J 3G1 Solicitor: Jeffrey M. Lee, K.C. Telephone: (306) 975-7136 Facsimile: (306) 975-7145 Email: jmlee@mltaikins.com File Number: 159371.8
DATE ON WHICH ORDER WAS PRONOUNCED:	April 19, 2023
NAME OF JUDGE WHO MADE THIS ORDER:	The Honourable Justice J.J. Gill
LOCATION OF HEARING:	Edmonton, Alberta

UPON the application of **J.W. CARR HOLDINGS LTD., SPRUCE GROVE INDUSTRIAL PARK INC., 272649 ALBERTA LTD., 279896 ALBERTA LTD., GRANDE PRAIRIE PLACE ENTERPRISES (1996) INC., 1170292 ALBERTA LTD. and 627612 ALBERTA LTD.** (collectively, the "**Applicants**"); **AND UPON** having read the Originating Application dated April 10, 2023; the Affidavit of Marjorie Carr sworn on April 10, 2023 (the "**Carr Affidavit**"); the Service List dated April 10, 2023 (the "**Service List**") and the Affidavit of Service, filed; **AND UPON** reading the consent of Ernst & Young Inc. to act as Monitor; **AND UPON** being advised that the secured creditors who are likely to be affected by the charges created herein have been provided notice of this application; **AND UPON** hearing counsel for the Applicants; **AND UPON** reading the Pre-Filling Report of the Proposed Monitor, Ernst & Young Inc. dated April 10, 2023; **IT IS HEREBY ORDERED AND DECLARED THAT**:

SERVICE

1. The time for service of the notice of application for this order (the "**Order**") is hereby abridged and deemed good and sufficient and this application is properly returnable today.

APPLICATION

2. The Applicants are companies to which the *Companies' Creditors Arrangement Act* of Canada (the "**CCAA**") applies.

PLAN OF ARRANGEMENT

3. The Applicants shall have the authority to file and may, subject to further order of this Court, file with this Court a plan of compromise or arrangement (the "**Plan**").

POSSESSION OF PROPERTY AND OPERATIONS

4. The Applicants shall:

    (a) remain in possession and control of their current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (the "**Property**");

    (b) subject to further order of this Court, continue to carry on business in a manner consistent with the preservation of their business (the "**Business**") and Property;

    (c) be authorized and empowered to continue to retain and employ the employees, consultants, agents, experts, accountants, counsel and such other persons (collectively "**Assistants**") currently retained or employed by them, with liberty to retain such further Assistants as they deem reasonably necessary or desirable in the ordinary course of business or for the carrying out of the terms of this Order; and

(d) be entitled to continue to utilize the central cash management system currently in place as described in the Affidavit of Marjorie Carr sworn on April 10, 2023 or replace it with another substantially similar central cash management system (the "**Cash Management System**") and that any present or future bank providing the Cash Management System shall not be under any obligation whatsoever to inquire into the propriety, validity or legality of any transfer, payment, collection or other action taken under the Cash Management System, or as to the use or application by the Applicants of funds transferred, paid, collected or otherwise dealt with in the Cash Management System, shall be entitled to provide the Cash Management System without any liability in respect thereof to any Person (as hereinafter defined) other than the Applicants, pursuant to the terms of the documentation applicable to the Cash Management System, and shall be, in its capacity as provider of the Cash Management System, an unaffected creditor under the Plan with regard to any claims or expenses it may suffer or incur in connection with the provision of the Cash Management System.

5. To the extent permitted by law, the Applicants shall be entitled but not required to make the following advances or payments of the following expenses, incurred prior to or after this Order:

(a) all outstanding and future wages, salaries, employee and pension benefits, vacation pay and expenses payable on or after the date of this Order, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements; and

(b) the reasonable fees and disbursements of any Assistants retained or employed by the Applicants in respect of these proceedings, at their standard rates and charges, including for periods prior to the date of this Order.

6. Except as otherwise provided to the contrary herein, the Applicants shall be entitled but not required to pay all reasonable expenses incurred by the Applicants in carrying on the Business in the ordinary course after this Order, and in carrying out the provisions of this Order, which expenses shall include, without limitation:

(a) all expenses and capital expenditures reasonably necessary for the preservation of the Property or the Business including, without limitation, payments on account of ongoing condominium contributions (as applicable), insurance (including directors and officers insurance), maintenance and security services; and

(b) payment for goods or services actually supplied to the Applicants following the date of this Order.

7. The Applicants shall remit, in accordance with legal requirements, or pay:

(a) any statutory deemed trust amounts in favour of the Crown in Right of Canada or of any Province thereof or any other taxation authority that are required to be deducted from employees' wages, including, without limitation, amounts in respect of:

(i) employment insurance,

(ii) Canada Pension Plan,

(iii) Quebec Pension Plan, and

(iv) income taxes,

but only where such statutory deemed trust amounts arise after the date of this Order, or are not required to be remitted until after the date of this Order, unless otherwise ordered by the Court;

(b) all goods and services or other applicable sales taxes (collectively, "**Sales Taxes**") required to be remitted by the Applicants in connection with the sale of goods and services by the Applicants, but only where such Sales Taxes are accrued or collected after the date of this Order, or where such Sales Taxes were accrued or collected prior to the date of this Order but not required to be remitted until on or after the date of this Order;

(c) any amount payable to: (i) the Crown in Right of Canada or of any Province thereof or any political subdivision thereof; or (ii) unless otherwise agreed in writing by the holders of a Condominium Priority Charge (if applicable) and First Charge Encumbrances in respect of related First Charge Real Property (each as hereinafter defined) any other taxation authority (which, for the purposes of this Order shall include condominium corporations) in respect of condominium contributions, municipal realty, municipal business or other taxes, assessments or levies of any nature or kind which are entitled at law to be paid in priority to claims of secured creditors and that are attributable to or in respect of the carrying on of the Business by the Applicants (such condominium contributions, municipal realty, municipal business or other taxes, assessments or levies of any nature or kind hereinafter described as "**Property Levies**") which accrue from and after the date of this Order. For greater clarity, the Applicants shall be required to pay arrears of Property Levies accrued prior to the date of this Order, to the extent that cash flow of the Applicants permits; and

(d) unless otherwise agreed in writing by the holders of a Condominium Priority Charge (if applicable) and First Charge Encumbrances in respect of related First Charge Real Property (each as hereinafter defined), principal and interest payments ("**Cash Flowing P & I Payments**") which become due from and after the date of this Order on those secured debt obligations of the Applicants secured by First Charge Encumbrances on real estate properties and related personal property owned by the Applicants which generate cash flow sufficient to pay such Cash Flowing P & I Payments ("**Cash Flowing Secured Debt Obligations**"), as such Cash Flowing Secured Debt Obligations are more particularly described in:

(i) **Schedule A** hereto (in regard to Cash Flowing Secured Debt Obligations owed by the Applicants to The Bank of Nova Scotia and Servus Credit Union);

(ii) **Schedule B** hereto (in regard to Cash Flowing Secured Debt Obligations owed by the Applicants to Bank of Montreal);

(iii) **Schedule C** hereto (in regard to Cash Flowing Secured Debt Obligations owed by the Applicants to Roynat Inc.);

(iv) **Schedule D** hereto (in regard to Cash Flowing Secured Debt Obligations owed by the Applicants to The Owners: Condominium Plan No. 872 2944 and Canadian Western Bank);

(v) **Schedule E** hereto (in regard to Cash Flowing Secured Debt Obligations owed by the Applicants to ATB Financial); and

(vi) **Schedule F** hereto (in regard to Cash Flowing Secured Debt Obligations owed by the Applicants to Servus Credit Union).

For greater clarity, the holders of a Condominium Priority Charge (if applicable) and First Charge Encumbrances described in this paragraph shall receive payment of such Cash Flowing P & I Payments as the cash flow generated by the real estate properties and related personal property to the extent of the obligations secured by such Condominium Priority Charge (if applicable) and First Charge Encumbrances described in this paragraph will allow (regardless of whether or not such cash flow in any given month is adequate to make such Cash Flowing P & I Payments in full).

8. Nothing herein shall waive or prejudice the right of any condominium corporation who is the holder of a Condominium Priority Charge to garnish any rental income owing to any of the Applicants in respect of a condominium unit owned by any of them in accordance with the condominium corporation's power to do so pursuant to s. 39.2(4) of the *Condominium Property Act,* RSA 2000, c. C-22.

9. Until such time as a real property lease is disclaimed or resiliated in accordance with the CCAA, the Applicants may pay all amounts constituting rent or payable as rent under real property leases (including, for greater certainty, common area maintenance charges, utilities and realty taxes and any other amounts payable as rent to the landlord under the lease) based on the terms of existing lease arrangements or as otherwise may be negotiated by the Applicants from time to time for the period commencing from and including the date of this Order ("**Rent**"), but shall not pay any rent in arrears.

10. Except as specifically permitted in this Order, the Applicants are hereby directed, until further order of this Court:

(a) to make no payments of principal, interest thereon or otherwise on account of amounts owing by the Applicants to any of their creditors as of the date of this Order;

(b) to grant no security interests, trust, liens, charges or encumbrances upon or in respect of any of their Property; and

(c) not to grant credit or incur liabilities except in the ordinary course of the Business.

RESTRUCTURING

11. The Applicants shall, subject to such requirements as are imposed by the CCAA and such covenants as may be contained in the Definitive Documents (as hereinafter defined in paragraph 35 hereof), have the right to:

(a) permanently or temporarily cease, downsize or shut down any portion of their business or operations and to dispose of redundant or non-material assets not exceeding $100,000 in any one transaction or $500,000 in the aggregate, provided that any sale that is either in excess of the above thresholds, or (ii) in favour of a person related to the Applicants (within the meaning of section 36(5) of the CCAA), shall require authorization by this Court in accordance with section 36 of the CCAA;

(b) notwithstanding subparagraph (a) hereof, the Applicants shall have the right to sell any residential condominium unit owned by them to satisfy any debt owing by the Applicants, or any of them, to a condominium corporation that holds a Condominium Priority Charge in respect of outstanding contributions;

(c) terminate the employment of such of their employees or temporarily lay off such of their employees as they deem appropriate on such terms as may be agreed upon between the Applicants and such employee, or failing such agreement, to deal with the consequences thereof in the Plan;

(d) disclaim or resiliate, in whole or in part, with the prior consent of the Monitor (as defined below) or further Order of the Court, their arrangements or agreements of any nature whatsoever with whomsoever, whether oral or written, as the Applicants deem appropriate, in accordance with section 32 of the CCAA; and

(e) pursue all avenues of refinancing of their Business or Property, in whole or part, subject to prior approval of this Court being obtained before any material refinancing,

all of the foregoing to permit the Applicants to proceed with an orderly restructuring of the Business (the “**Restructuring**”).

12. The Applicants shall provide each of the relevant landlords with notice of the Applicants’ intention to remove any fixtures from any leased premises at least seven (7) days prior to the date of the intended removal. The relevant landlord shall be entitled to have a representative present in the leased premises to observe such removal. If the landlord disputes the Applicants’ entitlement to remove any such fixture under the provisions of the lease, such fixture shall remain on the premises and shall be dealt with as agreed between any applicable secured creditors, such landlord and the Applicants, or by further order of this Court upon application by the Applicants on at least two (2) days’

notice to such landlord and any such secured creditors. If the Applicants disclaim or resiliate the lease governing such leased premises in accordance with section 32 of the CCAA, they shall not be required to pay Rent under such lease pending resolution of any such dispute other than Rent payable for the notice period provided for in section 32(5) of the CCAA, and the disclaimer or resiliation of the lease shall be without prejudice to the Applicants' claim to the fixtures in dispute.

13. If a notice of disclaimer or resiliation is delivered pursuant to section 32 of the CCAA, then:

(a) during the notice period prior to the effective time of the disclaimer or resiliation, the landlord may show the affected leased premises to prospective tenants during normal business hours, on giving the Applicants and the Monitor 24 hours' prior written notice; and

(b) at the effective time of the disclaimer or resiliation, the relevant landlord shall be entitled to take possession of any such leased premises without waiver of or prejudice to any claims or rights such landlord may have against the Applicants in respect of such lease or leased premises and such landlord shall be entitled to notify the Applicants of the basis on which it is taking possession and to gain possession of and re-lease such leased premises to any third party or parties on such terms as such landlord considers advisable, provided that nothing herein shall relieve such landlord of its obligation to mitigate any damages claimed in connection therewith.

NO PROCEEDINGS AGAINST THE APPLICANTS OR THE PROPERTY

14. Subject to paragraph 15A hereof, until and including April 29, 2023, or such later date as this Court may order (the "**Stay Period**"), no proceeding or enforcement process in any court (each, a "**Proceeding**") shall be commenced or continued against or in respect of the Applicants or the Monitor, or affecting the Business or the Property, except with leave of this Court, and any and all Proceedings currently under way against or in respect of the Applicants or affecting the Business or the Property are hereby stayed and suspended pending further order of this Court.

NO EXERCISE OF RIGHTS OR REMEDIES

15. Subject to paragraph 15A hereof, during the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of

the foregoing, collectively being "**Persons**" and each being a "**Person**"), whether judicial or extra-judicial, statutory or non-statutory against or in respect of the Applicants or the Monitor, or affecting the Business or the Property, are hereby stayed and suspended and shall not be commenced, proceeded with or continued except with leave of this Court, provided that nothing in this Order shall:

(a) empower the Applicants to carry on any business that the Applicants are not lawfully entitled to carry on;

(b) affect such investigations, actions, suits or proceedings by a regulatory body as are permitted by section 11.1 of the CCAA;

(c) prevent the filing of any registration to preserve or perfect a security interest;

(d) prevent the registration of a claim for lien; or

(e) exempt the Applicants from compliance with statutory or regulatory provisions relating to health, safety or the environment.

15A **[NTD: Names of Secured Lenders Who Enter Into Forbearance Agreements With The Applicants Co-Extensive With the SISP and Condomnium Corporations]** , in respect of obligations secured by Condominium Priority Charge or First Charge Encumbrances, shall not be bound by or subject to paragraphs 14 or 15 of this Order.

16. For the sake of clarity, nothing in this Order shall prejudice the right of any condominium corporation creditor of the Applicants who is the holder of a Condominium Priority Charge from applying for a Redemption Order or further seeking the judicial sale of any condominium unit in respect of which the Applicants, or any of them, owe such condominium corporation any outstanding contributions.

17. Nothing in this Order shall prevent any party from taking an action against the Applicants where such an action must be taken in order to comply with statutory time limitations in order to preserve their rights at law, provided that no further steps shall be taken by such party except in accordance with the other provisions of this Order, and notice in writing of such action be given to the Monitor at the first available opportunity.

NO INTERFERENCE WITH RIGHTS

18. During the Stay Period, no person shall accelerate, suspend, discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right,

contract, agreement, licence or permit in favour of or held by the Applicants, except with the written consent of the Applicants and the Monitor, or leave of this Court.

CONTINUATION OF SERVICES

19. During the Stay Period, all persons having:

(a) statutory or regulatory mandates for the supply of goods and/or services; or

(b) oral or written agreements or arrangements with the Applicants, including without limitation all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation, services, utility or other services to the Business or the Applicants

are hereby restrained until further order of this Court from discontinuing, altering, interfering with, suspending or terminating the supply of such goods or services as may be required by the Applicants or exercising any other remedy provided under such agreements or arrangements. The Applicants shall be entitled to the continued use of their current premises, telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the usual prices or charges for all such goods or services received after the date of this Order are paid by the Applicants in accordance with the payment practices of the Applicants, or such other practices as may be agreed upon by the supplier or service provider and each of the Applicants and the Monitor, or as may be ordered by this Court.

NON-DEROGATION OF RIGHTS

20. Nothing in this Order has the effect of prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided on or after the date of this Order, nor shall any person, other than the Interim Lender where applicable, be under any obligation on or after the date of this Order to advance or re-advance any monies or otherwise extend any credit to the Applicants.

PROCEEDINGS AGAINST DIRECTORS AND OFFICERS

21. During the Stay Period, and except as permitted by subsection 11.03(2) of the CCAA and paragraph 16 of this Order, no Proceeding may be commenced or continued against any of the former, current or future directors or officers of the Applicants with respect to any claim against the directors or officers that arose before the date of this Order and

that relates to any obligations of the Applicants whereby the directors or officers are alleged under any law to be liable in their capacity as directors or officers for the payment or performance of such obligations, until a compromise or arrangement in respect of the Applicants, if one is filed, is sanctioned by this Court or is refused by the creditors of the Applicants or this Court.

SECURITY INTERESTS

22. For purposes of this Order, the following terms shall have the following respective meanings:

(a) **"Condominium Priority Charge"** shall mean the statutory priority charge of any condominium corporation, secured against any condominium unit owned by the Applicants in respect of outstanding contributions and in accordance with s. 39.2 of the *Condominium Property Act* RSA, 2000 c. C-22;

(b) "**Encumbrances**" shall mean all security interests, trusts, liens, charges and encumbrances, and claims of secured creditors, statutory or otherwise in favour of any Person;

(c) "**First Charge Ancillary Security**" means any valid consensual Encumbrance (other than a First Charge Mortgage) of the Applicants which has been granted and registered on or prior to the Qualifying First Charge Date in favour of the holder of a First Charge Mortgage against First Charge Real Property in respect of (i) chattels and other tangible personal property specifically related to such First Charge Real Property and (ii) rents, leases, grants, distributions and other amounts directly in respect of such First Charge Real Property;

(d) **"First Charge Encumbrances**" means, collectively, the First Charge Mortgages and the First Charge Ancillary Security;

(e) **"First Charge Mortgages**" shall mean all valid fixed mortgages of specific real property of the Applicants which have been granted and registered against title to such real property prior to the Qualifying First Charge Date as first priority fixed charge mortgages, subject only to any applicable Condominium Priority Charge;

(f) "**First Charge Real Property**" means specific real property against which First Charge Mortgages have been registered;

(g) “**Non-First Charge Encumbrances”** shall mean all Encumbrances other than Condominium Priority Charges and First Charge Mortgages; and

(h) **“Qualifying First Charge Date”** means March 10, 2023.

23. [Intentionally Deleted]

24. [Intentionally Deleted]

APPOINTMENT OF MONITOR

25. **ERNST & YOUNG INC.** is hereby appointed pursuant to the CCAA as the Monitor, an officer of this Court, to monitor the Property, Business, and financial affairs and the Applicants with the powers and obligations set out in the CCAA or set forth herein and that the Applicants and their shareholders, officers, directors, and Assistants shall advise the Monitor of all material steps taken by the Applicants pursuant to this Order, and shall co-operate fully with the Monitor in the exercise of its powers and discharge of its obligations and provide the Monitor with the assistance that is necessary to enable the Monitor to adequately carry out the Monitor’s functions.

26. The Monitor, in addition to its prescribed rights and obligations under the CCAA, is hereby directed and empowered to:

(a) monitor the Applicants’ receipts and disbursements, Business and dealings with the Property;

(b) report to this Court at such times and intervals as the Monitor may deem appropriate with respect to matters relating to the Property, the Business, and such other matters as may be relevant to the proceedings herein and immediately report to the Court if in the opinion of the Monitor there is a material adverse change in the financial circumstances of the Applicants;

(c) assist the Applicants, to the extent required by the Applicants, in their dissemination to the Interim Lender and the holders of Condominium Priority Charges, First Charge Encumbrances and their respective counsel of financial and other information as agreed to between the Applicants, the Interim Lender and such holders of Condominium Priority Charges and First Charge Encumbrances which may be used in these proceedings, including reporting on a basis as reasonably required by the Interim Lender and such holders of Condominium Priority Charges and First Charge Encumbrances;

(d) advise the Applicants in their preparation of the Applicants' cash flow statements and reporting required by the Interim Lender and the holders of Condominium Priority Charges and First Charge Encumbrances, which information shall be reviewed with the Monitor and delivered to the Interim Lender, the holders of Condominium Priority Charges and First Charge Encumbrances and their respective counsel on a periodic basis, as agreed to by the Interim Lender and such holders of Condominium Priority Charges and First Charge Encumbrances;

(e) advise the Applicants in their development of the Plan and any amendments to the Plan;

(f) assist the Applicants, to the extent required by the Applicants, with the holding and administering of creditors' or shareholders' meetings for voting on the Plan;

(g) have full and complete access to the Property, including the premises, books, records, data, including data in electronic form and other financial documents of the Applicants to the extent that is necessary to adequately assess the Property, Business, and financial affairs of the Applicants or to perform their duties arising under this Order;

(h) be at liberty to engage independent legal counsel or such other persons as the Monitor deems necessary or advisable respecting the exercise of its powers and performance of its obligations under this Order;

(i) hold funds in trust or in escrow, to the extent required, to facilitate settlements between the Applicants and any other Person; and

(j) perform such other duties as are required by this Order or by this Court from time to time.

27. The Monitor shall not take possession of the Property and shall take no part whatsoever in the management or supervision of the management of the Business and shall not, by fulfilling its obligations hereunder, or by inadvertence in relation to the due exercise of powers or performance of duties under this Order, be deemed to have taken or maintain possession or control of the Business or Property, or any part thereof. Nothing in this Order shall require the Monitor to occupy or to take control, care, charge, possession or management of any of the Property that might be environmentally contaminated, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation,

enhancement, remediation or rehabilitation of the environment or relating to the disposal or waste or other contamination, provided however that this Order does not exempt the Monitor from any duty to report or make disclosure imposed by applicable environmental legislation or regulation. The Monitor shall not, as a result of this Order or anything done in pursuance of the Monitor's duties and powers under this Order be deemed to be in possession of any of the Property within the meaning of any federal or provincial environmental legislation.

28. The Monitor shall provide any creditor of the Applicants, including the Interim Lender and holders of Condominium Priority Charges and First Charge Mortgages, with information provided by the Applicants in response to reasonable requests for information made in writing by such creditor addressed to the Monitor. The Monitor shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Monitor has been advised by the Applicants is confidential, the Monitor shall not provide such information to creditors unless otherwise directed by this Court or on such terms as the Monitor and the Applicants may agree.

29. In addition to the rights and protections afforded the Monitor under the CCAA or as an Officer of this Court, the Monitor shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Monitor by the CCAA or any applicable legislation.

30. The Monitor, counsel to the Monitor, and counsel to the Applicants shall be paid their reasonable fees and disbursements (including any pre-filing fees and disbursements related to these CCAA proceedings), in each case at their standard rates and charges, by the Applicants as part of the costs of these proceedings. The Applicants are hereby authorized and directed to pay the accounts of the Monitor, counsel for the Monitor and counsel for the Applicants on a bi-weekly basis and, in addition, the Applicants are hereby authorized to pay to the Monitor, counsel to the Monitor, and counsel to the Applicants, retainers in such amounts as may be respectively agreed to by the Applicants (on the one hand) and the Monitor, counsel to the Monitor and counsel to the Applicants (on the other hand)**,** to be held by them as security for payment of their respective fees and disbursements outstanding from time to time.

31. The Monitor and its legal counsel shall pass their accounts from time to time.

32. The Monitor, counsel to the Monitor, if any, and the Applicants' counsel, as security for the payment of their respective professional fees and disbursements incurred both before and after the granting of this Order, shall be entitled to the benefits of and are hereby granted a charge (the "**Administration Charge**") on the Property, which charge shall not exceed an aggregate amount of Five Hundred Thousand ($500,000) Dollars, as security for their professional fees and disbursements incurred at the normal rates and charges of the Monitor and such counsel, both before and after the making of this Order in respect of these proceedings. The Administration Charge shall have the priority set out in paragraph 41 hereof.

INTERIM FINANCING

33. The Applicants are hereby authorized and empowered to obtain and borrow under a credit facility from MGB INVESTMENTS LTD. (the "**Interim Lender**") in order to finance the Applicants' working capital requirements and other general corporate purposes and capital expenditures, provided that borrowings under such credit facility shall not exceed Two Hundred and Fifty Thousand ($250,000) Dollars unless permitted by further order of this Court.

34. Such credit facility shall be on the terms and subject to the conditions set forth in the commitment letter between the Applicants and the Interim Lender dated as of March 27, 2023 (the "**Commitment Letter**"), filed.

35. The Applicants are hereby authorized and empowered to execute and deliver such credit agreements, mortgages, charges, hypothecs, and security documents, guarantees and other definitive documents (collectively, the "**Definitive Documents**"), as are contemplated by the Commitment Letter or as may be reasonably required by the Interim Lender pursuant to the terms thereof, and the Applicants are hereby authorized and directed to pay and perform all of their indebtedness, interest, fees, liabilities, and obligations to the Interim Lender under and pursuant to the Commitment Letter and the Definitive Documents as and when the same become due and are to be performed, notwithstanding any other provision of this Order.

36. The Interim Lender shall be entitled to the benefits of and is hereby granted a charge (the "**Interim Lender's Charge**") on the Property to secure all obligations under the Definitive Documents incurred on or after the date of this Order which charge shall not exceed the aggregate amount advanced on or after the date of this Order under the Definitive Documents. The Interim Lender's Charge shall not secure any obligation

existing before this the date this Order is made. The Interim Lender's Charge shall have the priority set out in paragraph 41 hereof.

37. Notwithstanding any other provision of this Order:

(a) the Interim Lender may take such steps from time to time as it may deem necessary or appropriate to file, register, record or perfect the Interim Lender's Charge or any of the Definitive Documents;

(b) upon the occurrence of an event of default under the Definitive Documents or the Interim Lender's Charge, the Interim Lender, upon seven days notice to all parties on the Service List, may exercise any and all of its rights and remedies against the Applicants or the Property under or pursuant to the Commitment Letter, Definitive Documents, and the Interim Lender's Charge, including without limitation, to cease making advances to the Applicants and set off and/or consolidate any amounts owing by the Interim Lender to the Applicants against the obligations of the Applicants to the Interim Lender under the Commitment Letter, the Definitive Documents or the Interim Lender's Charge, to make demand, accelerate payment, and give other notices, or to apply to this Court for the appointment of a receiver, receiver and manager or interim receiver, or for a bankruptcy order against the Applicants and for the appointment of a trustee in bankruptcy of the Applicants; and

(c) the foregoing rights and remedies of the Interim Lender shall be enforceable against any trustee in bankruptcy, interim receiver, receiver or receiver and manager of the Applicants or the Property.

38. The Interim Lender (with respect to any advances made under the Definitive Documents) and the holders of First Charge Encumbrances (to the extent of the obligations secured thereby) (unless otherwise agreed to in writing by the holders of First Charge Encumbrances) shall be treated as unaffected in any plan of arrangement or compromise filed by the Applicants under the CCAA, or any proposal filed by the Applicants under the *Bankruptcy and Insolvency Act* of Canada (the "**BIA**").

VALIDITY AND PRIORITY OF CHARGES

39. [Intentionally Deleted]

40. The filing, registration or perfection of the Administration Charge or the Interim Lender's Charge (collectively, the "**Charges**") shall not be required, and the Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect.

41. Each of the Administration Charge and the Interim Lender's Charge (all as constituted and defined herein) shall constitute a charge on the Property and subject always to section 34(11) of the CCAA such Charges shall rank in priority to all Encumbrances, save and except for Condominium Priority Charges and First Charge Encumbrances to the extent of the obligations secured thereby. As among the Administration Charge, the Interim Lender's Charge, the Condominium Priority Charges, the First Charge Encumbrances and the Non-First Charge Encumbrances, their respective priorities shall be as follows:

(a) First – The Condominium Priority Charges, in each case to the extent of the obligations secured thereby;

(b) Second – The First Charge Encumbrances, in each case to the extent of the obligations secured thereby;

(c) Third – The Administration Charge (to the maximum amount of $500,000);

(d) Fourth – The Interim Lender's Charge; and

(e) Fifth – The Non-First Charge Encumbrances.

42. Except as otherwise expressly provided for herein, or as may be approved by this Court, the Applicants shall not grant any Encumbrances over any Property that rank in priority to, or *pari passu* with, any of the Administration Charge, the Interim Lender's Charge or the First Charge Encumbrances, unless the Applicants also obtain the prior written consent of the Monitor, the Interim Lender, the beneficiaries of the Administration Charge and the holders of such Condominium Priority Charges, First Charge Encumbrances, or further order of this Court.

43. The Administration Charge, the Commitment Letter, the Definitive Documents and the Interim Lender's Charge shall not be rendered invalid or unenforceable and the rights and remedies of the chargees entitled to the benefit of the Charges (collectively, the

"**Chargees**") and/or the Interim Lender thereunder shall not otherwise be limited or impaired in any way by:

(a) the pendency of these proceedings and the declarations of insolvency made in this Order;

(b) any application(s) for bankruptcy order(s) issued pursuant to BIA, or any bankruptcy order made pursuant to such applications;

(c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA;

(d) the provisions of any federal or provincial statutes; or

(e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an "**Agreement**") that binds the Applicants, and notwithstanding any provision to the contrary in any Agreement:

(i) neither the creation of the Charges nor the execution, delivery, perfection, registration or performance of any documents in respect thereof**,** including the Commitment Letter or the Definitive Documents, shall create or be deemed to constitute a new breach by the Applicants of any Agreement to which they are a party;

(ii) none of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the creation of the Charges, the Applicants entering into the Commitment Letter, or the execution, delivery or performance of the Definitive Documents; and

(iii) the payments made by the Applicants pursuant to this Order, including pursuant to the Commitment Letter, the Definitive Documents or the First Charge Encumbrances, and the granting of the Charges, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct or other challengeable or voidable transactions under any applicable law.

ALLOCATION

44. Any interested Person may apply to this Court on notice to any other party likely to be affected for an order to allocate the Administration Charge and the Interim Lender's Charge amongst the various assets comprising the Property.

SERVICE AND NOTICE

45. The Monitor shall (i) without delay, publish in the *Edmonton Journal* and the *Grande Prairie Daily Herald-Tribune* newspapers a notice containing the information prescribed under the CCAA; (ii) within five (5) days after the date of this Order (A) make this Order publicly available in the manner prescribed under the CCAA, (B) send, in the prescribed manner, a notice to every known creditor who has a claim against the Applicants of more than $1,000 and (C) prepare a list showing the names and addresses of those creditors and the estimated amounts of those claims, and make it publicly available in the prescribed manner, all in accordance with section 23(1)(a) of the CCAA and the regulations made thereunder.

46. This Court further orders that a Case Website shall be established in accordance with the Guide with the following URL: www.ey.com/ca/jwcarr.

GENERAL

47. The Applicants or the Monitor may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

48. Notwithstanding Rule 6.11 of the *Alberta Rules of Court*, unless otherwise ordered by this Court, the Monitor will report to the Court from time to time, which reporting is not required to be in affidavit form and shall be considered by this Court as evidence. The Monitor's reports shall be filed by the Court Clerk notwithstanding that they do not include an original signature.

49. Notwithstanding Rule 6.11(1)(f), The Owners: Condominium Plan No. 872 2944 shall be at liberty the file in this action and rely on the Affidavit of Default, sworn on February 7, 2023 in Court Action No. 2203 18325 and filed in the said action on March 2, 2023.

50. Nothing in this Order shall prevent the Monitor from acting as an interim receiver, a receiver, a receiver and manager or a trustee in bankruptcy of the Applicants, the Business or the Property.

51. This Court hereby requests the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in any foreign jurisdiction, to give effect to this Order and to assist the Applicants, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicants and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Applicants and the Monitor and their respective agents in carrying out the terms of this Order.

52. Each of the Applicants and the Monitor be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order and that the Monitor is authorized and empowered to act as a representative in respect of the within proceeding for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

53. Any interested party (including the Applicants and the Monitor) may apply to this Court to vary or amend this Order on not less than seven (7) days' notice to any other party or parties likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

54. This Order and all of its provisions are effective as of 12:01 a.m. Mountain Standard Time on the date of this Order.

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Justice of the Court of King's Bench of Alberta

SCHEDULE A

CASH FLOWING SECURED DEBT OBLIGATIONS OWED BY THE APPLICANTS TO THE BANK OF NOVA SCOTIA AND SERVUS CREDIT UNION

1. Secured debt owed by Grande Prairie Place Enterprises (1996) Inc. to The Bank of Nova Scotia and/or Servus Credit Union which is secured by First Charge Mortgages more particularly described below (the "**BNS/Servus First Charge Mortgages**") registered against title to the following cash flowing Properties located in Grande Prairie, Alberta:

   (a) Nordic Court (10014 – 99th Street, Grande Prairie, Alberta);

   (b) 214 Place North (9909 – 102 Street, Grande Prairie, Alberta);

   (c) 214 Place South (Second Tower) (10130 – 99 Avenue, Grande Prairie, Alberta);

   (d) O'Brien Place (10131-10135 – 101 Avenue, Grande Prairie, Alberta); and

   (e) Professional Building (9907 – 101 Street, Grande Prairie, Alberta).

2. For greater clarity, the BNS/Servus First Charge Encumbrances comprise a Collateral Mortgage between The Bank of Nova Scotia and Grande Prairie Place Enterprises (1996) Inc. in the amount of $30,000,000 dated June 16, 2017 and Caveat re: Assignment of Rents and Leases between the Bank and Grande Prairie Place Enterprises (1996) Inc. dated June 16, 2017, for the properties legally described as follows:

   PLAN 8315 A.K.
   BLOCK THIRTY FOUR (34)
   LOTS SEVENTEEN (17) AND EIGHTEEN (18) GRANDE PRAIRIE EXCEPTING THEREOUT:
   PART OUT OF LOT SEVENTEEN (17), AS SHOWN ON ROAD PLAN 8220183.
   EXCEPTING THEREOUT ALL MINES AND MINERALS PLAN 8315AK BLOCK 34
   LOTS 19, 20 AND 21
   EXCEPTING THEREOUT ALL MINES AND MINERALS PLAN 7517BP
   BLOCK 1
   LOT 4
   EXCEPTING THEREOUT ALL MINES AND MINERALS PLAN 7517BP
   BLOCK 1
   LOT 5
   EXCEPTING THEREOUT ALL MINES AND MINERALS PLAN

7517BP
BLOCK 1
LOTS 6 AND 7
EXCEPTING THEREOUT ALL MINES AND MINERALS PLAN 7517BP
BLOCK 1
LOTS 16 AND 17
EXCEPTING THEREOUT ALL MINES AND MINERALS PLAN 8315AK

BLOCK THIRTY FOUR (34)
LOTS TWENTY TWO (22), TWENTY THREE (23) AND TWENTY FOUR (24) EXCEPTING THEREOUT:
A PORTION OF SAID LOT TWENTY FOUR
(24) FOR ROAD AS SHOWN ON ROAD PLAN 1888RS EXCEPTING THEREOUT ALL MINES AND MINERAL

PLAN 8315AK

BLOCK THIRTY FIVE (35)

LOTS SEVENTEEN (17) EIGHTEEN (18) AND NINETEEN (19) EXCEPTING THEREOUT: ALL THAT PORTION TAKEN OUT OF LOT SEVENTEEN (17) FOR ROAD, AS SHOWN ON ROAD PLAN 1888RS EXCEPTING THEREOUT ALL MINES AND MINERALS PLAN 8315AK
BLOCK 35

LOT 20

EXCEPTING THEREOUT ALL MINES AND MINERALS PLAN 8315AK
BLOCK 35

LOTS 21 AND 22

EXCEPTING THEREOUT ALL MINES AND MINERALS PLAN 8315AK
BLOCK 35

LOTS 23 AND 24

EXCEPTING THEREOUT ALL MINES AND MINERALS PLAN 1476BV
BLOCK ONE (1)

LOTS NINETEEN (19) AND TWENTY (20)

EXCEPTING THEREOUT - THE MOST NORTHERLY SIX (6) FEET IN UNIFORM WIDTH THROUGHOUT OF THE SAID LOTS EXCEPTING THEREOUT ALL MINES AND MINERALS PLAN 1476BV
BLOCK 1

LOTS 23 TO 28 INCLUSIVE

EXCEPTING THEREOUT ALL MINES AND MINERALS PLAN 1476BV
BLOCK ONE (1)

LOTS TWENTY NINE (29) AND THIRTY (30) EXCEPTING THEREOUT:
THE WESTERLY TWENTY FIVE (25) FEET THROUGHOUT OF SAID LOT THIRTY (30)
EXCEPTING THEREOUT ALL MINES AND MINERALS PLAN 1410AC
BLOCK FIVE (5)

LOT SIXTEEN (16) AND THE WEST HALF OF LOT FIFTEEN (15)

EXCEPTING THEREOUT : 0.004 HECTARES MORE OR LESS TAKEN FROM LOT FIFTEEN

(15) AND 0.004 HECTARES MORE OR LESS TAKEN FROM LOT SIXTEEN (16)
BOTH UNDER ROAD PLAN 7722557
EXCEPTING THEREOUT ALL MINES AND MINERALPLAN 1410AC BLOCK FIVE (5) LOTS SEVENTEEN (17) AND EIGHTEEN (18)

EXCEPTING THEREOUT : 0.008 HECTARES MORE OR LESS TAKEN OUT OF LOT SEVENTEEN (17) UNDER ROAD PLAN 7722557
EXCEPTING THEREOUT ALL MINES AND MINERALS

SCHEDULE B
CASH FLOWING SECURED DEBT OBLIGATIONS OWED BY THE APPLICANTS TO BANK OF MONTREAL

1. Secured debt owed by Grande Prairie Place Enterprises (1996) Inc. to Bank of Montreal which is secured by a First Charge Mortgage in favour of Bank of Montreal in the amount of $2,880,000 registered on June 5, 2012 (as amended by an Amending Agreement in the amount of $3,771,674 registered on July 23, 2013) against title to the following condominium units in the Inverness Estates condominium project in Grande Prairie, Alberta comprising cash flowing Properties legally described as follows (all within Condominium Plan 0628168:

   (a) Unit 275 (**Title no.:** 122 174 562 +2)

   (b) Unit 287 (**Title no.:** 122 174 562 +3)

   (c) Unit 345 (*Parking unit*) (**Title no.:** 122 174 562 +4)

   (d) Unit 351 (*Parking unit*) (**Title no.:** 122 174 562 +5)

   (e) Unit 388 (**Title no.:** 122 174 562 +10)

   (f) Unit 390 (**Title no.:** 122 174 562 +12)

   (g) Unit 391 (**Title no.:** 122 174 562 +13)

   (h) Unit 395 (**Title no.:** 122 174 562 +14)

   (i) Unit 411 (**Title no.:** 122 174 562 +16)

   (j) Unit 412 (**Title no.:** 122 174 562 +17)

   (k) Unit 413 (**Title no.:** 122 174 562 +18)

   (l) Unit 423 (**Title no.:** 122 174 562 +19)

   (m) Unit 430 (**Title no.:** 122 174 562 +20)

   (n) Unit 436 (**Title no.:** 122 174 562 +22)

   (o) Unit 446 (**Title no.:** 122 174 562 +23)

   (p) Unit 457 (**Title no.:** 122 174 562 +24)

(q) Unit 459 (**Title no.:** 122 174 562 +24)

(r) Unit 471 (*Parking unit*) (**Title no.:** 122 174 562 +26)

(s) Unit 483 (*Parking unit*) (**Title no.:** 122 174 562 +28)

(t) Unit 494 (*Parking unit*) (**Title no.:** 122 174 562 +30)

(u) Unit 499 (*Parking unit*) (**Title no.:** 122 174 562 +31)

(v) Unit 511 (*Parking unit*) (**Title no.:** 122 174 562 +33)

(w) Unit 514 (*Parking unit*) (**Title no.:** 122 174 562 +34)

(x) Unit 519 (*Parking unit*) (**Title no.:** 122 174 562 +35)

(y) Unit 526 (*Parking unit*) (**Title no.:** 122 174 562 +36)

(z) Unit 528 (*Parking unit*) (**Title no.:** 122 174 562 +37)

(aa) Unit 544 (*Parking unit*) (**Title no.:** 122 174 562 +38)

(bb) Unit 546 (*Parking unit*) (**Title no.:** 122 174 562 +39)

(cc) Unit 553 (*Parking unit*) (**Title no.:** 122 174 562 +40)

(dd) Unit 565 (*Parking unit*) (**Title no.:** 122 174 562 +41)

(ee) Unit 577 (*Parking unit*) (**Title no.:** 122 174 562 +46)

(ff) Unit 584 (*Parking unit*) (**Title no.:** 122 174 562 +47)

(gg) Unit 594 (*Parking unit*) (**Title no.:** 122 174 562 +49)

(hh) Unit 606 (*Parking unit*) **Title no.:** 122 174 562 +50)

SCHEDULE C
CASH FLOWING SECURED DEBT OBLIGATIONS OWED BY THE APPLICANTS TO ROYNAT INC.

1. Secured debt owed by 272649 Alberta Ltd. to Roynat Inc. which is secured by the following First Charge Mortgages registered against title to that cash flowing Property described as the Clarient Building and located at 9602 – 118 Street in Grande Prairie, Alberta:

   (a) Mortgage dated November 8, 2019, in the principal amount of $2,774,400 over Plan 1523374, Block 7, Lot 3 (Grande Prairie, Alberta)

   (b) Mortgage dated March 26, 2020 in the principal amount of $13,179,250 over, *inter alia,* Plan 1523374, Block 7, Lot 3 (Grande Prairie, Alberta); and

   (c) Mortgage dated April 23, 2021 in the principal amount of $250,000 over Plan 1523374, Block 7, Lot 3 (Grande Prairie, Alberta).

SCHEDULE D

CASH FLOWING SECURED DEBT OBLIGATIONS OWED BY THE APPLICANTS TO THE OWNERS: CONDOMINIUM PLAN NO. 872 2944 AND CANADIAN WESTERN BANK

1. Secured debt owed by 272649 Alberta Ltd. to Canadian Western Bank which is secured by the following First Charge Mortgages registered against title to the following cash flowing Properties located in Grande Prairie, Alberta:

   (a) Memorandum of Mortgage in the principal amount of $2,200,000 dated April 7, 2016 and registered against title to the Iron Nation Building located at 9502 – 117th Street West in the Centre West Business Park, Grande Prairie, Alberta and legally described as Plan 0625015, Block 3, Lot 3: and

   (b) Mortgage in the principal amount of $1,750,000 dated December 6, 2017 and registered against title to the Tundra Process Solutions Ltd. Office and Shop Building located at 11517 – 89th Avenue in the Richmond Industrial Park, Grande Prairie, Alberta and legally described as Plan 8020127, Block 17, Lot 1.

2. Secured debt owed by J.W. Carr Holdings Ltd. to The Owners: Condominium Plan No. 872 2944 which is secured by Condominium Priority Charge registered against title to the following condominium units in the Central Park condominium project in Edmonton, Alberta comprising cash flowing Properties legally described as follows (all within Condominium Plan 8722944): Units 6, 7, 9, 10, 13, 18, 19, 22, 23, 24, 25, 29, 30, 45, 63, 66, 69, 72, 73, 79, 85, 97, and 99.

3. Secured debt owed by J.W. Carr Holdings Ltd. to Canadian Western Bank which is secured by that First Charge Mortgage in the principal amount of $3,684,200 dated February 6, 2008 which is registered against title to the following condominium units in the Central Park condominium project in Edmonton, Alberta comprising cash flowing Properties legally described as follows (all within Condominium Plan 8722944): Units 6, 7, 9, 10, 13, 18, 19, 22, 23, 24, 25, 29, 30, 45, 63, 66, 69, 72, 73, 79, 85, 97, and 99.

SCHEDULE E

CASH FLOWING SECURED DEBT OBLIGATIONS OWED BY THE APPLICANTS TO ATB FINANCIAL

1. Secured debt owed by 272649 Alberta Ltd. to ATB Financial which is secured by the following First Charge Mortgages registered against title to that cash flowing Property described as the Ovintiv Building (formerly known as the Encana Building) and located at 12002 – 97 Avenue in Grande Prairie, Alberta:

   (a) Collateral Mortgage in the amount of $7,500,000.00 dated April 30, 2013 over lands legally described as follows:

   PLAN 1124406
   BLOCK 2
   LOT 7
   EXPECTING THEREOUT ALL MINES AND MINERALS AREA:
   0.785 HECTARES (1.94 ACRES) MORE OR LESS

   (b) Collateral Mortgage from Debtor in the amount of $4,297,000.00 dated August 27, 2018 over lands legally described as follows:

   PLAN 1124406
   BLOCK 2
   LOT 7
   EXPECTING THEREOUT ALL MINES AND MINERALS AREA:
   0.785 HECTARES (1.94 ACRES) MORE OR LESS

SCHEDULE F – CASH FLOWING SECURED DEBT OBLIGATIONS OWED BY THE APPLICANTS TO SERVUS CREDIT UNION

1. Secured debt owed by 672612 Alberta Ltd. to Servus Credit Union which is secured by that First Charge Mortgage in the principal amount of $2,360,000 dated January 15, 2014 which is registered against title to the following condominium units in the Rosedale condominium project in Edmonton, Alberta comprising cash flowing Properties legally described as follows:

CONDOMINIUM PLAN 8321571
UNIT 2
AND 112 UNDIVIDED ONE TEN THOUSANDTH SHARES IN THE COMMON PROPERTY EXCEPTING THEREOUT ALL MINES AND MINERALS

CONDOMINIUM PLAN 8321571
UNIT 17
AND 118 UNDIVIDED ONE TEN THOUSANDTH SHARES IN THE COMMON PROPERTY EXCEPTING THEREOUT ALL MINES AND MINERALS

CONDOMINIUM PLAN 8321571
UNIT 20
AND 84 UNDIVIDED ONE TEN THOUSANDTH SHARES IN THE COMMON PROPERTY EXCEPTING THEREOUT ALL MINES AND MINERALS

CONDOMINIUM PLAN 8321571
UNIT 33
AND 119 UNDIVIDED ONE TEN THOUSANDTH SHARES IN THE COMMON PROPERTY EXCEPTING THEREOUT ALL MINES AND MINERALS

CONDOMINIUM PLAN 8321571
UNIT 35
AND 86 UNDIVIDED ONE TEN THOUSANDTH SHARES IN THE COMMON PROPERTY EXCEPTING THEREOUT ALL MINES AND MINERALS

CONDOMINIUM PLAN 8321571
UNIT 43
AND 86 UNDIVIDED ONE TEN THOUSANDTH SHARES IN THE

COMMON PROPERTY EXCEPTING THEREOUT ALL MINES AND MINERALS

CONDOMINIUM PLAN 8321571
UNIT 50
AND 114 UNDIVIDED ONE TEN THOUSANDTH SHARES IN THE COMMON PROPERTY EXCEPTING THEREOUT ALL MINES AND MINERALS

CONDOMINIUM PLAN 8321571
UNIT 58
AND 114 UNDIVIDED ONE TEN THOUSANDTH SHARES IN THE COMMON PROPERTY EXCEPTING THEREOUT ALL MINES AND MINERALS

CONDOMINIUM PLAN 8321571
UNIT 59
AND 86 UNDIVIDED ONE TEN THOUSANDTH SHARES IN THE COMMON PROPERTY EXCEPTING THEREOUT ALL MINES AND MINERALS

CONDOMINIUM PLAN 8321571
UNIT 64
AND 86 UNDIVIDED ONE TEN THOUSANDTH SHARES IN THE COMMON PROPERTY EXCEPTING THEREOUT ALL MINES AND MINERALS

CONDOMINIUM PLAN 8321571
UNIT 70
AND 116 UNDIVIDED ONE TEN THOUSANDTH SHARES IN THE COMMON PROPERTY EXCEPTING THEREOUT ALL MINES AND MINERALS

CONDOMINIUM PLAN 8321571
UNIT 81
AND 121 UNDIVIDED ONE TEN THOUSANDTH SHARES IN THE COMMON PROPERTY EXCEPTING THEREOUT ALL MINES AND MINERALS

CONDOMINIUM PLAN 8321571
UNIT 88

AND 87 UNDIVIDED ONE TEN THOUSANDTH SHARES IN THE COMMON PROPERTY EXCEPTING THEREOUT ALL MINES AND MINERALS

CONDOMINIUM PLAN 8321571
UNIT 94
AND 117 UNDIVIDED ONE TEN THOUSANDTH SHARES IN THE COMMON PROPERTY EXCEPTING THEREOUT ALL MINES AND MINERALS

CONDOMINIUM PLAN 8321571
UNIT 96
AND 89 UNDIVIDED ONE TEN THOUSANDTH SHARES IN THE COMMON PROPERTY EXCEPTING THEREOUT ALL MINES AND MINERALS

2. Secured debt owed by 672612 Alberta Ltd. to Servus Credit Union which is secured by that First Charge Mortgage in the principal amount of $640,000 which is registered against title to the apartment buildings located at 9919 and 9939 – 96 Avenue in Grande Prairie, Alberta comprising cash flowing Properties legally described as follows:

Plan 1936MC
Block 12
Lots 18 – 20

SCHEDULE "B" – BLACKLINE COPY OF REVISED INITIAL ORDER

Clerk's Stamp:

COURT FILE NUMBER	
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE OF	EDMONTON
	IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, as amended AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF J.W. CARR HOLDINGS LTD., SPRUCE GROVE INDUSTRIAL PARK INC., 272649 ALBERTA LTD., 279896 ALBERTA LTD., GRANDE PRAIRIE PLACE ENTERPRISES (1996) INC., 1170292 ALBERTA LTD. and 627612 ALBERTA LTD.
APPLICANTS:	J.W. CARR HOLDINGS LTD., SPRUCE GROVE INDUSTRIAL PARK INC., 272649 ALBERTA LTD., 279896 ALBERTA LTD., GRANDE PRAIRIE PLACE ENTERPRISES (1996) INC., 1170292 ALBERTA LTD. and 627612 ALBERTA LTD.
DOCUMENT	**CCAA INITIAL ORDER**
CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT:	**MLT AIKINS LLP** Suite 2200, 10135 – 101st Street NW Edmonton, AB T5J 3G1 Solicitor: Jeffrey M. Lee, K.C. Telephone: (306) 975-7136 Facsimile: (306) 975-7145 Email: jmlee@mltaikins.com File Number: 159371.8
DATE ON WHICH ORDER WAS PRONOUNCED:	April 19, 2023
NAME OF JUDGE WHO MADE THIS ORDER:	The Honourable Justice J.J. Gill
LOCATION OF HEARING:	Edmonton, Alberta

UPON the application of **J.W. CARR HOLDINGS LTD., SPRUCE GROVE INDUSTRIAL PARK INC., 272649 ALBERTA LTD., 279896 ALBERTA LTD., GRANDE PRAIRIE PLACE ENTERPRISES (1996) INC., 1170292 ALBERTA LTD. and 627612 ALBERTA LTD.** (collectively, the "**Applicants**"); **AND UPON** having read the Originating Application dated April 10, 2023; the Affidavit of Marjorie Carr sworn on April 10, 2023 (the "**Carr Affidavit**"); the Service List dated April 10, 2023 (the "**Service List**") and the Affidavit of Service, filed; **AND UPON** reading the consent of Ernst & Young Inc. to act as Monitor; **AND UPON** being advised that the secured creditors who are likely to be affected by the charges created herein have been provided notice of this application; **AND UPON** hearing counsel for the Applicants; **AND UPON** reading the Pre-Filling Report of the Proposed Monitor, Ernst & Young Inc. dated April 10, 2023; **IT IS HEREBY ORDERED AND DECLARED THAT**:

SERVICE

1. The time for service of the notice of application for this order (the "**Order**") is hereby abridged and deemed good and sufficient and this application is properly returnable today.

APPLICATION

2. The Applicants are companies to which the *Companies' Creditors Arrangement Act* of Canada (the "**CCAA**") applies.

PLAN OF ARRANGEMENT

3. The Applicants shall have the authority to file and may, subject to further order of this Court, file with this Court a plan of compromise or arrangement (the "**Plan**").

POSSESSION OF PROPERTY AND OPERATIONS

4. The Applicants shall:

   (a) remain in possession and control of their current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (the "**Property**");

   (b) subject to further order of this Court, continue to carry on business in a manner consistent with the preservation of their business (the "**Business**") and Property;

(c) be authorized and empowered to continue to retain and employ the employees, consultants, agents, experts, accountants, counsel and such other persons (collectively "**Assistants**") currently retained or employed by them, with liberty to retain such further Assistants as they deem reasonably necessary or desirable in the ordinary course of business or for the carrying out of the terms of this Order; and

(d) be entitled to continue to utilize the central cash management system currently in place as described in the Affidavit of Marjorie Carr sworn on April 10, 2023 or replace it with another substantially similar central cash management system (the "**Cash Management System**") and that any present or future bank providing the Cash Management System shall not be under any obligation whatsoever to inquire into the propriety, validity or legality of any transfer, payment, collection or other action taken under the Cash Management System, or as to the use or application by the Applicants of funds transferred, paid, collected or otherwise dealt with in the Cash Management System, shall be entitled to provide the Cash Management System without any liability in respect thereof to any Person (as hereinafter defined) other than the Applicants, pursuant to the terms of the documentation applicable to the Cash Management System, and shall be, in its capacity as provider of the Cash Management System, an unaffected creditor under the Plan with regard to any claims or expenses it may suffer or incur in connection with the provision of the Cash Management System.

5. To the extent permitted by law, the Applicants shall be entitled but not required to make the following advances or payments of the following expenses, incurred prior to or after this Order:

(a) all outstanding and future wages, salaries, employee and pension benefits, vacation pay and expenses payable on or after the date of this Order, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements; and

(b) the reasonable fees and disbursements of any Assistants retained or employed by the Applicants in respect of these proceedings, at their standard rates and charges, including for periods prior to the date of this Order.

6. Except as otherwise provided to the contrary herein, the Applicants shall be entitled but not required to pay all reasonable expenses incurred by the Applicants in carrying on the

Business in the ordinary course after this Order, and in carrying out the provisions of this Order, which expenses shall include, without limitation:

(a) all expenses and capital expenditures reasonably necessary for the preservation of the Property or the Business including, without limitation, payments on account of ongoing condominium contributions (as applicable), insurance (including directors and officers insurance), maintenance and security services; and

(b) payment for goods or services actually supplied to the Applicants following the date of this Order.

7. The Applicants shall remit, in accordance with legal requirements, or pay:

(a) any statutory deemed trust amounts in favour of the Crown in Right of Canada or of any Province thereof or any other taxation authority that are required to be deducted from employees' wages, including, without limitation, amounts in respect of:

(i) employment insurance,

(ii) Canada Pension Plan,

(iii) Quebec Pension Plan, and

(iv) income taxes,

but only where such statutory deemed trust amounts arise after the date of this Order, or are not required to be remitted until after the date of this Order, unless otherwise ordered by the Court;

(b) all goods and services or other applicable sales taxes (collectively, "**Sales Taxes**") required to be remitted by the Applicants in connection with the sale of goods and services by the Applicants, but only where such Sales Taxes are accrued or collected after the date of this Order, or where such Sales Taxes were accrued or collected prior to the date of this Order but not required to be remitted until on or after the date of this Order;

(c) any amount payable to: (i) the Crown in Right of Canada or of any Province thereof or any political subdivision thereof; or (ii) unless otherwise agreed in writing by the holders of a Condominium Priority Charge (if applicable) and First

Charge Encumbrances in respect of related First Charge Real Property (each as hereinafter defined) any other taxation authority ~~in respect of~~(which, for the purposes of this Order shall include condominium corporations) in respect of condominium contributions, municipal realty, municipal business or other taxes, assessments or levies of any nature or kind which are entitled at law to be paid in priority to claims of secured creditors and that are attributable to or in respect of the carrying on of the Business by the Applicants (such condominium contributions, municipal realty, municipal business or other taxes, assessments or levies of any nature or kind hereinafter described as "**~~Municipal~~ Property ~~Taxes~~Levies**") which accrue from and after the date of this Order. For greater clarity, the Applicants shall be ~~entitled but not~~ required to pay arrears of ~~Municipal~~ Property ~~Taxes~~Levies accrued prior to the date of this Order, to the extent that cash flow of the Applicants permits; and

(d) unless otherwise agreed in writing by the holders of a Condominium Priority Charge (if applicable) and First Charge Encumbrances in respect of related First Charge Real Property (each as hereinafter defined), principal and interest payments ("**Cash Flowing P & I Payments**") which become due from and after the date of this Order on those secured debt obligations of the Applicants secured by First Charge Encumbrances on real estate properties and related personal property owned by the Applicants which generate cash flow sufficient to pay such Cash Flowing P & I Payments ("**Cash Flowing Secured Debt Obligations**"), as such Cash Flowing Secured Debt Obligations are more particularly described in:

(i) **Schedule A** hereto (in regard to Cash Flowing Secured Debt Obligations owed by the Applicants to The Bank of Nova Scotia and Servus Credit Union);

(ii) **Schedule B** hereto (in regard to Cash Flowing Secured Debt Obligations owed by the Applicants to Bank of Montreal);

(iii) **Schedule C** hereto (in regard to Cash Flowing Secured Debt Obligations owed by the Applicants to Roynat Inc.);

(iv) **Schedule D** hereto (in regard to Cash Flowing Secured Debt Obligations owed by the Applicants to The Owners: Condominium Plan No. 872 2944 and Canadian Western Bank);

(v) **Schedule E** hereto (in regard to Cash Flowing Secured Debt Obligations owed by the Applicants to ATB Financial); and

(vi) **Schedule F** hereto (in regard to Cash Flowing Secured Debt Obligations owed by the Applicants to Servus Credit Union).

For greater clarity, the holders of a Condominium Priority Charge (if applicable) and First Charge Encumbrances described in this paragraph shall receive payment of such Cash Flowing P & I Payments as the cash flow generated by the real estate properties and related personal property to the extent of the obligations secured by such Condominium Priority Charge (if applicable) and First Charge Encumbrances described in this paragraph will allow (regardless of whether or not such cash flow in any given month is adequate to make such Cash Flowing P & I Payments in full).

8. Nothing herein shall waive or prejudice the right of any condominium corporation who is the holder of a Condominium Priority Charge to garnish any rental income owing to any of the Applicants in respect of a condominium unit owned by any of them in accordance with the condominium corporation's power to do so pursuant to s. 39.2(4) of the *Condominium Property Act,* RSA 2000, c. C-22.

~~8.~~9. Until such time as a real property lease is disclaimed or resiliated in accordance with the CCAA, the Applicants may pay all amounts constituting rent or payable as rent under real property leases (including, for greater certainty, common area maintenance charges, utilities and realty taxes and any other amounts payable as rent to the landlord under the lease) based on the terms of existing lease arrangements or as otherwise may be negotiated by the Applicants from time to time for the period commencing from and including the date of this Order ("**Rent**"), but shall not pay any rent in arrears.

~~9.~~10. Except as specifically permitted in this Order, the Applicants are hereby directed, until further order of this Court:

(a) to make no payments of principal, interest thereon or otherwise on account of amounts owing by the Applicants to any of their creditors as of the date of this Order;

(b) to grant no security interests, trust, liens, charges or encumbrances upon or in respect of any of their Property; and

(c) not to grant credit or incur liabilities except in the ordinary course of the Business.

RESTRUCTURING

~~10.~~11. The Applicants shall, subject to such requirements as are imposed by the CCAA and such covenants as may be contained in the Definitive Documents (as hereinafter defined in paragraph 35 hereof), have the right to:

(a) permanently or temporarily cease, downsize or shut down any portion of their business or operations and to dispose of redundant or non-material assets not exceeding $100,000 in any one transaction or $500,000 in the aggregate, provided that any sale that is either in excess of the above thresholds, or (ii) in favour of a person related to the Applicants (within the meaning of section 36(5) of the CCAA), shall require authorization by this Court in accordance with section 36 of the CCAA;

(b) notwithstanding subparagraph (a) hereof, the Applicants shall have the right to sell any residential condominium unit owned by them to satisfy any debt owing by the Applicants, or any of them, to a condominium corporation that holds a Condominium Priority Charge in respect of outstanding contributions;

~~(b)~~(c) terminate the employment of such of their employees or temporarily lay off such of their employees as they deem appropriate on such terms as may be agreed upon between the Applicants and such employee, or failing such agreement, to deal with the consequences thereof in the Plan;

~~(c)~~(d) disclaim or resiliate, in whole or in part, with the prior consent of the Monitor (as defined below) or further Order of the Court, their arrangements or agreements of any nature whatsoever with whomsoever, whether oral or written, as the Applicants deem appropriate, in accordance with section 32 of the CCAA; and

~~(d)~~(e) pursue all avenues of refinancing of their Business or Property, in whole or part, subject to prior approval of this Court being obtained before any material refinancing,

all of the foregoing to permit the Applicants to proceed with an orderly restructuring of the Business (the “**Restructuring**”).

~~11.~~12. The Applicants shall provide each of the relevant landlords with notice of the Applicants’ intention to remove any fixtures from any leased premises at least seven (7) days prior to the date of the intended removal. The relevant landlord shall be entitled to have a representative present in the leased premises to observe such removal. If the landlord disputes the Applicants' entitlement to remove any such fixture under the provisions of the lease, such fixture shall remain on the premises and shall be dealt with as agreed between any applicable secured creditors, such landlord and the Applicants, or by further order of this Court upon application by the Applicants on at least two (2) days' notice to such landlord and any such secured creditors. If the Applicants disclaim or resiliate the lease governing such leased premises in accordance with section 32 of the CCAA, they shall not be required to pay Rent under such lease pending resolution of any such dispute other than Rent payable for the notice period provided for in section 32(5) of the CCAA, and the disclaimer or resiliation of the lease shall be without prejudice to the Applicants' claim to the fixtures in dispute.

~~12.~~13. If a notice of disclaimer or resiliation is delivered pursuant to section 32 of the CCAA, then:

(a) during the notice period prior to the effective time of the disclaimer or resiliation, the landlord may show the affected leased premises to prospective tenants during normal business hours, on giving the Applicants and the Monitor 24 hours' prior written notice; and

(b) at the effective time of the disclaimer or resiliation, the relevant landlord shall be entitled to take possession of any such leased premises without waiver of or prejudice to any claims or rights such landlord may have against the Applicants in respect of such lease or leased premises and such landlord shall be entitled to notify the Applicants of the basis on which it is taking possession and to gain possession of and re-lease such leased premises to any third party or parties on such terms as such landlord considers advisable, provided that nothing herein shall relieve such landlord of its obligation to mitigate any damages claimed in connection therewith.

NO PROCEEDINGS AGAINST THE APPLICANTS OR THE PROPERTY

~~13.~~14. Subject to paragraph 15A hereof, until and including April 29, 2023, or such later date as this Court may order (the "**Stay Period**"), no proceeding or enforcement process in any court (each, a "**Proceeding**") shall be commenced or continued against or in respect of the Applicants or the Monitor, or affecting the Business or the Property, except with leave of this Court, and any and all Proceedings currently under way against or in respect of the Applicants or affecting the Business or the Property are hereby stayed and suspended pending further order of this Court.

NO EXERCISE OF RIGHTS OR REMEDIES

~~14.~~15. Subject to paragraph 15A hereof, during the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "**Persons**" and each being a "**Person**"), whether judicial or extra-judicial, statutory or non-statutory against or in respect of the Applicants or the Monitor, or affecting the Business or the Property, are hereby stayed and suspended and shall not be commenced, proceeded with or continued except with leave of this Court, provided that nothing in this Order shall:

(a) empower the Applicants to carry on any business that the Applicants are not lawfully entitled to carry on;

(b) affect such investigations, actions, suits or proceedings by a regulatory body as are permitted by section 11.1 of the CCAA;

(c) prevent the filing of any registration to preserve or perfect a security interest;

(d) prevent the registration of a claim for lien; or

(e) exempt the Applicants from compliance with statutory or regulatory provisions relating to health, safety or the environment.

~~14A~~15A **[NTD: Names of Secured Lenders Who Enter Into Forbearance Agreements With The Applicants Co-Extensive With the SISP and Condomnium Corporations]** , in respect of obligations secured by Condominium Priority Charge or First Charge Encumbrances, shall not be bound by or subject to paragraphs 14 or 15 of this Order.

16. For the sake of clarity, nothing in this Order shall prejudice the right of any condominium corporation creditor of the Applicants who is the holder of a Condominium Priority Charge from applying for a Redemption Order or further seeking the judicial sale of any condominium unit in respect of which the Applicants, or any of them, owe such condominium corporation any outstanding contributions.

~~15.~~17. Nothing in this Order shall prevent any party from taking an action against the Applicants where such an action must be taken in order to comply with statutory time limitations in order to preserve their rights at law, provided that no further steps shall be taken by such party except in accordance with the other provisions of this Order, and notice in writing of such action be given to the Monitor at the first available opportunity.

NO INTERFERENCE WITH RIGHTS

~~16.~~18. During the Stay Period, no person shall accelerate, suspend, discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Applicants, except with the written consent of the Applicants and the Monitor, or leave of this Court.

CONTINUATION OF SERVICES

~~17.~~19. During the Stay Period, all persons having:

(a) statutory or regulatory mandates for the supply of goods and/or services; or

(b) oral or written agreements or arrangements with the Applicants, including without limitation all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation, services, utility or other services to the Business or the Applicants

are hereby restrained until further order of this Court from discontinuing, altering, interfering with, suspending or terminating the supply of such goods or services as may be required by the Applicants or exercising any other remedy provided under such agreements or arrangements. The Applicants shall be entitled to the continued use of their current premises, telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the usual prices or charges for all such goods or services received after the date of this Order are paid by the Applicants in accordance with the payment practices of the Applicants, or such other practices as may be agreed upon by the supplier or service provider and each of the Applicants and the Monitor, or as may be ordered by this Court.

NON-DEROGATION OF RIGHTS

~~18.~~20. Nothing in this Order has the effect of prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided on or after the date of this Order, nor shall any person, other than the Interim Lender where applicable, be under any obligation on or after the date of this Order to advance or re-advance any monies or otherwise extend any credit to the Applicants.

PROCEEDINGS AGAINST DIRECTORS AND OFFICERS

~~19.~~21. During the Stay Period, and except as permitted by subsection 11.03(2) of the CCAA and paragraph 16 of this Order, no Proceeding may be commenced or continued against any of the former, current or future directors or officers of the Applicants with respect to any claim against the directors or officers that arose before the date of this Order and that relates to any obligations of the Applicants whereby the directors or officers are alleged under any law to be liable in their capacity as directors or officers for the payment or performance of such obligations, until a compromise or arrangement in respect of the Applicants, if one is filed, is sanctioned by this Court or is refused by the creditors of the Applicants or this Court.

SECURITY INTERESTS

~~20.~~22. For purposes of this Order, the following terms shall have the following respective meanings:

(a) **"Condominium Priority Charge"** shall mean the statutory priority charge of any condominium corporation, secured against any condominium unit owned by the Applicants in respect of outstanding contributions and in accordance with s. 39.2 of the *Condominium Property Act* RSA, 2000 c. C-22;

~~(a)~~(b) "**Encumbrances**" shall mean all security interests, trusts, liens, charges and encumbrances, and claims of secured creditors, statutory or otherwise in favour of any Person;

~~(b)~~(c) "**First Charge Ancillary Security**" means any valid consensual Encumbrance (other than a First Charge Mortgage) of the Applicants which has been granted and registered on or prior to the Qualifying First Charge Date in favour of the holder of a First Charge Mortgage against First Charge Real Property in respect of (i) chattels and other tangible personal property specifically related to such First Charge Real Property and (ii) rents, leases, grants, distributions and other amounts directly in respect of such First Charge Real Property;

~~(c)~~(d) **"First Charge Encumbrances**" means, collectively, the First Charge Mortgages and the First Charge Ancillary Security;

~~(d)~~(e) **"First Charge Mortgages**" shall mean all valid fixed mortgages of specific real property of the Applicants which have been granted and registered against title to such real property prior to the Qualifying First Charge Date as first priority fixed charge mortgages, subject only to any applicable Condominium Priority Charge;

~~(e)~~(f) "**First Charge Real Property**" means specific real property against which First Charge Mortgages have been registered;

~~(f)~~(g) "**Non-First Charge Encumbrances"** shall mean all Encumbrances other than Condominium Priority Charges and First Charge Mortgages; and

~~(g)~~(h) **"Qualifying First Charge Date"** means March 10, 2023.

~~21.~~23. [Intentionally Deleted]

~~22.~~24. [Intentionally Deleted]

APPOINTMENT OF MONITOR

~~23.~~25. **ERNST & YOUNG INC.** is hereby appointed pursuant to the CCAA as the Monitor, an officer of this Court, to monitor the Property, Business, and financial affairs and the Applicants with the powers and obligations set out in the CCAA or set forth herein and that the Applicants and their shareholders, officers, directors, and Assistants shall advise the Monitor of all material steps taken by the Applicants pursuant to this Order, and shall co-operate fully with the Monitor in the exercise of its powers and discharge of its obligations and provide the Monitor with the assistance that is necessary to enable the Monitor to adequately carry out the Monitor's functions.

~~24.~~26. The Monitor, in addition to its prescribed rights and obligations under the CCAA, is hereby directed and empowered to:

(a) monitor the Applicants' receipts and disbursements, Business and dealings with the Property;

(b) report to this Court at such times and intervals as the Monitor may deem appropriate with respect to matters relating to the Property, the Business, and such other matters as may be relevant to the proceedings herein and immediately report to the Court if in the opinion of the Monitor there is a material adverse change in the financial circumstances of the Applicants;

(c) assist the Applicants, to the extent required by the Applicants, in their dissemination to the Interim Lender and the holders of Condominium Priority Charges, First Charge Encumbrances and their respective counsel of financial and other information as agreed to between the Applicants, the Interim Lender and such holders of Condominium Priority Charges and First Charge Encumbrances which may be used in these proceedings, including reporting on a basis as reasonably required by the Interim Lender and such holders of Condominium Priority Charges and First Charge Encumbrances;

(d) advise the Applicants in their preparation of the Applicants' cash flow statements and reporting required by the Interim Lender and the holders of Condominium Priority Charges and First Charge Encumbrances, which information shall be reviewed with the Monitor and delivered to the Interim Lender, the holders of Condominium Priority Charges and First Charge Encumbrances and their respective counsel on a periodic basis, as agreed to by the Interim Lender and such holders of Condominium Priority Charges and First Charge Encumbrances;

(e) advise the Applicants in their development of the Plan and any amendments to the Plan;

(f) assist the Applicants, to the extent required by the Applicants, with the holding and administering of creditors' or shareholders' meetings for voting on the Plan;

(g) have full and complete access to the Property, including the premises, books, records, data, including data in electronic form and other financial documents of the Applicants to the extent that is necessary to adequately assess the Property, Business, and financial affairs of the Applicants or to perform their duties arising under this Order;

(h) be at liberty to engage independent legal counsel or such other persons as the Monitor deems necessary or advisable respecting the exercise of its powers and performance of its obligations under this Order;

(i) hold funds in trust or in escrow, to the extent required, to facilitate settlements between the Applicants and any other Person; and

(j) perform such other duties as are required by this Order or by this Court from time to time.

~~25.~~27. The Monitor shall not take possession of the Property and shall take no part whatsoever in the management or supervision of the management of the Business and shall not, by fulfilling its obligations hereunder, or by inadvertence in relation to the due exercise of powers or performance of duties under this Order, be deemed to have taken or maintain possession or control of the Business or Property, or any part thereof. Nothing in this Order shall require the Monitor to occupy or to take control, care, charge, possession or management of any of the Property that might be environmentally contaminated, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal or waste or other contamination, provided however that this Order does not exempt the Monitor from any duty to report or make disclosure imposed by applicable environmental legislation or regulation. The Monitor shall not, as a result of this Order or anything done in pursuance of the Monitor's duties and powers under this Order be deemed to be in possession of any of the Property within the meaning of any federal or provincial environmental legislation.

~~26.~~28. The Monitor shall provide any creditor of the Applicants, including the Interim Lender and holders of Condominium Priority Charges and First Charge Mortgages, with information provided by the Applicants in response to reasonable requests for information made in writing by such creditor addressed to the Monitor. The Monitor shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Monitor has been advised by the Applicants is confidential, the Monitor shall not provide such information to creditors unless otherwise directed by this Court or on such terms as the Monitor and the Applicants may agree.

~~27.~~29. In addition to the rights and protections afforded the Monitor under the CCAA or as an Officer of this Court, the Monitor shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Monitor by the CCAA or any applicable legislation.

~~28.~~30. The Monitor, counsel to the Monitor, and counsel to the Applicants shall be paid their reasonable fees and disbursements (including any pre-filing fees and disbursements related to these CCAA proceedings), in each case at their standard rates and charges, by the Applicants as part of the costs of these proceedings. The Applicants are hereby authorized and directed to pay the accounts of the Monitor, counsel for the Monitor and counsel for the Applicants on a bi-weekly basis and, in addition, the Applicants are hereby authorized to pay to the Monitor, counsel to the Monitor, and counsel to the

Applicants, retainers in such amounts as may be respectively agreed to by the Applicants (on the one hand) and the Monitor, counsel to the Monitor and counsel to the Applicants (on the other hand)**,** to be held by them as security for payment of their respective fees and disbursements outstanding from time to time.

~~29.~~31. The Monitor and its legal counsel shall pass their accounts from time to time.

~~30.~~32. The Monitor, counsel to the Monitor, if any, and the Applicants' counsel, as security for the payment of their respective professional fees and disbursements incurred both before and after the granting of this Order, shall be entitled to the benefits of and are hereby granted a charge (the "**Administration Charge**") on the Property, which charge shall not exceed an aggregate amount of Five Hundred Thousand ($500,000) Dollars, as security for their professional fees and disbursements incurred at the normal rates and charges of the Monitor and such counsel, both before and after the making of this Order in respect of these proceedings. The Administration Charge shall have the priority set out in paragraph 41 hereof.

INTERIM FINANCING

~~31.~~33. The Applicants are hereby authorized and empowered to obtain and borrow under a credit facility from MGB INVESTMENTS LTD. (the "**Interim Lender**") in order to finance the Applicants' working capital requirements and other general corporate purposes and capital expenditures, provided that borrowings under such credit facility shall not exceed Two Hundred and Fifty Thousand ($250,000) Dollars unless permitted by further order of this Court.

~~32.~~34. Such credit facility shall be on the terms and subject to the conditions set forth in the commitment letter between the Applicants and the Interim Lender dated as of March 27, 2023 (the "**Commitment Letter**"), filed.

~~33.~~35. The Applicants are hereby authorized and empowered to execute and deliver such credit agreements, mortgages, charges, hypothecs, and security documents, guarantees and other definitive documents (collectively, the "**Definitive Documents**"), as are contemplated by the Commitment Letter or as may be reasonably required by the Interim Lender pursuant to the terms thereof, and the Applicants are hereby authorized and directed to pay and perform all of their indebtedness, interest, fees, liabilities, and obligations to the Interim Lender under and pursuant to the Commitment Letter and the

Definitive Documents as and when the same become due and are to be performed, notwithstanding any other provision of this Order.

~~34.~~36. The Interim Lender shall be entitled to the benefits of and is hereby granted a charge (the "**Interim Lender's Charge**") on the Property to secure all obligations under the Definitive Documents incurred on or after the date of this Order which charge shall not exceed the aggregate amount advanced on or after the date of this Order under the Definitive Documents. The Interim Lender's Charge shall not secure any obligation existing before this the date this Order is made. The Interim Lender's Charge shall have the priority set out in paragraph 41 hereof.

~~35.~~37. Notwithstanding any other provision of this Order:

(a) the Interim Lender may take such steps from time to time as it may deem necessary or appropriate to file, register, record or perfect the Interim Lender's Charge or any of the Definitive Documents;

(b) upon the occurrence of an event of default under the Definitive Documents or the Interim Lender's Charge, the Interim Lender, upon seven days notice to all parties on the Service List, may exercise any and all of its rights and remedies against the Applicants or the Property under or pursuant to the Commitment Letter, Definitive Documents, and the Interim Lender's Charge, including without limitation, to cease making advances to the Applicants and set off and/or consolidate any amounts owing by the Interim Lender to the Applicants against the obligations of the Applicants to the Interim Lender under the Commitment Letter, the Definitive Documents or the Interim Lender's Charge, to make demand, accelerate payment, and give other notices, or to apply to this Court for the appointment of a receiver, receiver and manager or interim receiver, or for a bankruptcy order against the Applicants and for the appointment of a trustee in bankruptcy of the Applicants; and

(c) the foregoing rights and remedies of the Interim Lender shall be enforceable against any trustee in bankruptcy, interim receiver, receiver or receiver and manager of the Applicants or the Property.

~~36.~~38. The Interim Lender (with respect to any advances made under the Definitive Documents) and the holders of First Charge Encumbrances (to the extent of the obligations secured thereby) (unless otherwise agreed to in writing by the holders of First

Charge Encumbrances) shall be treated as unaffected in any plan of arrangement or compromise filed by the Applicants under the CCAA, or any proposal filed by the Applicants under the *Bankruptcy and Insolvency Act* of Canada (the "**BIA**").

VALIDITY AND PRIORITY OF CHARGES

~~37.~~39. [Intentionally Deleted]

~~38.~~40. The filing, registration or perfection of the Administration Charge or the Interim Lender's Charge (collectively, the "**Charges**") shall not be required, and the Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect.

~~39.~~41. Each of the Administration Charge and the Interim Lender's Charge (all as constituted and defined herein) shall constitute a charge on the Property and subject always to section 34(11) of the CCAA such Charges shall rank in priority to all Encumbrances, save and except for Condominium Priority Charges and First Charge Encumbrances to the extent of the obligations secured thereby. As among the Administration Charge, the Interim Lender's Charge, the Condominium Priority Charges, the First Charge Encumbrances and the Non-First Charge Encumbrances, their respective priorities shall be as follows:

(a) First – The Condominium Priority Charges, in each case to the extent of the obligations secured thereby;

~~(a)~~(b) Second – The First Charge Encumbrances, in each case to the extent of the obligations secured thereby;

~~(b)~~(c) ~~Second~~Third – The Administration Charge (to the maximum amount of $500,000);

~~(c)~~(d) ~~Third~~Fourth – The Interim Lender's Charge; and

~~(d)~~(e) ~~Fourth~~Fifth – The Non-First Charge Encumbrances.

~~40.~~42. Except as otherwise expressly provided for herein, or as may be approved by this Court, the Applicants shall not grant any Encumbrances over any Property that rank in priority to, or *pari passu* with, any of the Administration Charge, the Interim Lender's Charge or the First Charge Encumbrances, unless the Applicants also obtain the prior written consent of the Monitor, the Interim Lender, the beneficiaries of the Administration Charge and the holders of such Condominium Priority Charges, First Charge Encumbrances, or further order of this Court.

~~41.~~43. The Administration Charge, the Commitment Letter, the Definitive Documents and the Interim Lender's Charge shall not be rendered invalid or unenforceable and the rights and remedies of the chargees entitled to the benefit of the Charges (collectively, the "**Chargees**") and/or the Interim Lender thereunder shall not otherwise be limited or impaired in any way by:

(a) the pendency of these proceedings and the declarations of insolvency made in this Order;

(b) any application(s) for bankruptcy order(s) issued pursuant to BIA, or any bankruptcy order made pursuant to such applications;

(c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA;

(d) the provisions of any federal or provincial statutes; or

(e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an "**Agreement**") that binds the Applicants, and notwithstanding any provision to the contrary in any Agreement:

(i) neither the creation of the Charges nor the execution, delivery, perfection, registration or performance of any documents in respect thereof, including the Commitment Letter or the Definitive Documents, shall create or be deemed to constitute a new breach by the Applicants of any Agreement to which they are a party;

(ii) none of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the creation of the Charges, the Applicants entering into the Commitment Letter, or the execution, delivery or performance of the Definitive Documents; and

(iii) the payments made by the Applicants pursuant to this Order, including pursuant to the Commitment Letter, the Definitive Documents or the First Charge Encumbrances, and the granting of the Charges, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct or other challengeable or voidable transactions under any applicable law.

ALLOCATION

~~42.~~44. Any interested Person may apply to this Court on notice to any other party likely to be affected for an order to allocate the Administration Charge and the Interim Lender's Charge amongst the various assets comprising the Property.

SERVICE AND NOTICE

~~43.~~45. The Monitor shall (i) without delay, publish in the *Edmonton Journal* and the *Grande Prairie Daily Herald-Tribune* newspapers a notice containing the information prescribed under the CCAA; (ii) within five (5) days after the date of this Order (A) make this Order publicly available in the manner prescribed under the CCAA, (B) send, in the prescribed manner, a notice to every known creditor who has a claim against the Applicants of more than $1,000 and (C) prepare a list showing the names and addresses of those creditors and the estimated amounts of those claims, and make it publicly available in the prescribed manner, all in accordance with section 23(1)(a) of the CCAA and the regulations made thereunder.

~~44.~~46. This Court further orders that a Case Website shall be established in accordance with the Guide with the following URL: www.ey.com/ca/jwcarr.

GENERAL

~~45.~~47. The Applicants or the Monitor may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

~~46.~~48. Notwithstanding Rule 6.11 of the *Alberta Rules of Court*, unless otherwise ordered by this Court, the Monitor will report to the Court from time to time, which reporting is not required to be in affidavit form and shall be considered by this Court as evidence. The Monitor's reports shall be filed by the Court Clerk notwithstanding that they do not include an original signature.

49. Notwithstanding Rule 6.11(1)(f), The Owners: Condominium Plan No. 872 2944 shall be at liberty the file in this action and rely on the Affidavit of Default, sworn on February 7, 2023 in Court Action No. 2203 18325 and filed in the said action on March 2, 2023.

~~47.~~50. Nothing in this Order shall prevent the Monitor from acting as an interim receiver, a receiver, a receiver and manager or a trustee in bankruptcy of the Applicants, the Business or the Property.

~~48.~~51. This Court hereby requests the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in any foreign jurisdiction, to give effect to this Order and to assist the Applicants, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicants and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Applicants and the Monitor and their respective agents in carrying out the terms of this Order.

~~49.~~52. Each of the Applicants and the Monitor be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order and that the Monitor is authorized and empowered to act as a representative in respect of the within proceeding for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

~~50.~~53. Any interested party (including the Applicants and the Monitor) may apply to this Court to vary or amend this Order on not less than seven (7) days' notice to any other party or parties likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

~~51.~~54. This Order and all of its provisions are effective as of 12:01 a.m. Mountain Standard Time on the date of this Order.

Justice of the Court of King's Bench of Alberta

SCHEDULE G

CASH FLOWING SECURED DEBT OBLIGATIONS OWED BY THE APPLICANTS TO THE BANK OF NOVA SCOTIA AND SERVUS CREDIT UNION

1. Secured debt owed by Grande Prairie Place Enterprises (1996) Inc. to The Bank of Nova Scotia and/or Servus Credit Union which is secured by First Charge Mortgages more particularly described below (the "**BNS/Servus First Charge Mortgages**") registered against title to the following cash flowing Properties located in Grande Prairie, Alberta:

   (a) Nordic Court (10014 – 99th Street, Grande Prairie, Alberta);

   (b) 214 Place North (9909 – 102 Street, Grande Prairie, Alberta);

   (c) 214 Place South (Second Tower) (10130 – 99 Avenue, Grande Prairie, Alberta);

   (d) O'Brien Place (10131-10135 – 101 Avenue, Grande Prairie, Alberta); and

   (e) Professional Building (9907 – 101 Street, Grande Prairie, Alberta).

2. For greater clarity, the BNS/Servus First Charge Encumbrances comprise a Collateral Mortgage between The Bank of Nova Scotia and Grande Prairie Place Enterprises (1996) Inc. in the amount of $30,000,000 dated June 16, 2017 and Caveat re: Assignment of Rents and Leases between the Bank and Grande Prairie Place Enterprises (1996) Inc. dated June 16, 2017, for the properties legally described as follows:

PLAN 8315 A.K.
BLOCK THIRTY FOUR (34)
LOTS SEVENTEEN (17) AND EIGHTEEN (18) GRANDE PRAIRIE EXCEPTING THEREOUT:
PART OUT OF LOT SEVENTEEN (17), AS SHOWN ON ROAD PLAN 8220183.
EXCEPTING THEREOUT ALL MINES AND MINERALS PLAN 8315AK BLOCK 34
LOTS 19, 20 AND 21
EXCEPTING THEREOUT ALL MINES AND MINERALS PLAN 7517BP
BLOCK 1
LOT 4
EXCEPTING THEREOUT ALL MINES AND MINERALS PLAN 7517BP
BLOCK 1
LOT 5
EXCEPTING THEREOUT ALL MINES AND MINERALS PLAN

7517BP
BLOCK 1
LOTS 6 AND 7
EXCEPTING THEREOUT ALL MINES AND MINERALS PLAN
7517BP
BLOCK 1
LOTS 16 AND 17
EXCEPTING THEREOUT ALL MINES AND MINERALS PLAN
8315AK

BLOCK THIRTY FOUR (34)
LOTS TWENTY TWO (22), TWENTY THREE (23) AND TWENTY FOUR (24) EXCEPTING THEREOUT:
A PORTION OF SAID LOT TWENTY FOUR
(24) FOR ROAD AS SHOWN ON ROAD PLAN 1888RS EXCEPTING THEREOUT ALL MINES AND MINERAL

PLAN 8315AK

BLOCK THIRTY FIVE (35)

LOTS SEVENTEEN (17) EIGHTEEN (18) AND NINETEEN (19) EXCEPTING THEREOUT: ALL THAT PORTION TAKEN OUT OF LOT SEVENTEEN (17) FOR ROAD, AS SHOWN ON ROAD PLAN 1888RS EXCEPTING THEREOUT ALL MINES AND MINERALS PLAN 8315AK
BLOCK 35

LOT 20

EXCEPTING THEREOUT ALL MINES AND MINERALS PLAN
8315AK
BLOCK 35

LOTS 21 AND 22

EXCEPTING THEREOUT ALL MINES AND MINERALS PLAN
8315AK
BLOCK 35

LOTS 23 AND 24

EXCEPTING THEREOUT ALL MINES AND MINERALS PLAN
1476BV
BLOCK ONE (1)

LOTS NINETEEN (19) AND TWENTY (20)

EXCEPTING THEREOUT - THE MOST NORTHERLY SIX (6) FEET IN UNIFORM WIDTH THROUGHOUT OF THE SAID LOTS EXCEPTING THEREOUT ALL MINES AND MINERALS PLAN
1476BV
BLOCK 1

LOTS 23 TO 28 INCLUSIVE

EXCEPTING THEREOUT ALL MINES AND MINERALS PLAN 1476BV
BLOCK ONE (1)

LOTS TWENTY NINE (29) AND THIRTY (30) EXCEPTING THEREOUT:
THE WESTERLY TWENTY FIVE (25) FEET THROUGHOUT OF SAID LOT THIRTY (30)
EXCEPTING THEREOUT ALL MINES AND MINERALS PLAN 1410AC
BLOCK FIVE (5)

LOT SIXTEEN (16) AND THE WEST HALF OF LOT FIFTEEN (15)

EXCEPTING THEREOUT : 0.004 HECTARES MORE OR LESS TAKEN FROM LOT FIFTEEN

(15) AND 0.004 HECTARES MORE OR LESS TAKEN FROM LOT SIXTEEN (16)
BOTH UNDER ROAD PLAN 7722557
EXCEPTING THEREOUT ALL MINES AND MINERALPLAN 1410AC BLOCK FIVE (5) LOTS SEVENTEEN (17) AND EIGHTEEN (18)

EXCEPTING THEREOUT : 0.008 HECTARES MORE OR LESS TAKEN OUT OF LOT SEVENTEEN (17) UNDER ROAD PLAN 7722557
EXCEPTING THEREOUT ALL MINES AND MINERALS

SCHEDULE H

CASH FLOWING SECURED DEBT OBLIGATIONS OWED BY THE APPLICANTS TO BANK OF MONTREAL

1. Secured debt owed by Grande Prairie Place Enterprises (1996) Inc. to Bank of Montreal which is secured by a First Charge Mortgage in favour of Bank of Montreal in the amount of $2,880,000 registered on June 5, 2012 (as amended by an Amending Agreement in the amount of $3,771,674 registered on July 23, 2013) against title to the following condominium units in the Inverness Estates condominium project in Grande Prairie, Alberta comprising cash flowing Properties legally described as follows (all within Condominium Plan 0628168:

   (a) Unit 275 (**Title no.:** 122 174 562 +2)

   (b) Unit 287 (**Title no.:** 122 174 562 +3)

   (c) Unit 345 (*Parking unit*) (**Title no.:** 122 174 562 +4)

   (d) Unit 351 (*Parking unit*) (**Title no.:** 122 174 562 +5)

   (e) Unit 388 (**Title no.:** 122 174 562 +10)

   (f) Unit 390 (**Title no.:** 122 174 562 +12)

   (g) Unit 391 (**Title no.:** 122 174 562 +13)

   (h) Unit 395 (**Title no.:** 122 174 562 +14)

   (i) Unit 411 (**Title no.:** 122 174 562 +16)

   (j) Unit 412 (**Title no.:** 122 174 562 +17)

   (k) Unit 413 (**Title no.:** 122 174 562 +18)

   (l) Unit 423 (**Title no.:** 122 174 562 +19)

   (m) Unit 430 (**Title no.:** 122 174 562 +20)

   (n) Unit 436 (**Title no.:** 122 174 562 +22)

   (o) Unit 446 (**Title no.:** 122 174 562 +23)

   (p) Unit 457 (**Title no.:** 122 174 562 +24)

(q) Unit 459 (**Title no.:** 122 174 562 +24)

(r) Unit 471 (*Parking unit*) (**Title no.:** 122 174 562 +26)

(s) Unit 483 (*Parking unit*) (**Title no.:** 122 174 562 +28)

(t) Unit 494 (*Parking unit*) (**Title no.:** 122 174 562 +30)

(u) Unit 499 (*Parking unit*) (**Title no.:** 122 174 562 +31)

(v) Unit 511 (*Parking unit*) (**Title no.:** 122 174 562 +33)

(w) Unit 514 (*Parking unit*) (**Title no.:** 122 174 562 +34)

(x) Unit 519 (*Parking unit*) (**Title no.:** 122 174 562 +35)

(y) Unit 526 (*Parking unit*) (**Title no.:** 122 174 562 +36)

(z) Unit 528 (*Parking unit*) (**Title no.:** 122 174 562 +37)

(aa) Unit 544 (*Parking unit*) (**Title no.:** 122 174 562 +38)

(bb) Unit 546 (*Parking unit*) (**Title no.:** 122 174 562 +39)

(cc) Unit 553 (*Parking unit*) (**Title no.:** 122 174 562 +40)

(dd) Unit 565 (*Parking unit*) (**Title no.:** 122 174 562 +41)

(ee) Unit 577 (*Parking unit*) (**Title no.:** 122 174 562 +46)

(ff) Unit 584 (*Parking unit*) (**Title no.:** 122 174 562 +47)

(gg) Unit 594 (*Parking unit*) (**Title no.:** 122 174 562 +49)

(hh) Unit 606 (*Parking unit*) **Title no.:** 122 174 562 +50)

SCHEDULE I
CASH FLOWING SECURED DEBT OBLIGATIONS OWED BY THE APPLICANTS TO ROYNAT INC.

1. Secured debt owed by 272649 Alberta Ltd. to Roynat Inc. which is secured by the following First Charge Mortgages registered against title to that cash flowing Property described as the Clarient Building and located at 9602 – 118 Street in Grande Prairie, Alberta:

    (a) Mortgage dated November 8, 2019, in the principal amount of $2,774,400 over Plan 1523374, Block 7, Lot 3 (Grande Prairie, Alberta)

    (b) Mortgage dated March 26, 2020 in the principal amount of $13,179,250 over, *inter alia,* Plan 1523374, Block 7, Lot 3 (Grande Prairie, Alberta); and

    (c) Mortgage dated April 23, 2021 in the principal amount of $250,000 over Plan 1523374, Block 7, Lot 3 (Grande Prairie, Alberta).

SCHEDULE J
CASH FLOWING SECURED DEBT OBLIGATIONS OWED BY THE APPLICANTS TO THE OWNERS: CONDOMINIUM PLAN NO. 872 2944 AND CANADIAN WESTERN BANK

1. Secured debt owed by 272649 Alberta Ltd. to Canadian Western Bank which is secured by the following First Charge Mortgages registered against title to the following cash flowing Properties located in Grande Prairie, Alberta:

   (a) Memorandum of Mortgage in the principal amount of $2,200,000 dated April 7, 2016 and registered against title to the Iron Nation Building located at 9502 – 117th Street West in the Centre West Business Park, Grande Prairie, Alberta and legally described as Plan 0625015, Block 3, Lot 3: and

   (b) Mortgage in the principal amount of $1,750,000 dated December 6, 2017 and registered against title to the Tundra Process Solutions Ltd. Office and Shop Building located at 11517 – 89th Avenue in the Richmond Industrial Park, Grande Prairie, Alberta and legally described as Plan 8020127, Block 17, Lot 1.

2. Secured debt owed by J.W. Carr Holdings Ltd. to The Owners: Condominium Plan No. 872 2944 which is secured by Condominium Priority Charge registered against title to the following condominium units in the Central Park condominium project in Edmonton, Alberta comprising cash flowing Properties legally described as follows (all within Condominium Plan 8722944): Units 6, 7, 9, 10, 13, 18, 19, 22, 23, 24, 25, 29, 30, 45, 63, 66, 69, 72, 73, 79, 85, 97, and 99.

~~2.~~3. Secured debt owed by J.W. Carr Holdings Ltd. to Canadian Western Bank which is secured by that First Charge Mortgage in the principal amount of $3,684,200 dated February 6, 2008 which is registered against title to the following condominium units in the Central Park condominium project in Edmonton, Alberta comprising cash flowing Properties legally described as follows (all within Condominium Plan 8722944): Units 6, 7, 9, 10, 13, 18, 19, 22, 23, 24, 25, 29, 30, 45, 63, 66, 69, 72, 73, 79, 85, 97, and 99.

SCHEDULE K

CASH FLOWING SECURED DEBT OBLIGATIONS OWED BY THE APPLICANTS TO ATB FINANCIAL

1. Secured debt owed by 272649 Alberta Ltd. to ATB Financial which is secured by the following First Charge Mortgages registered against title to that cash flowing Property described as the Ovintiv Building (formerly known as the Encana Building) and located at 12002 – 97 Avenue in Grande Prairie, Alberta:

   (a) Collateral Mortgage in the amount of $7,500,000.00 dated April 30, 2013 over lands legally described as follows:

   PLAN 1124406
   BLOCK 2
   LOT 7
   EXPECTING THEREOUT ALL MINES AND MINERALS AREA:
   0.785 HECTARES (1.94 ACRES) MORE OR LESS

   (b) Collateral Mortgage from Debtor in the amount of $4,297,000.00 dated August 27, 2018 over lands legally described as follows:

   PLAN 1124406
   BLOCK 2
   LOT 7
   EXPECTING THEREOUT ALL MINES AND MINERALS AREA:
   0.785 HECTARES (1.94 ACRES) MORE OR LESS

SCHEDULE L – CASH FLOWING SECURED DEBT OBLIGATIONS OWED BY THE APPLICANTS TO SERVUS CREDIT UNION

1. Secured debt owed by 672612 Alberta Ltd. to Servus Credit Union which is secured by that First Charge Mortgage in the principal amount of $2,360,000 dated January 15, 2014 which is registered against title to the following condominium units in the Rosedale condominium project in Edmonton, Alberta comprising cash flowing Properties legally described as follows:

   CONDOMINIUM PLAN 8321571
   UNIT 2
   AND 112 UNDIVIDED ONE TEN THOUSANDTH SHARES IN THE COMMON PROPERTY EXCEPTING THEREOUT ALL MINES AND MINERALS

   CONDOMINIUM PLAN 8321571
   UNIT 17
   AND 118 UNDIVIDED ONE TEN THOUSANDTH SHARES IN THE COMMON PROPERTY EXCEPTING THEREOUT ALL MINES AND MINERALS

   CONDOMINIUM PLAN 8321571
   UNIT 20
   AND 84 UNDIVIDED ONE TEN THOUSANDTH SHARES IN THE COMMON PROPERTY EXCEPTING THEREOUT ALL MINES AND MINERALS

   CONDOMINIUM PLAN 8321571
   UNIT 33
   AND 119 UNDIVIDED ONE TEN THOUSANDTH SHARES IN THE COMMON PROPERTY EXCEPTING THEREOUT ALL MINES AND MINERALS

   CONDOMINIUM PLAN 8321571
   UNIT 35
   AND 86 UNDIVIDED ONE TEN THOUSANDTH SHARES IN THE COMMON PROPERTY EXCEPTING THEREOUT ALL MINES AND MINERALS

   CONDOMINIUM PLAN 8321571
   UNIT 43

AND 86 UNDIVIDED ONE TEN THOUSANDTH SHARES IN THE COMMON PROPERTY EXCEPTING THEREOUT ALL MINES AND MINERALS

CONDOMINIUM PLAN 8321571
UNIT 50
AND 114 UNDIVIDED ONE TEN THOUSANDTH SHARES IN THE COMMON PROPERTY EXCEPTING THEREOUT ALL MINES AND MINERALS

CONDOMINIUM PLAN 8321571
UNIT 58
AND 114 UNDIVIDED ONE TEN THOUSANDTH SHARES IN THE COMMON PROPERTY EXCEPTING THEREOUT ALL MINES AND MINERALS

CONDOMINIUM PLAN 8321571
UNIT 59
AND 86 UNDIVIDED ONE TEN THOUSANDTH SHARES IN THE COMMON PROPERTY EXCEPTING THEREOUT ALL MINES AND MINERALS

CONDOMINIUM PLAN 8321571
UNIT 64
AND 86 UNDIVIDED ONE TEN THOUSANDTH SHARES IN THE COMMON PROPERTY EXCEPTING THEREOUT ALL MINES AND MINERALS

CONDOMINIUM PLAN 8321571
UNIT 70
AND 116 UNDIVIDED ONE TEN THOUSANDTH SHARES IN THE COMMON PROPERTY EXCEPTING THEREOUT ALL MINES AND MINERALS

CONDOMINIUM PLAN 8321571
UNIT 81
AND 121 UNDIVIDED ONE TEN THOUSANDTH SHARES IN THE COMMON PROPERTY EXCEPTING THEREOUT ALL MINES AND MINERALS

CONDOMINIUM PLAN 8321571
UNIT 88
AND 87 UNDIVIDED ONE TEN THOUSANDTH SHARES IN THE COMMON PROPERTY EXCEPTING THEREOUT ALL MINES AND MINERALS

CONDOMINIUM PLAN 8321571
UNIT 94
AND 117 UNDIVIDED ONE TEN THOUSANDTH SHARES IN THE COMMON PROPERTY EXCEPTING THEREOUT ALL MINES AND MINERALS

CONDOMINIUM PLAN 8321571
UNIT 96
AND 89 UNDIVIDED ONE TEN THOUSANDTH SHARES IN THE COMMON PROPERTY EXCEPTING THEREOUT ALL MINES AND MINERALS

2. Secured debt owed by 672612 Alberta Ltd. to Servus Credit Union which is secured by that First Charge Mortgage in the principal amount of $640,000 which is registered against title to the apartment buildings located at 9919 and 9939 – 96 Avenue in Grande Prairie, Alberta comprising cash flowing Properties legally described as follows:

Plan 1936MC
Block 12
Lots 18 – 20

Province of Alberta

CONDOMINIUM PROPERTY ACT

Revised Statutes of Alberta 2000
Chapter C-22

Current as of November 16, 2022

Office Consolidation

Alberta King's Printer
Suite 700, Park Plaza
10611 - 98 Avenue
Edmonton, AB T5K 2P7
Phone: 780-427-4952

E-mail: kings-printer@gov.ab.ca
Shop on-line at kings-printer.alberta.ca

property, may be included in the same certificate of title with a unit.

(3) After a certificate of title to a unit is issued pursuant to subsection (1), the unit comprised in it may devolve or be transferred, leased, mortgaged or otherwise dealt with in the same manner and form as land held under the *Land Titles Act* and the provisions of that Act apply to those dealings insofar as they do not conflict with this Act or the regulations.

RSA 1980 cC-22 s3

Certificate to show share in common property

6(1) The Registrar, in issuing a certificate of title for a unit, shall certify on it the owner's share in the common property.

(2) The common property comprised in a registered condominium plan is held by the owners of all the units as tenants in common in shares proportional to the unit factors for their respective units.

(3) Except as provided in this Act, a share in the common property shall not be disposed of or become subject to a charge except as appurtenant to the unit of an owner and a disposition of or charge on a unit operates to dispose of or charge that share in the common property without express reference to it.

RSA 1980 cC-22 s4

Liability of owner

7 Except to the extent that an interest endorsed on a certificate of title relates to that particular unit, the owner of the unit is only liable in respect of that interest in proportion to the unit factor for the owner's unit.

RSA 1980 cC-22 s5

Condominium Plans

Requirements of condominium plan

8(1) Every plan presented for registration as a condominium plan shall

(a) be described in the heading of the plan as a condominium plan,

(b) delineate the external surface boundaries of the parcel and the location of the building, if any, in relation to them,

(c) except where the condominium plan is to divide a building referred to in section 2(2), delineate that portion of the land that is to be provided for the purposes of roads, public utilities and reserve land under Part 17 of the *Municipal Government Act*,

(b) the entry is made on a day that is not

(i) a holiday, except that the person may enter on a Sunday if the day of religious worship of the adult person in possession of the unit is not Sunday and that adult person has provided to the person wishing to enter the unit a written notice of that adult person's day of religious worship, or

(ii) the day of religious worship of the adult person in possession of the unit if that day is not Sunday and that person has provided to the person wishing to enter the unit a written notice of that day,

and

(c) the entry is between 8 a.m. and 8 p.m.

(5) A notice under subsection (3) must

(a) be in writing,

(b) state the reason for the entry, and

(c) name a date and time of entry that comply with subsection (4).

2016 c18 s3

Condominium Corporation

Condominium corporation

25(1) On the registration of a condominium plan, there is constituted a corporation under the name "Condominium Corporation No. ____ " and the number to be specified is the number given to the plan on registration.

(2) A corporation consists of all those persons

(a) who are owners of units in the parcel to which the condominium plan applies, or

(b) who are entitled to the parcel when the condominium arrangement is terminated pursuant to section 60 or 61.

(3) Without limiting the powers of the corporation under this or any other Act, a corporation may

(a) sue for and in respect of any damage or injury to the common property caused by any person, whether an owner or not, and

(b) be sued in respect of any matter connected with the parcel for which the owners are jointly liable.

(4) Nothing in this Act shall be construed so as to prohibit a corporation from acting by means of agents or its employees.

(5) The *Companies Act* and the *Business Corporations Act* do not apply to a corporation.

RSA 1980 cC-22 s20;1983 c22 s2;1996 c12 s19

Voting Rights

Voting rights

26(1) The voting rights of the owner of a unit are determined by the unit factor for the owner's unit.

(2) When an owner's interest is subject to a registered mortgage, a power of voting conferred on the owner by this Act or the bylaws may be exercised as follows:

(a) first, by the mortgagee, if any, who is first entitled in priority if that mortgagee has notified the corporation of the mortgage in writing and is present at the meeting at which the vote is being conducted;

(b) second, by the owner;

(c) third and subsequently, in order of their priority among themselves, by any other mortgagees who are subsequent in priority to the mortgagee referred to in clause (a) if the subsequent mortgagee wishing to exercise the power of voting has notified the corporation of the mortgage in writing and is present at the meeting at which the vote is conducted.

(3) Subsection (2) does not apply unless the mortgagee has given written notice of the mortgagee's mortgage to the corporation at the corporation's address for service.

(4) An owner or mortgagee, as the case may be, may exercise the owner's or mortgagee's right to vote personally or by proxy.

(5) Notwithstanding anything in this section, neither an owner nor a mortgagee is entitled to exercise the power of voting conferred on the owner by this Act or the regulations where

(a) any contribution payable in respect of the owner's unit, or

(b) any other obligation owing to the corporation in respect of the owner's unit or the common property,

(c) dismiss the action;

(d) make an award as to costs as appears appropriate in the circumstances.

(4) For the purposes of an action commenced under subsection (1)(a)(ii) or (b)(ii), once the court is satisfied that the requirements of subsection (2) have been met, damages are deemed to have been suffered by the corporation.

(5) Where a corporation takes proceedings under this section, it is entitled to claim from the defendant the corporation's legal expenses incurred in respect of the proceedings.

(6) For the purposes of subsection (2)(a), a copy of a bylaw that is certified by the Registrar as being a true copy of the bylaw filed at the land titles office is proof, in the absence of evidence to the contrary,

(a) of the contents of the bylaw, and

(b) that the bylaw was properly enacted.

(7) An action taken against a person under this section does not restrict, limit or derogate from any other remedy that an owner or the corporation may have against that person.

(8) A caveat in respect of a monetary sanction or other debt to a corporation, other than a contribution under section 39, may be registered against the certificate of title of a unit only pursuant to a writ of enforcement.

RSA 2000 cC-22 s36;2014 c10 s27;2015 c12 s7;
AR 217/2022

Powers and Duties of Corporation

Control and management

37(1) A corporation is responsible for the enforcement of its bylaws and the control, management and administration of its real and personal property, the common property and managed property.

(2) Without restricting the generality of subsection (1), the duties of a corporation include the following:

(a) to keep in a state of good and serviceable repair and properly maintain the real and personal property of the corporation, the common property and managed property;

(b) to comply with notices or orders by any municipal authority or public authority requiring repairs to or work to be done in respect of the parcel.

(3) A corporation may by a special resolution acquire or dispose of an interest in real property.

(4) A corporation may, subject to the regulations, borrow money for the purpose of carrying out the powers and duties of the corporation under this section.

(5) Money borrowed by the corporation under subsection (4) must be used only for the purpose for which it was borrowed.

RSA 2000 cC-22 s37;2014 c10 s28

Reserve fund

38(1) Subject to the regulations, a corporation shall, from funds levied under section 39(1)(a) or under section 39.1, establish and maintain a reserve fund that is reasonably sufficient to provide for major repairs and replacement of the following, where the repair or replacement is of a nature that does not normally occur annually:

(a) any real and personal property of the corporation;

(b) the common property;

(c) managed property.

(1.01) Notwithstanding subsection (1), funds from the reserve fund may be used for

(a) a reserve fund study and reserve fund report required by the regulations,

(b) any other report prepared by an expert examining the condition of the real and personal property of the corporation, the common property and managed property, and

(c) any other purpose provided for in the regulations.

(1.1) If, before the coming into force of subsection (1)(c) as enacted by section 1(2)(a) of the *Statutes Amendment Act, 2013*, a corporation was required by bylaw to repair and replace property of an owner of a bare land unit, the collection and expenditure of funds to repair and replace that property are valid if

(a) the collection and expenditure occurred on or after the date the bylaw took effect under this Act, and

(b) the collection and expenditure would have been in compliance with subsection (1) if subsection (1)(c) as enacted by section 1(2)(a) of the *Statutes Amendment Act, 2013* had been in force at the time the collection and expenditure occurred.

(2) Notwithstanding subsection (1), funds shall not be taken from a reserve fund for the purpose of making capital improvements unless

(a) the removal of funds for that purpose is authorized by a special resolution or is necessary to maintain property referred to in subsection (1) to comply with health, building and maintenance and occupancy standards as required by law, and

(b) there will be sufficient funds remaining in the reserve fund to meet the requirements of subsection (1).

(3) The money in the capital replacement reserve fund of the corporation is an asset of the corporation and no part of that money shall be refunded or distributed to any owner of a unit except where the owners and the property cease to be governed by this Act.

(4) For the purposes of this section and section 39.1, the following are not capital improvements:

(a) the replacement of existing real and personal property of the corporation, the common property or managed property with

(i) the contemporary equivalent of an obsolete property, or

(ii) a lower cost equivalent of the existing property;

(b) any other replacement prescribed by the regulations.

RSA 2000 cC-22 s38;2013 c10 s1;2014 c10 s29

Operating account

38.1 Subject to the regulations, a corporation shall, from funds levied under section 39(1)(a) or (b), establish and maintain an operating account to be used to provide sufficient funds for

(a) the control, management and administration of the real and personal property of the corporation, the common property and managed property, and

(b) the payment of any other obligation of the corporation, that are not required to be paid out of the reserve fund.

2014 c10 s30

Contributions

39(1) A board may by resolution

(a) determine from time to time the amounts to be raised for the purposes of the operating account and the reserve fund and may raise those amounts by levying contributions on the owners at regular intervals

(i) in proportion to the unit factors of the owners' respective units, or

(ii) subject to the regulations, and if provided for in the bylaws, on a basis other than in proportion to the unit factors of the owners' respective units;

(b) determine from time to time amounts to be raised by special levy and raise those amounts in accordance with section 39.1.

(2) A contribution shall not include any amount for the purpose of collecting from an individual owner

(a) a monetary sanction under a bylaw made under section 35(1),

(b), (c) repealed 2013 cS-19.3 s3.

RSA 2000 cC-22 s39;2013 cS-19.3 s3;2014 c10 s30

Special levy

39.1(1) A resolution of the board under section 39(1)(b) to approve a special levy must set out the following:

(a) the purpose of the levy;

(b) the total amount to be levied;

(c) either

(i) the method of determining each unit's proportionate share of the levy by unit factor, or

(ii) subject to the regulations, and if provided for in the bylaws, the method for determining each unit's share of the levy on a basis other than the unit factors of the owners' respective units;

(d) the date by which the levy is to be paid or, if the levy is payable in instalments, the dates by which the instalments are to be paid.

(2) A special levy may be levied to raise money

(a) for the payment of unexpected and urgent maintenance, repair or replacement of the real and personal property of the corporation, common property or managed property,

(b) to cover unexpected shortfalls in the operating account,

(c) to increase the balance of the reserve fund to meet the requirements in a reserve fund plan required under the regulations,

(d) subject to subsection (3), for the payment of a capital improvement,

(e) to satisfy a judgment against the corporation, or

(f) for any other purpose provided for in the regulations.

(3) If the purpose of the special levy is for the making of a capital improvement, a special resolution is required before the board may approve the special levy.

(4) As soon as possible after the passing of a resolution referred to in subsection (1), the board must inform each owner of the following:

(a) the purpose of the levy;

(b) the total amount of the levy;

(c) the method used to determine each unit's share of the levy;

(d) the amount of the owner's unit's share of the levy;

(e) the date by which the levy is to be paid or, if the levy is payable in instalments, the dates by which the instalments are to be paid.

(5) If the amount collected exceeds the amount required or for any other reason is not fully used for the purpose set out in the resolution referred to in subsection (1), the corporation must pay the money into the reserve fund.

2014 c10 s30

Payment and enforcement of contributions

39.2(1) A contribution levied as provided in section 39(1)(a) is due and payable on the passing of a resolution by the board to that effect and in accordance with the terms of the resolution, and a contribution levied under section 39(1)(b) is due and payable in accordance with a resolution of the board passed under section 39(1).

(2) A contribution referred to in subsection (1), and any interest charged under section 40, may be recovered by an action for debt by the corporation

(a) from a person who was an owner at the time when the resolution of the board was passed, and

(b) from a person who was an owner at the time when the action was instituted,

both jointly and severally.

(3) Where a contribution, including any interest owing, is not paid by the owner, the mortgagee may pay any amount owing in respect of that contribution and add that amount to the amount owing to the mortgagee under the mortgage.

(4) Where

(a) a person other than the owner is in possession of a unit and pays rent to the owner in respect of the unit, and

(b) contributions, including any interest owing in respect of that unit, are in arrears,

the corporation may require the person in possession of the unit to pay the rent owing to the owner in respect of that unit to the corporation so that that rent can be applied against the contributions, including any interest owing, that are in arrears.

(5) Where a person in possession of a unit other than the owner pays the rent to the corporation under subsection (4), that person is deemed to have paid that rent to the owner.

(6) A corporation may file a caveat against the certificate of title to an owner’s unit for the amount of a contribution levied on the owner and interest payable but unpaid by the owner.

(7) On the filing of the caveat under subsection (6), the corporation has a charge against the unit equal to the unpaid contributions and any interest owing.

(8) On and from the date of filing of the caveat, a charge under subsection (7) has the same priority as a mortgage under the *Land Titles Act* and may be enforced in the same manner as a mortgage.

(9) The *Dower Act* and Part 10 of the *Civil Enforcement Act* do not apply to proceedings under subsection (8).

(10) If a corporation has filed a caveat under this section, the corporation shall withdraw the caveat on the payment to it of the amount of the charge.

(11) Notwithstanding subsection (8), if

(a) a corporation has filed a caveat under this section,

(b) subsequent to the caveat's being filed another person gains title to the unit pursuant to

(i) a foreclosure action,

(ii) an action for specific performance, or

(iii) a tax recovery proceeding under the *Municipal Government Act,*

and

(c) an amount remains owing to the corporation with respect to the contribution and interest for which the caveat was filed,

the caveat remains registered against the certificate of title of the unit until the amount owing is paid to the corporation.

2014 c10 s30

Interest on outstanding accounts

40(1) A corporation may charge interest on any unpaid balance of a contribution owing to it by an owner.

(2) Notwithstanding subsection (1), the rate of interest charged under subsection (1) is not to be greater than the rate of interest provided for by regulation.

RSA 1980 cC-22 s32;1996 c12 s33;2000 c11 s9

41 Repealed 2014 c10 s31.

Recovery of costs

42 Where a corporation takes any steps to collect any amount owing under section 39, the corporation may

(a) recover from the person against whom the steps were taken all reasonable costs, including legal expenses and interest, incurred by the corporation in collecting the amount owing, and

(b) if a caveat is registered against the title to the unit, recover from the owner all reasonable prescribed expenses incurred by the corporation with respect to the preparation, registration, enforcement and discharge of the caveat.

RSA 2000 cC-22 s42;2014 c10 s32

Investments

43 Subject to section 37(3) and the regulations, a corporation may invest any funds not immediately required by it only in accordance with the regulations.

RSA 2000 cC-22 s43;2001 c28 s6;2006 c9 s7;
2014 c10 s33

Trust money

43.1(1) Where the corporation or any person is in receipt of money paid to or for the benefit of the corporation, that money and all the proceeds arising from that money are

(a) legally and beneficially owned by the corporation, and

(b) deemed to be held in trust for the performance of the duties and obligations in respect of which the payment was made.

(2) Where the corporation is in receipt of money referred to in subsection (1), the corporation shall

(a) except as otherwise authorized in writing pursuant to a resolution of the board,

(i) deposit all the money into a separate account at a bank, trust corporation, credit union or treasury branch within 3 days, exclusive of holidays and Saturdays, from the day that the corporation received the money, and

(ii) designate the account as a trust account registered in the name of the corporation,

and

(b) keep all trust money intact and not withdraw, convert, direct, borrow or commingle that trust money, other than pursuant to a resolution referred to in clause (a).

2014 c10 s34

Form 10
[Rule 3.25]

Clerk's stamp:

JUDICIAL CENTRE OF EDMONTON
FILED DIGITALLY
2203 18325
Nov 23, 2022
10:50 AM
CLERK OF THE COURT

COURT FILE NUMBER	
COURT OF KING'S BENCH OF ALBERTA	
JUDICIAL CENTRE	EDMONTON
PLAINTIFF	THE OWNERS: CONDOMINIUM PLAN NO. 872 2944
DEFENDANT	J.W. CARR HOLDINGS LTD.
DOCUMENT	**STATEMENT OF CLAIM**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	MILLER THOMSON LLP Barristers and Solicitors 2700, Commerce Place 10155-102 Street Edmonton, AB, Canada T5J 4G8 Phone: 780.429.1751 Fax: 780.424.5866 Lawyer's Name: Roberto Noce, K.C. Lawyer's Email: rnoce@millerthomson.com File No.: 222016.53

NOTICE TO DEFENDANT

You are being sued. You are a defendant.

Go to the end of this document to see what you can do and when you must do it.

Note: State below only facts and not evidence (Rule 13.6)

Statement of facts relied on:

1. The Plaintiff, The Owners: Condominium Plan No. 872 2944 (the "**Corporation**"), is a condominium corporation constituted pursuant to the provisions of the *Condominium Property Act*, RSA 1980, c C-22, now replaced by the *Condominium Property Act*, RSA 2000, c C-22, as amended (the "**Act**"), by

registration of condominium plan number 872 2944 (the "**Plan**") at the Land Titles Office for the North Alberta Land Registration District on December 31, 1987.

2. The units and common property described by the Plan are hereinafter referred to as the "**Condominium Property**".

3. The Defendant, J.W. Carr Holdings Ltd. ("J.W. Carr"), is a corporation incorporated pursuant to the laws of the Province of Alberta, and is the registered owner of twenty three (23) units located on the Condominium Property, located 9916 113 Street, Edmonton, Alberta, and legally described as:

CONDOMINIUM PLAN 8722944
UNIT 6
AND 95 UNDIVIDED ONE TEN THOUSANDTH SHARES
IN THE COMMON PROPERTY
EXCEPTING THEREOUT ALL MINES AND MINERALS

CONDOMINIUM PLAN 8722944
UNIT 7
AND 88 UNDIVIDED ONE TEN THOUSANDTH SHARES
IN THE COMMON PROPERTY
EXCEPTING THEREOUT ALL MINES AND MINERALS

CONDOMINIUM PLAN 8722944
UNIT 9
AND 78 UNDIVIDED ONE TEN THOUSANDTH SHARES
IN THE COMMON PROPERTY
EXCEPTING THEREOUT ALL MINES AND MINERALS

CONDOMINIUM PLAN 8722944
UNIT 10
AND 104 UNDIVIDED ONE TEN THOUSANDTH SHARES
IN THE COMMON PROPERTY
EXCEPTING THEREOUT ALL MINES AND MINERALS

CONDOMINIUM PLAN 8722944
UNIT 13
AND 88 UNDIVIDED ONE TEN THOUSANDTH SHARES
IN THE COMMON PROPERTY
EXCEPTING THEREOUT ALL MINES AND MINERALS

CONDOMINIUM PLAN 8722944
UNIT 18
AND 95 UNDIVIDED ONE TEN THOUSANDTH SHARES

IN THE COMMON PROPERTY
EXCEPTING THEREOUT ALL MINES AND MINERALS

CONDOMINIUM PLAN 8722944
UNIT 19
AND 88 UNDIVIDED ONE TEN THOUSANDTH SHARES
IN THE COMMON PROPERTY
EXCEPTING THEREOUT ALL MINES AND MINERALS

CONDOMINIUM PLAN 8722944
UNIT 22
AND 104 UNDIVIDED ONE TEN THOUSANDTH SHARES
IN THE COMMON PROPERTY
EXCEPTING THEREOUT ALL MINES AND MINERALS

CONDOMINIUM PLAN 8722944
UNIT 23
AND 104 UNDIVIDED ONE TEN THOUSANDTH SHARES
IN THE COMMON PROPERTY
EXCEPTING THEREOUT ALL MINES AND MINERALS

CONDOMINIUM PLAN 8722944
UNIT 24
AND 95 UNDIVIDED ONE TEN THOUSANDTH SHARES
IN THE COMMON PROPERTY
EXCEPTING THEREOUT ALL MINES AND MINERALS

CONDOMINIUM PLAN 8722944
UNIT 25
AND 88 UNDIVIDED ONE TEN THOUSANDTH SHARES
IN THE COMMON PROPERTY
EXCEPTING THEREOUT ALL MINES AND MINERALS

CONDOMINIUM PLAN 8722944
UNIT 29
AND 104 UNDIVIDED ONE TEN THOUSANDTH SHARES
IN THE COMMON PROPERTY
EXCEPTING THEREOUT ALL MINES AND MINERALS

CONDOMINIUM PLAN 8722944
UNIT 30
AND 95 UNDIVIDED ONE TEN THOUSANDTH SHARES
IN THE COMMON PROPERTY
EXCEPTING THEREOUT ALL MINES AND MINERALS

CONDOMINIUM PLAN 8722944
UNIT 45
AND 78 UNDIVIDED ONE TEN THOUSANDTH SHARES

IN THE COMMON PROPERTY
EXCEPTING THEREOUT ALL MINES AND MINERALS

CONDOMINIUM PLAN 8722944
UNIT 63
AND 78 UNDIVIDED ONE TEN THOUSANDTH SHARES
IN THE COMMON PROPERTY
EXCEPTING THEREOUT ALL MINES AND MINERALS

CONDOMINIUM PLAN 8722944
UNIT 66
AND 95 UNDIVIDED ONE TEN THOUSANDTH SHARES
IN THE COMMON PROPERTY
EXCEPTING THEREOUT ALL MINES AND MINERALS

CONDOMINIUM PLAN 8722944
UNIT 69
AND 78 UNDIVIDED ONE TEN THOUSANDTH SHARES
IN THE COMMON PROPERTY
EXCEPTING THEREOUT ALL MINES AND MINERALS

CONDOMINIUM PLAN 8722944
UNIT 72
AND 95 UNDIVIDED ONE TEN THOUSANDTH SHARES
IN THE COMMON PROPERTY
EXCEPTING THEREOUT ALL MINES AND MINERALS

CONDOMINIUM PLAN 8722944
UNIT 73
AND 88 UNDIVIDED ONE TEN THOUSANDTH SHARES
IN THE COMMON PROPERTY
EXCEPTING THEREOUT ALL MINES AND MINERALS

CONDOMINIUM PLAN 8722944
UNIT 79
AND 88 UNDIVIDED ONE TEN THOUSANDTH SHARES
IN THE COMMON PROPERTY
EXCEPTING THEREOUT ALL MINES AND MINERALS

CONDOMINIUM PLAN 8722944
UNIT 85
AND 88 UNDIVIDED ONE TEN THOUSANDTH SHARES
IN THE COMMON PROPERTY
EXCEPTING THEREOUT ALL MINES AND MINERALS

CONDOMINIUM PLAN 8722944
UNIT 97
AND 88 UNDIVIDED ONE TEN THOUSANDTH SHARES

IN THE COMMON PROPERTY
EXCEPTING THEREOUT ALL MINES AND MINERALS

CONDOMINIUM PLAN 8722944
UNIT 99
AND 78 UNDIVIDED ONE TEN THOUSANDTH SHARES
IN THE COMMON PROPERTY
EXCEPTING THEREOUT ALL MINES AND MINERALS

(collectively, the "**Units**", or any one of "**Unit 6**", "**Unit 7**", "**Unit 9**", "**Unit 10**", "**Unit 13**", "**Unit 18**", "**Unit 19**", "**Unit 22**", "**Unit 23**", "**Unit 24**", "**Unit 25**", "**Unit 29**", "**Unit 30**", "**Unit 45**", "**Unit 63**", "**Unit 66**", "**Unit 69**", "**Unit 72**", "**Unit 73**", "**Unit 79**", "**Unit 85**", "**Unit 97**", "**Unit 99**" when referring to one of the above-noted Units specifically)

4. The Corporation has passed bylaws relevant to the Condominium Property (the "**Bylaws**"). The Bylaws were duly registered at the Land Titles Office for the North Alberta Land Registration District on November 14, 1996, as instrument number 962 313 929.

5. Pursuant to sections 32(2) of the Act, the Corporation's Bylaws are binding on J.W. Carr.

6. Sections 39, 39.2 and 42 of the Act empower the Corporation to raise contributions from unit owners for the control, management and administration of the Condominium Property ("**Condominium Fees**"). Each unit owner, including J.W. Carr, is obligated to pay its assessed Condominium Fees.

7. The Act, the *Condominium Property Regulation*, Alta Reg. 168/2000 (the "**Regulations**"), and Article 2(A)(i) of the Bylaws entitle the Corporation to charge interest on outstanding Condominium Fees at the rate of twelve (12%) percent per annum, from the date due to the date payment is received.

8. The Corporation has assessed Condominium Fees and has levied contributions against the Unit in proportion to the unit factors of the Units described above, and as provided for by the Act.

9. J.W. Carr has failed to pay the Condominium Fees when due, or at all, since April 1, 2019, and, as such, the amount of unpaid Condominium Fees, interest and related costs has continued to increase.

10. J.W. Carr is therefore in default as it has continuously neglected or refused to pay any Condominium Fees, despite repeated demands by the Corporation that he do so.

11. Further, pursuant to Articles 83(b) and (c) of the Bylaws, together with such further and other provisions of the Bylaws, Act, or Regulations as will be shown at the trial of this matter, an owner is responsible for all monies expended by the Corporation to maintain and/or repair an owner's unit or exclusive use area and to remediate damage caused to the common property which originates from their unit, and the same shall be a charge against that owner's unit. Accordingly, the Corporation has incurred maintenance and repair expenses with respect to Unit 10, Unit 23, Unit 25, and Unit 72, and has charged the same back to those Units. Such amounts remain due and payable by J.W. Carr.

12. By virtue of the following Caveats, registered at the Land Titles Office for the North Alberta Registration District, the Corporation claims an interest in the Units for outstanding Condominium Fees levied but unpaid:

Unit Number	**Registration No. for the Caveat**	**Registration Date**
Unit 6	212 038 461	February 8, 2021
Unit 7	212 038 434	February 8, 2021
Unit 9	212 038 440	February 8, 2021
Unit 10	212 038 504	February 8, 2021
Unit 13	212 038 494	February 8, 2021
Unit 18	212 038 448	February 8, 2021
Unit 19	212 038 431	February 8, 2021
Unit 22	212 038 506	February 8, 2021
Unit 23	212 038 492	February 8, 2021

Unit Number	Registration No. for the Caveat	Registration Date
Unit 24	212 038 450	February 8, 2021
Unit 25	212 038 731	February 8, 2021
Unit 29	212 038 499	February 8, 2021
Unit 30	212 038 466	February 8, 2021
Unit 45	212 038 457	February 8, 2021
Unit 63	212 038 436	February 8, 2021
Unit 66	212 038 497	February 8, 2021
Unit 69	212 038 465	February 8, 2021
Unit 72	212 038 458	February 8, 2021
Unit 73	212 038 734	February 8, 2021
Unit 79	212 038 442	February 8, 2021
Unit 85	212 038 433	February 8, 2021
Unit 97	212 038 459	February 8, 2021
Unit 99	212 038 438	February 8, 2021

13. The sums now due and owing by J.W. Carr are calculated as follows:

Unit 6

Outstanding Special Assessments from 2018	$30,400.00
Outstanding Accelerated Condominium Fee Arrears from August 13, 2021 in the amount of $4,480.42	$2,560.24
Monthly Condominium Fees between April 1 and October 1, 2022 in the amount of $680.56 per month	$4,763.92
Interest	$2,131.28

Collection Charges	$525.00
Caveat Registration Fee	$420.00
Less Payments Received	($15,755.11)
TOTAL AMOUNT OWING:	**$25,045.33**

Unit 7

Outstanding Special Assessments from 2018	$28,160.00
Outstanding Accelerated Condominium Fee Arrears from August 13, 2021 in the amount of $4,150.30	$2,371.60
Monthly Condominium Fees between April 1 and October 1, 2022 in the amount of $630.41 per month	$4,412.87
Interest	$2,036.64
Collection Charges	$525.00
Caveat Registration Fee	$420.00
Less Payments Received	($14,625.15)
TOTAL AMOUNT OWING:	**$23,300.96**

Unit 9

Outstanding Special Assessments from 2018	$24,960.00
Outstanding Accelerated Condominium Fee Arrears from August 13, 2021 in the amount of $3,678.64	$2,102.05
Monthly Condominium Fees between April 1 and October 1, 2022 in the amount of $558.77 per month	$3,911.39

Interest	$1,797.92
Collection Charges	$525.00
Caveat Registration Fee	$420.00
Less Payments Received	($13,011.07)
TOTAL AMOUNT OWING:	**$20,705.29**

Unit 10

Outstanding Special Assessments from 2018	$33,280.00
Outstanding Accelerated Condominium Fee Arrears from August 13, 2021 in the amount of $4,904.90	$2,802.80
Monthly Condominium Fees between April 1 and October 1, 2022 in the amount of $745.03 per month	$5,215.21
General Repair Chargeback	$254.31
Interest	$2408.15
Collection Charges	$525.00
Caveat Registration Fee	$420.00
Less Payments Received	($17,462.04)
TOTAL AMOUNT OWING:	**$27,443.43**

Unit 13

Outstanding Special Assessments from 2018	$28,160.00
Outstanding Accelerated Condominium Fee Arrears from August 13, 2021 in the amount of $4150.30	$2,371.60
Monthly Condominium Fees	$4,412.87

between April 1 and October 1, 2022 in the amount of $630.41 per month	
Interest	$2,057.44
Collection Charges	$525.00
Caveat Registration Fee	$420.00
Less Payments Received	($14,625.15)
TOTAL AMOUNT OWING:	**$23,321.76**

Unit 18

Outstanding Special Assessments from 2018	$30,400.00
Outstanding Accelerated Condominium Fee Arrears from August 13, 2021 in the amount of $4,480.42	$2,560.24
Monthly Condominium Fees between April 1 and October 1, 2022 in the amount of $680.56 per month	$4,763.92
Interest	$2,269.95
Collection Charges	$525.00
Caveat Registration Fee	$420.00
Less Payments Received	($15,755.11)
TOTAL AMOUNT OWING:	**$25,184.00**

Unit 19

Outstanding Special Assessments from 2018	$28,160.00
Outstanding Accelerated Condominium Fee Arrears from August 13, 2021 in the amount of	$2,371.60

$4,150.30	
Monthly Condominium Fees between April 1 and October 1, 2022 in the amount of $630.41 per month	$4,412.87
Interest	$2,225.14
Collection Charges	$525.00
Caveat Registration Fee	$420.00
Less Payments Received	($14,625.15)
TOTAL AMOUNT OWING:	**$23,489.46**

Unit 22

Outstanding Special Assessments from 2018	$33,280.00
Outstanding Accelerated Condominium Fee Arrears from August 13, 2021 in the amount of $4,904.90	$2,802.80
Monthly Condominium Fees between April 1 and October 1, 2022 in the amount of $745.03 per month	$5,215.21
Interest	$2,452.44
Collection Charges	$525.00
Caveat Registration Fee	$420.00
Less Payments Received	($17,486.04)
TOTAL AMOUNT OWING:	**$27,209.41**

Unit 23

Outstanding Special Assessments from 2018	$33,280.00
Outstanding Accelerated	$2,802.80

Condominium Fee Arrears from August 13, 2021 in the amount of $4,904.90	
Monthly Condominium Fees between April 1 and October 1, 2022 in the amount of $745.03 per month	$5,215.21
November 2019 Chargeback	$135.00
Administration Fees	$21.00
Interest	$2,465.96
Collection Charges	$525.00
Caveat Registration Fee	$420.00
Less Payments Received	($17,207.91)
TOTAL AMOUNT OWING:	**$27,657.06**

Unit 24

Outstanding Special Assessments from 2018	$30,400.00
Outstanding Accelerated Condominium Fee Arrears from August 13, 2021 in the amount of $4,480.42	$2,560.24
Monthly Condominium Fees between April 1 and October 1, 2022 in the amount of $680.56 per month	$4,763.92
Interest	$2,256.08
Collection Charges	$525.00
Caveat Registration Fee	$420.00
Less Payments Received	($15,755.11)
TOTAL AMOUNT OWING:	**$25,170.13**

Unit 25

Outstanding Special Assessments from 2018	$28,160.00
Outstanding Accelerated Condominium Fee Arrears from August 13, 2021 in the amount of $4,150.30	$2,371.60
Monthly Condominium Fees between April 1 and October 1, 2022 in the amount of $630.41 per month	$4,412.87
March 2022 Flood Chargeback	$1,837.50
Interest	$2,099.04
Collection Charges	$525.00
Caveat Registration Fee	$420.00
Less Payments Received	($14,625.15)
TOTAL AMOUNT OWING:	**$25,200.86**

Unit 29

Outstanding Special Assessments from 2018	$33,280.00
Outstanding Accelerated Condominium Fee Arrears from August 13, 2021 in the amount of $4,904.90	$2,802.80
Monthly Condominium Fees between April 1 and October 1, 2022 in the amount of $745.03 per month	$5,215.21
Interest	$2,474.00
Collection Charges	$525.00
Caveat Registration Fee	$420.00

Less Payments Received	($17,207.91)
TOTAL AMOUNT OWING:	**$27,509.10**

Unit 30

Outstanding Special Assessments from 2018	$30,400.00
Outstanding Accelerated Condominium Fee Arrears from August 13, 2021 in the amount of $4,480.42	$2,560.24
Monthly Condominium Fees between April 1 and October 1, 2022 in the amount of $680.56 per month	$4,763.92
Interest	$2,256.08
Collection Charges	$525.00
Caveat Registration Fee	$420.00
Less Payments Received	($15,755.11)
TOTAL AMOUNT OWING:	**$25,170.13**

Unit 45

Outstanding Special Assessments from 2018	$24,960.00
Outstanding Accelerated Condominium Fee Arrears from August 13, 2021 in the amount of $3,678.64	$2,102.05
Monthly Condominium Fees between April 1 and October 1, 2022 in the amount of $558.77 per month	$3,911.39
Interest	$1,859.49
Collection Charges	$525.00

Caveat Registration Fee	$420.00
Less Payments Received	($13,011.07)
TOTAL AMOUNT OWING:	**$20,766.86**

Unit 63

Outstanding Special Assessments from 2018	$24,960.00
Outstanding Accelerated Condominium Fee Arrears from August 13, 2021 in the amount of $3,678.64	$2,102.05
Monthly Condominium Fees between April 1 and October 1, 2022 in the amount of $558.77 per month	$3,911.39
Interest	$1,901.89
Collection Charges	$525.00
Caveat Registration Fee	$420.00
Less Payments Received	($13,011.07)
TOTAL AMOUNT OWING:	**$20,809.26**

Unit 66

Outstanding Special Assessments from 2018	$30,400.00
Outstanding Accelerated Condominium Fee Arrears from August 13, 2021 in the amount of $4,480.42	$2,560.24
Monthly Condominium Fees between April 1 and October 1, 2022 in the amount of $680.56 per month	$4,763.92
Interest	$2,283.28

Collection Charges	$525.00
Caveat Registration Fee	$420.00
Less Payments Received	($15,755.11)
TOTAL AMOUNT OWING:	**$25,197.33**

Unit 69

Outstanding Special Assessments from 2018	$24,960.00
Outstanding Accelerated Condominium Fee Arrears from August 13, 2021 in the amount of $3,678.64	$2,102.05
Monthly Condominium Fees between April 1 and October 1, 2022 in the amount of $558.77 per month	$3,911.39
Interest	$1,901.89
Collection Charges	$525.00
Caveat Registration Fee	$420.00
Less Payments Received	($13,011.07)
TOTAL AMOUNT OWING:	**$20,809.26**

Unit 72

Outstanding Special Assessments from 2018	$30,400.00
Outstanding Accelerated Condominium Fee Arrears from August 13, 2021 in the amount of $4,480.42	$2,560.24
Monthly Condominium Fees between April 1 and October 1, 2022 in the amount of $680.56 per month	$4,763.92

March 2020 Door Chargeback	$561.75
Administrative Fees	$21.00
Interest	$2,289.11
Collection Charges	$525.00
Caveat Registration Fee	$420.00
Less Payments Received	($15,755.11)
TOTAL AMOUNT OWING:	**$25,785.91**

Unit 73

Outstanding Special Assessments from 2018	$28,160.00
Outstanding Accelerated Condominium Fee Arrears from August 13, 2021 in the amount of $4,150.30	$2,371.60
Monthly Condominium Fees between April 1 and October 1, 2022 in the amount of $630.41 per month	$4,412.87
Interest	$2,126.24
Collection Charges	$525.00
Caveat Registration Fee	$420.00
Less Payments Received	($14,625.15)
TOTAL AMOUNT OWING:	**$23,390.56**

Unit 79

Outstanding Special Assessments from 2018	$28,160.00
Outstanding Accelerated Condominium Fee Arrears from August 13, 2021 in the amount of	$2,371.60

$4,150.30	
Monthly Condominium Fees between April 1 and October 1, 2022 in the amount of $630.41 per month	$4,412.87
Interest	$2,141.77
Collection Charges	$525.00
Caveat Registration Fee	$420.00
Less Payments Received	($14,625.15)
TOTAL AMOUNT OWING:	**$23,406.09**

Unit 85

Outstanding Special Assessments from 2018	$28,160.00
Outstanding Accelerated Condominium Fee Arrears from August 13, 2021 in the amount of $4,150.30	$2,371.60
Monthly Condominium Fees between April 1 and October 1, 2022 in the amount of $630.41 per month	$4,412.87
Interest	$2,140.64
Collection Charges	$525.00
Caveat Registration Fee	$420.00
Less Payments Received	($14,625.15)
TOTAL AMOUNT OWING:	**$23,404.96**

Unit 97

Outstanding Special Assessments from 2018	$28,160.00
Outstanding Accelerated	$2,371.60

Condominium Fee Arrears from August 13, 2021 in the amount of $4,150.30	
Monthly Condominium Fees between April 1 and October 1, 2022 in the amount of $630.41 per month	$4,412.87
Interest	$2,140.64
Collection Charges	$525.00
Caveat Registration Fee	$420.00
Less Payments Received	($14,625.15)
TOTAL AMOUNT OWING:	**$23,404.96**

Unit 99

Outstanding Special Assessments from 2018	$24,960.00
Outstanding Accelerated Condominium Fee Arrears from August 13, 2021 in the amount of $3,678.64	$2,102.05
Monthly Condominium Fees between April 1 and October 1, 2022 in the amount of $558.77 per month	$3,911.39
Interest	$1,916.29
Collection Charges	$525.00
Caveat Registration Fee	$420.00
Less Payments Received	($13,011.07)
TOTAL AMOUNT OWING:	**$20,825.66**

(the “**Indebtedness**”)

14. Interest continues to accrue on the Indebtedness.

15. As of October 7, 2022, the total unpaid Condominium Fees, chargebacks, administrative charges and interest, but excluding legal fees, amounts to $554,205.77, and can be further summarized as follows:

Condominium Fees	$825,959.96
Interest	$49,631.36
Collection Charges	$12,075.00
Chargebacks	$2,788.56
Administration Fees	$42.00
Caveat Registration Fee	$9,660.00
Less Payments Received	($345,951.11)
TOTAL AMOUNT OWING:	**$554,205.77**

16. Pursuant to section 42 of the Act, the Corporation is entitled to collect from J.W. Carr:

(a) all reasonable costs, including legal expenses and interest, incurred by the corporation in collecting the amount owing, and

(b) if a Caveat is registered against title to a Unit, recover from the owner all reasonable expenses incurred by the Corporation with respect to the preparation, registration, enforcement and discharge of the Caveat.

17. The Corporation states that additional Condominium Fees, interest, legal fees and other costs may accrue before the trial of this action, and that by virtue of the Bylaws and the Act, these fees will become due and owing and accumulate to the date of the final disposition of this action by the Court.

18. The Corporation proposes that the trial of this action be held in the City of Edmonton, in the Province of Alberta. At this time, it does not appear that the trial of this action will take more than 25 days.

19. The Corporation pleads and relies on the provisions of the *Condominium Property Act*, RSA 2000, c. C-22, as amended, and the Corporation's Bylaws passed pursuant to the Act.

Remedy sought:

20. WHEREFORE, the Corporation seeks:

(a) A Declaration as to the amount owing from J.W. Carr in respect of Condominium Fees, chargebacks, interest, related costs and such other amounts as may accumulate under the terms of the Corporation's Bylaws and the Act, to the date of final disposition of this action;

(b) Judgment as against J.W. Carr in the amount owing in respect of Condominium Fees, chargebacks, interest, related costs and such other amounts as may accumulate under the terms of the Corporation's Bylaws and the Act, to the date of final disposition of this action, and in default of payment, sale or foreclosure and possession of the Unit;

(c) An Order shortening the period of redemption, as the Court may direct;

(d) In default of payment within the redemption period of the amount owing in respect of Condominium Fees, interest, related costs, and such other amounts as may accumulate during the course of the redemption period, sale or foreclosure and possession of the Units, or alternatively, immediate sale or foreclosure and possession of the Units;

(e) An Order for Possession;

(f) A Preservation Order, if necessary;

(g) An Order for the appointment of a Receiver;

(h) Costs of this action on a solicitor-and-his-own-client full indemnity basis; and

(i) Such further and other relief as the nature of the case may require and this Honourable Court may deem just.

NOTICE TO THE DEFENDANT(S)

You only have a short time to do something to defend yourself against this claim:

20 days if you are served in Alberta

1 month if you are served outside Alberta but in Canada

2 months if you are served outside Canada.

You can respond by filing a statement of defence or a demand for notice in the office of the clerk of the Court of King's Bench at Edmonton, Alberta, AND serving your statement of defence or a demand for notice on the plaintiff's' address for service.

WARNING

If you do not file and serve a statement of defence or a demand for notice within your time period, you risk losing the law suit automatically. If you do not file, or do not serve, or are late in doing either of these things, a court may give a judgment to the plaintiff(s) against you.

Clerk's Stamp

COURT FILE NUMBER	2203 18325
COURT OF KING'S BENCH OF ALBERTA	
JUDICIAL CENTRE	EDMONTON
PLAINTIFF	THE OWNERS: CONDOMINIUM PLAN NO. 872 2944
DEFENDANT	J.W. CARR HOLDINGS LTD.
DOCUMENT	**CONSENT REDEMPTION ORDER - CONDOMINIUM**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	MILLER THOMSON LLP Barristers and Solicitors 2700, Commerce Place 10155-102 Street Edmonton, AB, Canada T5J 4G8 Phone: 780.429.1751 Fax: 780.424.5866 Lawyer's Name: Roberto Noce, K.C. Lawyer's Email rnoce@millerthomson.com File No.: 222016.53

DATE ORDER WAS PRONOUNCED	April 12, 2023
LOCATION WHERE ORDER WAS PRONOUNCED	Edmonton
NAME OF APPLICATIONS JUDGE WHO MADE THIS ORDER	Applications Judge Summers

UPON the application of the Plaintiff; AND UPON reading the statement of claim, the affidavit of default, the certified copies of title and evidence of service thereof; AND UPON hearing from counsel for the Plaintiff; AND UPON noting the consent of counsel for the Defendant to this Order; AND UPON reference to the Affidavit of Roman Soltykevych, sworn February 7, 2023;

IT IS HEREBY ORDERED AND DECLARED THAT:

1. In this order the lands are the following:

CONDOMINIUM PLAN 8722944
UNIT 6
AND 95 UNDIVIDED ONE TEN THOUSANDTH SHARES
IN THE COMMON PROPERTY
EXCEPTING THEREOUT ALL MINES AND MINERALS

("Unit 6")

CONDOMINIUM PLAN 8722944
UNIT 7
AND 88 UNDIVIDED ONE TEN THOUSANDTH SHARES
IN THE COMMON PROPERTY
EXCEPTING THEREOUT ALL MINES AND MINERALS

("Unit 7")

CONDOMINIUM PLAN 8722944
UNIT 9
AND 78 UNDIVIDED ONE TEN THOUSANDTH SHARES
IN THE COMMON PROPERTY
EXCEPTING THEREOUT ALL MINES AND MINERALS

("Unit 9")

CONDOMINIUM PLAN 8722944
UNIT 10
AND 104 UNDIVIDED ONE TEN THOUSANDTH SHARES
IN THE COMMON PROPERTY
EXCEPTING THEREOUT ALL MINES AND MINERALS

("Unit 10")

CONDOMINIUM PLAN 8722944
UNIT 13
AND 88 UNDIVIDED ONE TEN THOUSANDTH SHARES
IN THE COMMON PROPERTY
EXCEPTING THEREOUT ALL MINES AND MINERALS

("Unit 13")

CONDOMINIUM PLAN 8722944
UNIT 18
AND 95 UNDIVIDED ONE TEN THOUSANDTH SHARES
IN THE COMMON PROPERTY
EXCEPTING THEREOUT ALL MINES AND MINERALS

("Unit 18")

CONDOMINIUM PLAN 8722944
UNIT 19
AND 88 UNDIVIDED ONE TEN THOUSANDTH SHARES

IN THE COMMON PROPERTY
EXCEPTING THEREOUT ALL MINES AND MINERALS

("Unit 19")

CONDOMINIUM PLAN 8722944
UNIT 22
AND 104 UNDIVIDED ONE TEN THOUSANDTH SHARES
IN THE COMMON PROPERTY
EXCEPTING THEREOUT ALL MINES AND MINERALS

("Unit 22")

CONDOMINIUM PLAN 8722944
UNIT 23
AND 104 UNDIVIDED ONE TEN THOUSANDTH SHARES
IN THE COMMON PROPERTY
EXCEPTING THEREOUT ALL MINES AND MINERALS

("Unit 23")

CONDOMINIUM PLAN 8722944
UNIT 24
AND 95 UNDIVIDED ONE TEN THOUSANDTH SHARES
IN THE COMMON PROPERTY
EXCEPTING THEREOUT ALL MINES AND MINERALS

("Unit 24")

CONDOMINIUM PLAN 8722944
UNIT 25
AND 88 UNDIVIDED ONE TEN THOUSANDTH SHARES
IN THE COMMON PROPERTY
EXCEPTING THEREOUT ALL MINES AND MINERALS

("Unit 25")

CONDOMINIUM PLAN 8722944
UNIT 29
AND 104 UNDIVIDED ONE TEN THOUSANDTH SHARES
IN THE COMMON PROPERTY
EXCEPTING THEREOUT ALL MINES AND MINERALS

("Unit 29")

CONDOMINIUM PLAN 8722944
UNIT 30
AND 95 UNDIVIDED ONE TEN THOUSANDTH SHARES
IN THE COMMON PROPERTY
EXCEPTING THEREOUT ALL MINES AND MINERALS

("Unit 30")

CONDOMINIUM PLAN 8722944
UNIT 45
AND 78 UNDIVIDED ONE TEN THOUSANDTH SHARES
IN THE COMMON PROPERTY
EXCEPTING THEREOUT ALL MINES AND MINERALS

("Unit 45")

CONDOMINIUM PLAN 8722944
UNIT 63
AND 78 UNDIVIDED ONE TEN THOUSANDTH SHARES
IN THE COMMON PROPERTY
EXCEPTING THEREOUT ALL MINES AND MINERALS

("Unit 63")

CONDOMINIUM PLAN 8722944
UNIT 66
AND 95 UNDIVIDED ONE TEN THOUSANDTH SHARES
IN THE COMMON PROPERTY
EXCEPTING THEREOUT ALL MINES AND MINERALS

("Unit 66")

CONDOMINIUM PLAN 8722944
UNIT 69
AND 78 UNDIVIDED ONE TEN THOUSANDTH SHARES
IN THE COMMON PROPERTY
EXCEPTING THEREOUT ALL MINES AND MINERALS

("Unit 69")

CONDOMINIUM PLAN 8722944
UNIT 72
AND 95 UNDIVIDED ONE TEN THOUSANDTH SHARES
IN THE COMMON PROPERTY
EXCEPTING THEREOUT ALL MINES AND MINERALS

("Unit 72")

CONDOMINIUM PLAN 8722944
UNIT 73
AND 88 UNDIVIDED ONE TEN THOUSANDTH SHARES
IN THE COMMON PROPERTY
EXCEPTING THEREOUT ALL MINES AND MINERALS

("Unit 73")

CONDOMINIUM PLAN 8722944
UNIT 79

AND 88 UNDIVIDED ONE TEN THOUSANDTH SHARES
IN THE COMMON PROPERTY
EXCEPTING THEREOUT ALL MINES AND MINERALS

("Unit 79")

CONDOMINIUM PLAN 8722944
UNIT 85
AND 88 UNDIVIDED ONE TEN THOUSANDTH SHARES
IN THE COMMON PROPERTY
EXCEPTING THEREOUT ALL MINES AND MINERALS

("Unit 85")

CONDOMINIUM PLAN 8722944
UNIT 97
AND 88 UNDIVIDED ONE TEN THOUSANDTH SHARES
IN THE COMMON PROPERTY
EXCEPTING THEREOUT ALL MINES AND MINERALS

("Unit 97")

CONDOMINIUM PLAN 8722944
UNIT 99
AND 78 UNDIVIDED ONE TEN THOUSANDTH SHARES
IN THE COMMON PROPERTY
EXCEPTING THEREOUT ALL MINES AND MINERALS

("Unit 99")

(Collectively, the "Units")

2. It is declared that the Plaintiff has a valid charge over each Unit pursuant to section 39.2(7) of the Condominium Property Act to enforce collection of amounts owing by the Defendant to the Plaintiff as unpaid contributions and interest owed in respect of each Unit in the following amounts as set forth at paragraph 13 of the Affidavit of Roman Soltykevych, updated to the 30th day of March, 2023:

(a) Unit 6 - $26,128.73

(b) Unit 7 - $24,063.61

(c) Unit 9 - $21,009.74

(d) Unit 10 – 28,684.87

(e) Unit 13 - $24,084.41

(f) Unit 18 - $26,267.40

(g) Unit 19 - $24,252.11

(h) Unit 22 - $28,694.04

(i) Unit 23 - $28,996.81

(j) Unit 24 - $26,253.53

(k) Unit 25 - $22,362.02

(l) Unit 29 - $29,004.86

(m) Unit 30 - $26,253.54

(n) Unit 45 - $21,071.32

(o) Unit 63 - $21,113.72

(p) Unit 66 - $26,280.74

(q) Unit 69 - $21,113.72

(r) Unit 72 - $26,286.57

(s) Unit 73 - $24,153.22

(t) Unit 79 - $24,168.75

(u) Unit 85 - $24,167.62

(v) Unit 97 - $24,167.62

(w) Unit 99 - $21,128.12

3. It is further declared that the Plaintiff has a valid charge over the Units 25 and 72 pursuant to the Plaintiff's by-laws to enforce payment of amounts owing in the amount of $2,399.25 as at the 30th day of March, 2023 (as set forth in the Statement of Indebtedness which is attached to this order).

4. The Plaintiff is hereby awarded judgment as an unsecured creditor against the Defendant in the amount of $12,117.00 (as set forth in the Statement of Indebtedness which is attached to this order).

5. The Defendant and subsequent encumbrancers have one month from service of this order upon them to apply to vary the amount declared owing pursuant to the preceding paragraph with respect to any amounts not disclosed in the affidavit of default served in support of the application for this order.

6. Prior to the entry of this order the assessment officer shall check the amounts claimed in the statements of indebtedness, including the particulars provided in the affidavit of

default and the Plaintiff's calculations. If the assessment officer returns this order unentered then the Plaintiff may either submit a corrected order or seek the advice and direction of the court. The requirement for service of documents prior to entry of this order, set out in Rule 9.35(1)(a), is hereby waived.

7. The Defendant or anyone else entitled to do so shall have until six (6) months from the date of service of this order upon the Defendant (the "Redemption Date") to repay the indebtedness owing pursuant to paragraphs 2 and 3 of this order in respect of each Unit (the "Secured Indebtedness"), failing which the respective Units shall be offered for sale in the manner described in a judicial listing agreement to be set by a further application on notice to the Defendant and other registered encumbrancers. Subject to further Order of the Court, and subject to paragraph 8 of this order, this Action is stayed until the Redemption Date.

8. The requirement to file an Affidavit of Value is dispensed with at this time. The Plaintiff is required to file an Affidavit of Value in conjunction with the Application contemplated in paragraph 7 of this Order.

9. If the Defendant, or anyone entitled to do so, repays the Secured Indebtedness owed in respect of each or any Unit prior to that Unit being sold or foreclosed in these proceedings, plus any further contributions accruing due under section 39.2(7) of the *Condominium Property Act* and/or amounts owing under the bylaws of the Plaintiff, then this Action is stayed in respect of that Unit so long as payments to the Plaintiff remain current.

10. If the lands become vacant or abandoned during the course of this action then the Plaintiff may enter the lands for the purpose of doing any and all things necessary to preserve them, and the Plaintiff shall not be considered a trespasser.

11. With respect to the annexed statements of indebtedness:

    (a) Where nothing is claimed with respect to a listed category, the word "nil" shall be inserted opposite; and

    (b) Where amounts are claimed for any items, documents substantiating such claims shall be provided in affidavit form to the assessment officer for review prior to the entry of this order.

68876900.5 / 92134920.1

12. Service of this order and all subsequent documents in this action may be served upon the Defendant, J.W. Carr Holdings Ltd., by serving the address provided in the Statement of Defence filed in the within Action, unless an alternate address for service is subsequently provided by the Defendant and in which case, service shall be to that alternate address.

13. The Plaintiff is awarded costs of this action on a solicitor and own client basis, which shall be assessed at a future date on notice pursuant to Rule 10.37.

14. The costs awarded in paragraph 13 are an unsecured judgment debt of the Defendant.

APPLICATIONS JUDGE IN CHAMBERS

Consented to this 11 day of April, 2023 by:

MLT AIKINS LLP

For: ______________________

Mandi Deren-Dubé, Counsel for the Defendant, J.W. Carr Holdings Ltd.

Statement of Indebtedness as at March 30, 2023 - Unit 6

Contributions

1.	Monthly condominium fees	$10,726.96
2.	Special Assessments	$30,400.00
3.	Interest at 12% pursuant to by-laws	$3,102.30
4.	Charges for preparing and registering caveats, pursuant to s. 42(b)	$420.00
5.	Whatever else the court determines falls under section 39.2(7)	Nil
6.	Payments Received	($18,520.53)
	TOTAL AT DATE ORDER GRANTED	**$26,128.73**

Unsecured

7.	Charge for filing caveat [if not under section 39.2(7) and not secured pursuant to by-law]	Nil
8.	NSF Fees	Nil
9.	Unpaid parking fees or fines, if not secured pursuant to by-law	Nil
10.	Collection charges and administration fees	$525.00
11.	Costs	To be assessed.
	TOTAL AT DATE ORDER GRANTED	**$TBD**

Statement of Indebtedness as at March 30, 2023 - Unit 7

Contributions

1.	Monthly condominium fees	$9,936.52
2.	Special Assessments	$28,160.00
3.	Interest at 12% pursuant to by-laws	$2,937.66
4.	Charges for preparing and registering caveats, pursuant to s. 42(b)	$420.00
5.	Whatever else the court determines falls under section 39.2(7)	Nil
6.	Payments Received	($17,390.57)
	TOTAL AT DATE ORDER GRANTED	**$24,063.61**

Unsecured

7.	Charge for filing caveat [if not under section 39.2(7) and not secured pursuant to by-law]	Nil
8.	NSF Fees	Nil
9.	Unpaid parking fees or fines, if not secured pursuant to by-law	Nil
10.	Collection charges and administration fees	$525.00
11.	Costs	To be assessed.
	TOTAL AT DATE ORDER GRANTED	**$TBD**

Statement of Indebtedness as at March 30, 2023 – Unit 9

Contributions

1.	Monthly condominium fees	$8,807.29
2.	Special Assessments	$24,960.00
3.	Interest at 12% pursuant to by-laws	$2,598.94
4.	Charges for preparing and registering caveats, pursuant to s. 42(b)	$420.00
5.	Whatever else the court determines falls under section 39.2(7)	Nil
6.	Payments Received	($15,776.49)
	TOTAL AT DATE ORDER GRANTED	**$21,009.74**

Unsecured

7.	Charge for filing caveat [if not under section 39.2(7) and not secured pursuant to by-law]	Nil
8.	NSF Fees	Nil
9.	Unpaid parking fees or fines, if not secured pursuant to by-law	Nil
10.	Collection charges and administration fees	$525.00
11.	Costs	To be assessed.
	TOTAL AT DATE ORDER GRANTED	**$TBD**

Statement of Indebtedness as at March 30, 2023 – Unit 10

Contributions

1.	Monthly condominium fees	$11,743.16
2.	Special Assessments	$33,280.00
3.	Interest at 12% pursuant to by-laws	$3,469.17
4.	Charges for preparing and registering caveats, pursuant to s. 42(b)	$420.00
5.	Whatever else the court determines falls under section 39.2(7)	Nil
6.	Payments Received	($20,227.46)
	TOTAL AT DATE ORDER GRANTED	**$28,684.87**

Unsecured

7.	Charge for filing caveat [if not under section 39.2(7) and not secured pursuant to by-law]	Nil
8.	NSF Fees	Nil
9.	Unpaid parking fees or fines, if not secured pursuant to by-law	Nil
10.	Collection charges and administration fees	$525.00
11.	Costs	To be assessed.
	TOTAL AT DATE ORDER GRANTED	**$TBD**

Statement of Indebtedness as at March 30, 2023 – Unit 13

Contributions

1.	Monthly condominium fees	$9,936.52
2.	Special Assessments	$28,160.00
3.	Interest at 12% pursuant to by-laws	$2,958.46
4.	Charges for preparing and registering caveats, pursuant to s. 42(b)	$420.00
5.	Whatever else the court determines falls under section 39.2(7)	Nil
6.	Payments Received	($17,390.57)
	TOTAL AT DATE ORDER GRANTED	**$24,084.41**

Unsecured

7.	Charge for filing caveat [if not under section 39.2(7) and not secured pursuant to by-law]	Nil
8.	NSF Fees	Nil
9.	Unpaid parking fees or fines, if not secured pursuant to by-law	Nil
10.	Collection charges and administration fees	$525.00
11.	Costs	To be assessed.
	TOTAL AT DATE ORDER GRANTED	**$TBD**

Statement of Indebtedness as at March 30, 2023 – Unit 18

Contributions

1.	Monthly condominium fees	$10,726.96
2.	Special Assessments	$30,400.00
3.	Interest at 12% pursuant to by-laws	$3,240.97
4.	Charges for preparing and registering caveats, pursuant to s. 42(b)	$420.00
5.	Whatever else the court determines falls under section 39.2(7)	Nil
6.	Payments Received	($18,520.53)
	TOTAL AT DATE ORDER GRANTED	**$26,267.40**

Unsecured

7.	Charge for filing caveat [if not under section 39.2(7) and not secured pursuant to by-law]	Nil
8.	NSF Fees	Nil
9.	Unpaid parking fees or fines, if not secured pursuant to by-law	Nil
10.	Collection charges and administration fees	$525.00
11.	Costs	To be assessed.
	TOTAL AT DATE ORDER GRANTED	**$TBD**

Statement of Indebtedness as at March 30, 2023 – Unit 19

Contributions

1.	Monthly condominium fees	$9,936.52
2.	Special Assessments	$28,160.00
3.	Interest at 12% pursuant to by-laws	$3,126.16
4.	Charges for preparing and registering caveats, pursuant to s. 42(b)	$420.00
5.	Whatever else the court determines falls under section 39.2(7)	Nil
6.	Payments Received	($17,390.57)
	TOTAL AT DATE ORDER GRANTED	**$24,252.11**

Unsecured

7.	Charge for filing caveat [if not under section 39.2(7) and not secured pursuant to by-law]	Nil
8.	NSF Fees	Nil
9.	Unpaid parking fees or fines, if not secured pursuant to by-law	Nil
10.	Collection charges and administration fees	$525.00
11.	Costs	To be assessed.
	TOTAL AT DATE ORDER GRANTED	**$TBD**

Statement of Indebtedness as at March 30, 2023 – Unit 22

Contributions

1.	Monthly condominium fees	$11,743.16
2.	Special Assessments	$33,280.00
3.	Interest at 12% pursuant to by-laws	$3,502.34
4.	Charges for preparing and registering caveats, pursuant to s. 42(b)	$420.00
5.	Whatever else the court determines falls under section 39.2(7)	Nil
6.	Payments Received	($20,251.46)
	TOTAL AT DATE ORDER GRANTED	**$28,694.04**

Unsecured

7.	Charge for filing caveat [if not under section 39.2(7) and not secured pursuant to by-law]	Nil
8.	NSF Fees	Nil
9.	Unpaid parking fees or fines, if not secured pursuant to by-law	Nil
10.	Collection charges and administration fees	$525
11.	Costs	To be assessed.
	TOTAL AT DATE ORDER GRANTED	**$TBD**

Statement of Indebtedness as at March 30, 2023 – Unit 23

Contributions

1.	Monthly condominium fees	$11,743.16
2.	Special Assessments	$33,280.00
3.	Interest at 12% pursuant to by-laws	$3,526.98
4.	Charges for preparing and registering caveats, pursuant to s. 42(b)	$420.00
5.	Whatever else the court determines falls under section 39.2(7)	Nil
6.	Payments Received	($19,973.33)
	TOTAL AT DATE ORDER GRANTED	**$28,996.81**

Unsecured

7.	Charge for filing caveat [if not under section 39.2(7) and not secured pursuant to by-law]	Nil
8.	NSF Fees	Nil
9.	Unpaid parking fees or fines, if not secured pursuant to by-law	Nil
10.	Collection charges and administration fees	$525.00
11.	Costs	To be assessed.
	TOTAL AT DATE ORDER GRANTED	**$TBD**

Statement of Indebtedness as at March 30, 2023 – Unit 24

Contributions

1.	Monthly condominium fees	$10,726.96
2.	Special Assessments	$30,400.00
3.	Interest at 12% pursuant to by-laws	$3,227.10
4.	Charges for preparing and registering caveats, pursuant to s. 42(b)	$420.00
5.	Whatever else the court determines falls under section 39.2(7)	Nil
6.	Payments Received	($18,520.53)
	TOTAL AT DATE ORDER GRANTED	**$26,253.53**

Unsecured

7.	Charge for filing caveat [if not under section 39.2(7) and not secured pursuant to by-law]	Nil
8.	NSF Fees	Nil
9.	Unpaid parking fees or fines, if not secured pursuant to by-law	Nil
10.	Collection charges and administration fees	$525.00
11.	Costs	To be assessed.
	TOTAL AT DATE ORDER GRANTED	**$TBD**

Statement of Indebtedness as at March 30 , 2023 – Unit 25

Contributions

1.	Monthly condominium fees	$9,936.52
2.	Special Assessments	$28,160.00
3.	Interest at 12% pursuant to by-laws	$3,073.56
4.	Charges for preparing and registering caveats, pursuant to s. 42(b)	$420.00
5.	Whatever else the court determines falls under section 39.2(7)	Nil
6.	Payments Received	($17,390.56)
	TOTAL AT DATE ORDER GRANTED	**$24,199.52**

Secured Under Bylaws

7.	Charge for filing caveat [if not under section 39.2(7) and if secured pursuant to by-law]	Nil
8.	NSF Fees	Nil
9.	Unpaid parking fees or fines, if secured pursuant to by-law	Nil
10.	Other amounts secured pursuant to by-laws – Chargebacks	$1,837.50
	TOTAL AT DATE ORDER GRANTED	**$1,837.50**

Unsecured

11.	Charge for filing caveat [if not under section 39.2(7) and not secured pursuant to by-law]	Nil
12.	NSF Fees	Nil
13.	Unpaid parking fees or fines, if not secured pursuant to by-law	Nil
14.	Collection charges and administration fees	$525.00
15.	Costs	To be assessed.
	TOTAL AT DATE ORDER GRANTED	**$TBD**

Statement of Indebtedness as at March 30, 2023 – Unit 29

Contributions

1.	Monthly condominium fees	$11,743.16
2.	Special Assessments	$33,280.00
3.	Interest at 12% pursuant to by-laws	$3,535.02
4.	Charges for preparing and registering caveats, pursuant to s. 42(b)	$420.00
5.	Whatever else the court determines falls under section 39.2(7)	Nil
6.	Payments Received	($19,973.32)
	TOTAL AT DATE ORDER GRANTED	**$29,004.86**

Unsecured

7.	Charge for filing caveat [if not under section 39.2(7) and not secured pursuant to by-law]	Nil
8.	NSF Fees	Nil
9.	Unpaid parking fees or fines, if not secured pursuant to by-law	Nil
10.	Collection charges and administration fees	$525.00
11.	Costs	To be assessed.
	TOTAL AT DATE ORDER GRANTED	**$TBD**

Statement of Indebtedness as at March 30, 2023 – Unit 30

Contributions

1.	Monthly condominium fees	$10,726.96
2.	Special Assessments	$30,400.00
3.	Interest at 12% pursuant to by-laws	$3,227.10
4.	Charges for preparing and registering caveats, pursuant to s. 42(b)	$420.00
5.	Whatever else the court determines falls under section 39.2(7)	Nil
6.	Payments Received	($18,520.52)
	TOTAL AT DATE ORDER GRANTED	**$26,253.54**

Unsecured

7.	Charge for filing caveat [if not under section 39.2(7) and not secured pursuant to by-law]	Nil
8.	NSF Fees	Nil
9.	Unpaid parking fees or fines, if not secured pursuant to by-law	Nil
10.	Collection charges and administration fees	$525.00
11.	Costs	To be assessed.
	TOTAL AT DATE ORDER GRANTED	**$TBD**

Statement of Indebtedness as at March 30, 2023 – Unit 45

Contributions

1.	Monthly condominium fees	$8,807.29
2.	Special Assessments	$24,960.00
3.	Interest at 12% pursuant to by-laws	$2,660.51
4.	Charges for preparing and registering caveats, pursuant to s. 42(b)	$420.00
5.	Whatever else the court determines falls under section 39.2(7)	Nil
6.	Payments Received	($15,776.48)
	TOTAL AT DATE ORDER GRANTED	**$21,071.32**

Unsecured

7.	Charge for filing caveat [if not under section 39.2(7) and not secured pursuant to by-law]	Nil
8.	NSF Fees	Nil
9.	Unpaid parking fees or fines, if not secured pursuant to by-law	Nil
10.	Collection charges and administration fees	$525.00
11.	Costs	To be assessed.
	TOTAL AT DATE ORDER GRANTED	**$TBD**

Statement of Indebtedness as at March 30, 2023 – Unit 63

Contributions

1.	Monthly condominium fees	$8,807.29
2.	Special Assessments	$24,960.00
3.	Interest at 12% pursuant to by-laws	$2,702.91
4.	Charges for preparing and registering caveats, pursuant to s. 42(b)	$420.00
5.	Whatever else the court determines falls under section 39.2(7)	Nil
6.	Payments Received	($15,776.48)
	TOTAL AT DATE ORDER GRANTED	**$21,113.72**

Unsecured

7.	Charge for filing caveat [if not under section 39.2(7) and not secured pursuant to by-law]	Nil
8.	NSF Fees	Nil
9.	Unpaid parking fees or fines, if not secured pursuant to by-law	Nil
10.	Collection charges and administration fees	$525.00
11.	Costs	To be assessed.
	TOTAL AT DATE ORDER GRANTED	**$TBD**

Statement of Indebtedness as at March 30, 2023 – Unit 66

Contributions

1.	Monthly condominium fees	$10,726.96
2.	Special Assessments	$30,400.00
3.	Interest at 12% pursuant to by-laws	$3,254.30
4.	Charges for preparing and registering caveats, pursuant to s. 42(b)	$420.00
5.	Whatever else the court determines falls under section 39.2(7)	Nil
6.	Payments Received	($18,520.52)
	TOTAL AT DATE ORDER GRANTED	**$26,280.74**

Unsecured

7.	Charge for filing caveat [if not under section 39.2(7) and not secured pursuant to by-law]	Nil
8.	NSF Fees	Nil
9.	Unpaid parking fees or fines, if not secured pursuant to by-law	Nil
10.	Collection charges and administration fees	$525.00
11.	Costs	To be assessed.
	TOTAL AT DATE ORDER GRANTED	**$TBD**

Statement of Indebtedness as at March 30, 2023 – Unit 69

Contributions

1.	Monthly condominium fees	$8,807.29
2.	Special Assessments	$24,960.00
3.	Interest at 12% pursuant to by-laws	$2,702.91
4.	Charges for preparing and registering caveats, pursuant to s. 42(b)	$420.00
5.	Whatever else the court determines falls under section 39.2(7)	Nil
6.	Payments Received	($15,776.48)
	TOTAL AT DATE ORDER GRANTED	**$21,113.72**

Unsecured

7.	Charge for filing caveat [if not under section 39.2(7) and not secured pursuant to by-law]	Nil
8.	NSF Fees	Nil
9.	Unpaid parking fees or fines, if not secured pursuant to by-law	Nil
10.	Collection charges and administration fees	$525.00
11.	Costs	To be assessed.
	TOTAL AT DATE ORDER GRANTED	**$TBD**

Statement of Indebtedness as at March 30, 2023 – Unit 72

Contributions

1.	Monthly condominium fees	$10,726.96
2.	Special Assessments	$30,400.00
3.	Interest at 12% pursuant to by-laws	$3,260.13
4.	Charges for preparing and registering caveats, pursuant to s. 42(b)	$420.00
5.	Whatever else the court determines falls under section 39.2(7)	Nil
6.	Payments Received	($18,520.52)
	TOTAL AT DATE ORDER GRANTED	**$26,286.57**

Secured Under Bylaws

7.	Charge for filing caveat [if not under section 39.2(7) and if secured pursuant to by-law]	Nil
8.	NSF Fees	Nil
9.	Unpaid parking fees or fines, if secured pursuant to by-law	Nil
10.	Other amounts secured pursuant to by-laws - Chargebacks	$561.75
	TOTAL AT DATE ORDER GRANTED	**$561.75**

Unsecured

11.	Charge for filing caveat [if not under section 39.2(7) and not secured pursuant to by-law]	Nil
12.	NSF Fees	Nil
13.	Unpaid parking fees or fines, if not secured pursuant to by-law	Nil
14.	Collection charges and administration fees	$525.00
15.	Costs	To be assessed.
	TOTAL AT DATE ORDER GRANTED	**$TBD**

Statement of Indebtedness as at March 30, 2023 – Unit 73

Contributions

1.	Monthly condominium fees	$9,936.52
2.	Special Assessments	$28,160.00
3.	Interest at 12% pursuant to by-laws	$3,027.26
4.	Charges for preparing and registering caveats, pursuant to s. 42(b)	$420.00
5.	Whatever else the court determines falls under section 39.2(7)	Nil
6.	Payments Received	($17,390.56)
	TOTAL AT DATE ORDER GRANTED	**$24,153.22**

Unsecured

7.	Charge for filing caveat [if not under section 39.2(7) and not secured pursuant to by-law]	Nil
8.	NSF Fees	Nil
9.	Unpaid parking fees or fines, if not secured pursuant to by-law	Nil
10.	Collection charges and administration fees	$525.00
11.	Costs	To be assessed.
	TOTAL AT DATE ORDER GRANTED	**$TBD**

Statement of Indebtedness as at March 30, 2023 – Unit 79

Contributions

1.	Monthly condominium fees	$9,936.52
2.	Special Assessments	$28,160.00
3.	Interest at 12% pursuant to by-laws	$3,042.79
4.	Charges for preparing and registering caveats, pursuant to s. 42(b)	$420.00
5.	Whatever else the court determines falls under section 39.2(7)	Nil
6.	Payments Received	($17,390.56)
	TOTAL AT DATE ORDER GRANTED	**$24,168.75**

Unsecured

7.	Charge for filing caveat [if not under section 39.2(7) and not secured pursuant to by-law]	Nil
8.	NSF Fees	Nil
9.	Unpaid parking fees or fines, if not secured pursuant to by-law	Nil
10.	Collection charges and administration fees	$525.00
11.	Costs	To be assessed.
	TOTAL AT DATE ORDER GRANTED	**$TBD**

Statement of Indebtedness as at March 30, 2023 – Unit 85

Contributions

1.	Monthly condominium fees	$9,936.52
2.	Special Assessments	$28,160.00
3.	Interest at 12% pursuant to by-laws	$3,041.66
4.	Charges for preparing and registering caveats, pursuant to s. 42(b)	$420.00
5.	Whatever else the court determines falls under section 39.2(7)	Nil
6.	Payments Received	($17,390.56)
	TOTAL AT DATE ORDER GRANTED	**$24,167.62**

Unsecured

7.	Charge for filing caveat [if not under section 39.2(7) and not secured pursuant to by-law]	Nil
8.	NSF Fees	Nil
9.	Unpaid parking fees or fines, if not secured pursuant to by-law	Nil
10.	Collection charges and administration fees	$525.00
11.	Costs	To be assessed.
	TOTAL AT DATE ORDER GRANTED	**$TBD**

Statement of Indebtedness as at March 30, 2023 – Unit 97

Contributions

1.	Monthly condominium fees	$9,936.52
2.	Special Assessments	$28,160.00
3.	Interest at 12% pursuant to by-laws	$3,041.66
4.	Charges for preparing and registering caveats, pursuant to s. 42(b)	$420.00
5.	Whatever else the court determines falls under section 39.2(7)	Nil
6.	Payments Received	($17,390.56)
	TOTAL AT DATE ORDER GRANTED	**$24,167.62**

Unsecured

7.	Charge for filing caveat [if not under section 39.2(7) and not secured pursuant to by-law]	Nil
8.	NSF Fees	Nil
9.	Unpaid parking fees or fines, if not secured pursuant to by-law	Nil
10.	Collection charges and administration fees	$525.00
11.	Costs	To be assessed.
	TOTAL AT DATE ORDER GRANTED	**$TBD**

Statement of Indebtedness as at March 30, 2023 – Unit 99

Contributions

1.	Monthly condominium fees	$8,807.29
2.	Special Assessments	$24,960.00
3.	Interest at 12% pursuant to by-laws	$2,717.31
4.	Charges for preparing and registering caveats, pursuant to s. 42(b)	$420.00
5.	Whatever else the court determines falls under section 39.2(7)	Nil
6.	Payments Received	($15,776.48)
	TOTAL AT DATE ORDER GRANTED	**$21,128.12**

Unsecured

7.	Charge for filing caveat [if not under section 39.2(7) and not secured pursuant to by-law]	Nil
8.	NSF Fees	Nil
9.	Unpaid parking fees or fines, if not secured pursuant to by-law	Nil
10.	Collection charges and administration fees	$525.00
11.	Costs	To be assessed.
	TOTAL AT DATE ORDER GRANTED	**$TBD**

Date:20010124
Docket: CA 163846
CA 163847

NOVA SCOTIA COURT OF APPEAL

[Cite as:2475813 Nova Scotia Ltd. v. Rodgers, 2001 NSCA 12]

Bateman, Hallett and Cromwell, JJ.A.

BETWEEN:

RITA M. RODGERS, et al.

Appellants
Respondents by Cross-Appeal

- and -

2475813 NOVA SCOTIA LIMITED

Respondent
Appellant by Cross-Appeal

AND BETWEEN:

INTAB ALI et al.

Appellants
Respondents by Cross-Appeal

- and -

BRUCE BRETT, 2475813 NOVA SCOTIA LIMITED, CHARLES HENMAN, PAMELA ROBERTSON, BETTY SINNIS and ROBERT THOMSON

Respondents
Appellants by Cross-Appeal

- and -

HALIFAX COUNTY CONDOMINIUM CORPORATION NO. 151

Respondent

REASONS FOR JUDGMENT

Counsel:	David A. Copp and Janet H. Morris for the Appellants (Respondents by Cross-Appeal) Intab Ali, et al Dennis James and Paul Morris for the Respondents (Appellants by Cross-Appeal)
Appeal Heard:	November 20, 2000
Judgment Delivered:	January 24, 2001
THE COURT:	Appeals allowed and cross-appeal dismissed per reasons for judgment of Cromwell, J.A.; Hallett and Bateman, JJ.A. concurring.

CROMWELL, J.A.:

I. Introduction:

[1] This case concerns a proposed sale of a condominium development. One person, Mr. Brett, effectively controls 80% of the votes of all unit owners. He was also the controlling mind of the developer and a director of the condominium corporation. By exercising his 80% voting control, Mr. Brett has obtained the authorization necessary to require the sale of the condominium to a company under his control at a price of his choosing. There is a group of dissenting unit owners who, if the transaction proceeds, will be required to sell their units against their will. Their position is that the proposed transaction has not been properly authorized. While the appeal raises several interpretative and procedural issues under the **Condominium Act**, the fundamental question is this. Does the **Act** permit a person controlling 80% of the votes to purchase the condominium property, dispossess all of the unit holders and dictate the terms of the sale over the dissent of the remaining unit holders?

[2] Before turning to the facts and issues, it will be helpful to set out an overview of the legal framework for the condominium out of which the specific questions to be answered on this appeal arise.

[3] The term “condominium” refers to a system of ownership and administration of property with three main features. A portion of the property is divided into individually owned units, the balance of the property is owned in common by all the individual owners and a vehicle for managing the property, known as the condominium corporation, is established: see A.H. Oosterhoff and W.B. Rayner, *Anger and Honsberger Law of Real Property* (1985), Vol. II, s. 3801 and Alvin B. Rosenberg, *Condominium in Canada* (1969). The condominium may be seen, therefore, as a vehicle for holding land which combines the advantages of individual ownership with those of multi-unit development: Oosterhoff and Rayner at s. 3802. In a sense, the unit owners make up a democratic society in which each has many of the rights associated with sole ownership of real property, but in which, having regard to their co-ownership with the others, some of those rights are subordinated to the will of the majority: see Robert J. Owens et al. (eds), *Corpus Juris Secundum* (1996), Estates § 195, Vol. 31, p. 260.

[4] As Oosterhoff and Rayner wisely observed, the success of a condominium depends in large measure on an equitable balance being struck between the independence of the individual owners and the interdependence of them all in a co-

operative community. It follows, they note, that common features of all condominiums are the need for balance and the possibility of tension between individual and collective interests: at s. 3802.

[5] From a more purely legal perspective, a modern condominium is created pursuant to detailed legislative provisions such as, in Nova Scotia, the **Condominium Act**, R.S.N.S. 1989, c. 85 (the "**Act**"). The condominium is, therefore, a creature of statute. But condominium legislation reflects the combination of several legal concepts and relies on, and to a degree incorporates by reference, principles drawn from several different areas of law. The law relating to individual ownership of real property is, of course, central because the owners of the individual units are, subject to certain limits, entitled to exclusive ownership and use of their units: see s. 27(2) of the **Act**. The law relating to joint ownership is significant because the owners are tenants in common with respect to the common elements: see s. 28(1). The law relating to easements and covenants is relevant because the unit owners have rights to compliance by the others with the provisions governing the condominium and certain easements are, by statute, appurtenant to each unit: see s. 30(2) and 29. The law relating to corporations is also of importance because the condominium is administered by the condominium

corporation in which the unit holders are in a position analogous to shareholders: see, e.g., ss. 13 and ff and s. 25. While the **Condominium Act** enables and, to a degree, regulates the legal aspects of condominium ownership, it does so against a vast background of general legal principles which will frequently be relevant to the interpretation and application of the **Act**. As has been said, "[i]n its legal structure, the condominium first combines elements of several concepts ... and then seeks to delineate separate privileges and responsibilities on the one hand from common privileges and responsibilities on the other." *Corpus Juris Secundum*, **supra** at p. 260.

[6] Not all condominium developments succeed or last indefinitely. The **Act** provides for termination and sale.

[7] Under s. 41, the owners may decide that the property will no longer be a condominium. To use the language of the statute, the government of the property by the **Act**, may be terminated. The effect of taking this step is that the property ceases to be a condominium, the unit owners become tenants in common and the condominium corporation is deemed to have been wound up: see s. 42(a) and (b)

and s. 22. This step may only be taken if approved by all unit owners and registered encumbrancers or by court order: s. 41(1) and 43.

[8] Under s. 40 of the **Act**, the property, that is, all units and common elements, may be sold. When this step is taken, the government of the property is terminated and the owners share the proceeds of sale in the same proportions as their common interests: s. 40(3)(a) and 40(4). The practical effect is that individual owners are forced to sell their units. This step may be taken only with the approval of 80% of the unit owners and all registered encumbrancers: s. 40(1). Dissenting unit owners are afforded a measure of protection. They are given the right to have the fair market value of the property determined and, if this is greater than the sale price, all unit owners voting for the sale are liable for the deficiency: s. 40(5) and 40(6).

[9] Termination or sale of the condominium are fundamental steps which, when contemplated or pursued, are likely to escalate the inherent tension between individual and collective interests. And so it is in this case.

II. Overview of the Facts:

[10] Halifax Condominium Corporation No. 151 was registered on March 29, 1988. It is a 200 unit residential building known as Granbury Place. Brett Pontiac Buick GMC Limited, a company controlled by Bruce Brett, was the declarant-owner of the property. The project was developed and marketed through Granbury Developments Limited, another Brett company.

[11] Some initial sales of the units were made, but about 80 of the 200 units remained unsold and were acquired by another Brett company, 2475813 Nova Scotia Limited. It acquired additional units with the result that, as of January 12, 2000, that company owned or together with Mr. Brett, controlled, in excess of 80% of the units and common elements. Most of these units were rented. The appellants, who in the main occupy their units, owned roughly 14%.

[12] Since at least 1997, there have been disputes between the Brett interests and the appellants about the governance and future direction of the condominium. The Board of Directors of the condominium corporation made offers (the first being made in May of 1997) to acquire all the units owned by the Brett interests, but no agreement was reached. From roughly June of 1998, Mr. Brett undertook what he referred to as "... an extensive process of repurchasing units through 2475813 Nova

Scotia Limited." The result of this process was that, according to Mr. Brett's disclosure statement in December, 1999, 2475813 Nova Scotia Limited owned 150 units and other persons related to Mr. Brett owned 13. He thus had effective control of just over 80% of the units.

[13] In December of 1998, Mr. Brett wrote to unit owners that "[i]rritations left in the body of unit owners which remain in the Corporation are of such a significance and to such an extent that I now conclude that the sole appropriate resolution of this matter is to move to a termination of the governance of the Corporation under the *Condominium Act*." This is a reference to the procedure contemplated by s. 41 of the **Condominium Act**. To simplify, when this procedure is properly invoked, the **Act** ceases to apply to the property and the owners become tenants in common in the same proportions as their common interests.

[14] Although a resolution to terminate was passed by votes representing over 80% of the units at a general meeting of owners in December of 1998, the termination did not become effective as the required documents were not accepted for registration by the Registrar of Condominiums.

[15] In late December of 1999, 2475813 Nova Scotia Limited, acting through its President, Mr. Brett, petitioned the Board of Directors to call a meeting of owners for the purpose of considering resolutions (referred to as a Resolutions A and B) authorizing the sale of the property to 2475813 Nova Scotia Limited, for $13,200,000 and the construction of an addition to the property. The Board convened the requested meeting on January 12, 2000 and the resolutions were declared passed on the affirmative vote of the units owned or controlled by the Brett interests. However, for reasons that will become apparent, no agreement of purchase and sale has been entered into in furtherance of these resolutions.

[16] For ease of reference, I will often refer to the various corporations owned or controlled by Mr. Brett as well as the units effectively under his control as the Brett interests and the appellants collectively as the individual unit holders.

III. Proceedings and Decision of the Chambers Judge:

[17] Various disputes between the Brett interests and the individual unit holders have resulted in litigation. The proceedings leading to these appeals are two applications, commenced within days of each other, to Supreme Court chambers for declaratory relief.

[18] The appellants (individual unit holders) are the plaintiffs in S.H. No 162174. Halifax Condominium Corporation No 151 (the corporation), 2475813 Nova Scotia Limited (the numbered company) and five individuals alleged to be Directors of the Condominium Corporation (Bruce Brett, Charles Henman, Pamela Robertson, Betty Sinnis and Robert Thomson) are the named defendants. (As noted, the appellants have ownership interests in approximately 30 of the 200 units in Granbury Place.) They asked for various declarations that, in essence, the **Act** does not permit the proposed transactions and that there were procedural and other faults that invalidated the approval process. Specifically, they sought the following relief (the numbering is as used in the Notice of Application):

> 2. an order pursuant to section 38 of the *Condominium Act* and Rule 5.14 of the *Civil Procedure Rules* declaring that:
>
> > Section 40 of the *Condominium Act* does not apply to authorize or permit a non-arms' length acquisition of the condominium

property, including the units, by a unit owner owning a majority of interest in the common elements and particularly by a unit owner who is deemed to be the Declarant legally or beneficially owning an interest or 80% or more of the common elements;

and,

3. an order pursuant to section 38 of the *Condominium Act* and Rule 5.14 of the *Civil Procedure Rules* declaring that:

   1. The purported authorization of the Board of Directors of the Defendant Halifax County Condominium Corporation No. 151 (the Defendant HCCC 151) *inter alia*, to sell all of the property of the Defendant HCCC151 to the Defendant 2475813 Nova Scotia Limited by Resolution A, moved at a meeting of the unit owners of the Defendant HCCC 151 of 12 January 2000, is without the authority of the *Condominium Act* and is null and void upon the following grounds, namely:

      1. Units are not included in the meaning of the term "property", within the meaning of section 40 of the *Condominium Act*;

      2. Section 40 of the *Condominium Act* does not apply to the transaction purportedly authorized by Resolution A, such transaction being a non-arms' length acquisition of the property, including the units, by a unit owner owning a majority of interest in the common elements and particularly by a unit owner who is deemed to be the Declarant legally or beneficially owning an interest or 80% or more of the common elements;

      3. At the time of the purported motion of Resolution A, there was no "sale" of the property, including the units, within the meaning of section 40 of the *Condominium Act*;

4. The purported Resolutions are a colourable attempt on the part of the Defendants, or some of the Defendants, to terminate the governance of the Defendant HCCC 151 by the *Condominium Act* without the consent of unit owners owning 100% of the common elements in accordance with the provisions of section 41 of the *Condominium Act*.

5. The process of the special meeting of the Defendant HCCC 151 purportedly held on 12 January 2000, was irregular and oppressive to the interest of the minority of unit owners;

6. The purported Resolutions were moved and voted upon without sufficient information presented to the meeting to enable members to make an informed decision on the issue;

7. The purported Resolutions were presented and voted upon without the presentation of proper, adequate or any analysis and recommendation by the management of the Defendant HCCC 151 so as to enable members to make an informed decision as to the best interests of the Defendant HCCC 151; and, ...

and,

4. an order pursuant to section 38 of the *Condominium Act* and Rule 5.14 of the *Civil Procedure Rules* declaring that:

The members of the Board of Directors of the Defendant HCCC 151 and, specifically, the Defendants Bruce Brett, Charles Henman, Pamela Robertson, Betty Sinnis and Robert Thomson, are in conflict with respect to the transactions purported authorized by Resolutions A and B, moved at a meeting of the unit owners of the Defendant HCCC 151 of 12 January 2000, and are prohibited from voting on, or being counted in quorum for, decisions and resolutions concerning the subject matter of such transactions by section 15F(7) of the *Condominium Act*.

[19] The Originating Notice also sought declaratory relief under the **Canadian Charter of Rights and Freedoms**, but on consent, this aspect of the application was severed and set to be heard separately from the other claims and is not before this Court in these appeals.

[20] In S.H. 162065, 2475813 Nova Scotia Limited is the plaintiff and the appellants are the defendants. The numbered company sought declaratory relief under s. 40 of the **Condominium Act** which, in substance, would (a) affirm the validity of the resolutions authorizing the sale and addition; (b) affirm the requirement of all unit holders to execute a deed of conveyance and such other documentation usual to a purchase and sale of a condominium unit; and (c) affirm that individual unit holders should not direct a registered encumbrancer to unreasonably withhold consent to the sale.

[21] The applications were heard together by Oland, J. (as she then was) in chambers on April 3 and 4, 2000. In her decision given orally on April 20, 2000, she found, essentially, that the **Act** permits the sale to be authorized in these circumstances, that the encumbrancers can withhold their consent if they so choose and that the resolution should be found invalid because the directors did not

provide the unit holders with adequate information before the vote. Specifically, the learned judge granted declarations as follows:

> 1. That s. 40 of the *Condominium Act*, and in particular s. 40(1), authorizes the sale of the property of Halifax County Condominium Corporation No. 151 by a vote of unit owners who own at least 80% of the common elements and consent of all registered encumbrancers;
>
> 2. That at any meeting of unit holders of Halifax County Condominium Corporation No. 151 called under the authority of the declaration and bylaws any individual or corporation owning two or more units may exercise voting rights for each of the units owned;
>
> 3. That for the purpose of Section 40 of the *Condominium Act* property includes all units <u>and</u> the common elements in Halifax County Condominium Corporation No. 151;
>
> 4. That Sub-Section 40(2) and Sub-Section 40(3) of the *Condominium Act* require, upon the conditions of Sub-Section 40(1) having been met, any unit holder to execute a deed of conveyance and such other documentation usual to a purchase and sale of a condominium unit.
>
> . . .
>
> 5. The purported authorization of the Board of Directors of the Defendant Halifax County Condominium Corporation No. 151 (the Defendant HCCC 151), *inter alia*, to sell all of the property of the Defendant HCCC 151 to the Defendant 2475813 Nova Scotia Limited by Resolution A, moved at a meeting of the unit owners of the Defendant HCCC 151 of 12 January 2000, is null and void upon the ground that purported Resolution was moved and voted upon without sufficient information presented to the meeting to enable members to make an informed decision on the issue.

IV. Issues on Appeal:

[22] The individual unit holders appeal the judge's disposition of both applications. The focus of their arguments is that the relevant provisions of the **Condominium Act** do not allow the numbered corporation to require them to sell their units to that corporation at a price of its choosing. The defendants cross-appeal. They challenge the judge's decision that the resolution authorizing the sale was null and void, her refusal to set an effective date for the resolution and her refusal to grant a declaration that the individual unit owners shall not direct registered encumbrancers to unreasonably withhold consent to the sale.

[23] The issues raised on the appeal and the cross-appeal are inter-related and will be dealt with together. They may conveniently be grouped into issues relating to statutory interpretation, conflict of interest, adequacy of information, consent of the encumbrancers and fiduciary duty. I will address the issues in that way.

V. Analysis:

1. Statutory Interpretation:

[24] The chambers judge held that s. 40 of the **Condominium Act**: (a) permits a sale of the condominium property if authorized by a vote of unit holders who own at least 80% of the common elements and the consent of all registered encumbrancers**;** (b) that any individual or corporation owning two or more units may exercise voting rights for each of the units owned; (c) that "property" for the purposes of s. 40 of the **Act** includes all units and common elements and (d) that once a sale is authorized pursuant to s. 40, unit holders are required to execute a deed of conveyance and such other documentation usual to the purchase and sale of a condominium unit.

[25] The appellants attack these conclusions making various arguments to the effect that the judge erred as a matter of statutory interpretation.

[26] It will be helpful to set out ss. 40 and 41 of the **Act** to which these arguments mainly relate:

> **40** **(1)** <u>Sale of the property</u> or any part of the common elements <u>may be authorized by</u>

(a) a vote of owners who own eighty per cent of the common elements; and

(b) the consent of the persons having registered claims against the property or the part of the common elements, as the case may be, created after the acceptance for registration of the declaration and description.

(2) A conveyance shall be executed by all the owners and a release or discharge shall be given by all the persons having registered claims against the property or the part of the common elements, as the case may be, created after the acceptance for registration of the declaration and description, and shall be submitted for registration together with a supplementary report on title in prescribed form showing the persons signing the same to be all the owners and persons having registered claims and the Registrar shall accept the deed or transfer so submitted for registration.

(3) Upon the acceptance for registration of the instruments mentioned in subsection (2),

(a) the government of the property or of the part of the common elements by this Act is terminated;

(b) claims against the land and interests appurtenant to the land created before the acceptance for registration of the declaration and description are as effective as if the declaration and description had not been accepted for registration; and

(c) claims against the property or the part of the common elements created after the acceptance for registration of the declaration and description are extinguished.

(4) Subject to subsection (5), the owners share the proceeds of the sale in the same proportions as their common interests.

(5) Where a sale is made pursuant to this Section, any owner who dissented may elect to have the fair market value of the property at the time of the sale determined by arbitration under the *Arbitration Act* by serving notice to that effect on the corporation within ten days after the vote, and the owner who served the notice is entitled to receive from the proceeds of the sale the amount the owner would have received if the sale price had been the fair market value as determined by the arbitration.

(6) Where the proceeds of the sale are inadequate to pay the amount determined pursuant to subsection (5), each of the owners who voted for the sale is liable for a portion of the deficiency determined by the proportions of their common interests. R.S., c. 85, s. 40; 1998, c. 28, s. 24.

41 (1) Termination of the government of the property by this Act may be authorized

(a) by a vote of owners who own one hundred per cent of the common elements;

(b) by the consent of the persons having registered claims against the property, created after the acceptance for registration of the declaration and description.

(emphasis added)

[27] The statutory interpretation arguments may be summarized as follows. The individual unit owners submit that the proposed acquisition by the numbered company was a colourable attempt by the Brett interests to terminate the governance of the Condominium Corporation without the consent of 100% of the unit owners in accordance with the provisions of s. 41 of the **Act**. It is further argued that the unit holders are not bound to execute a conveyance to which they do not consent, that Mr. Brett could not vote his interests based on his unit holding and that the proposed transaction is not a sale within the meaning of the **Act**.

[28] In my respectful view these arguments have no merit as a matter of statutory interpretation. With respect to what is required under section 40, the chambers judge correctly interpreted the **Act** and I respectfully adopt her conclusions which she expressed in these terms:

> [20] It is my view that Section 40 of the Act authorizes sale of the property of the Corporation by a vote of unit owners who own at least eighty per cent of the common elements and the consent of all required encumbrancers. ... Section 40 itself contains all the requirements to authorize sale.
>
> [21] My interpretation that Section 40(1)(a) contemplates authorization by a vote of owners who own eighty per cent of the common elements is supported by Sections 40(5) and 40(6) which provide for arbitration to determine fair market

value for “any owner who dissented”. That phrase refers to an owner who voted against sale. Sections 40(5) and 40(6) underscore the possibility of less than one hundred per cent support for a sale. They also provide an essential mechanism for the protection of dissident unit owners. ...

[22] Furthermore, the reference to a vote of the unit owners who own at least eighty per cent of the common elements in Section 40 is to be contrasted with that to one hundred per cent in Section 41 which deals with termination of governance of a condominium corporation. If the legislative intent was that one hundred per cent of such unit owners was necessary to authorize sale in Section 40, that provision could have been drafted to refer to that higher percentage.

[23] The individual unit owners submitted that Section 40(2) requires any sale to be authorized by <u>all</u> unit owners. ... (underlining mine)

[24] Those arguments are not persuasive. If accepted, they would mean that a sale could never be effected unless all of the owners of the common elements agreed. This is contrary to the plain language of Section 40(1)(a) and of Sections 40(5) and 40(6).

[25] In addition, the suggestion by the individual unit owners that Section 40(1)(a) is merely a procedural provision designed to allow a Board of Directors of a condominium corporation to confirm a sale negotiated by the Board which is conditional upon that Board obtaining that eighty per cent approval is flawed. A purchaser whose offer was accepted based on an authorization vote of eighty per cent or greater would still have to face the possibility that at or before closing, one or more of the unit owners could refuse to sign the conveyance. This is not only a strained interpretation but simply unworkable as a matter of business efficacy.

[26] The use of the active rather than the passive voice in Section 40(2) is not sufficient to overcome Section 40(1) and the arbitration provisions. ...

> [27] In summary, Section 40 of the Act authorizes sale of the property of a corporation by a vote of unit owners who own at least eighty percent of the common elements and the consent of all required encumbrancers. Once such vote has taken place, all unit owners are required to execute the conveyance of the property and any owner who voted against the sale is entitled to the protection of the arbitration procedures in Section 40(5) and 40(6) to determine fair market value of the property.

[29] It follows from this that once the requisite approval has been obtained, unit holders are obliged to execute a deed of conveyance and such other documentation usual to a purchase and sale of a condominium unit. I would, therefore, uphold the judge's declaration to that effect.

[30] With respect to voting rights, these are specified in the statute, by-laws and declaration of the corporation. I agree with the chambers judge's interpretation of these provisions as follows:

> [28] It is my opinion that at any meeting of unit owners of the corporation called under the authority of the Declaration and By-Laws, any individual or corporation owing (sic) two or more units may exercise voting rights for each of the units owned. In particular, 2475813 Nova Scotia Limited was entitled to vote at the general meeting held on January 12, 2000.

> [29] Voting rights attach to the ownership of units of the Corporation. "Owner" is defined in Section 3(1)(1) of the Act as follows:

> [q] "owner" means the owner or owners of the free hold estate or estates in a unit and common interests, . . ."

2475813 Nova Scotia Limited is an owner as defined in the Act. Article 1.08 of the Declaration of the Corporation reads as follows:

> 1.08 Voting Rights
>
> Voting rights accrue to each unit in the proportions outlined Schedule "C" expressed in percentages."

.....

[31] Nothing in the Act or in the Declaration of this Corporation prohibits any person from owning more than one unit or any number of units. There is nothing in the evidence regarding the acquisition of units by 2475813 Nova Scotia Limited which indicates that such acquisition was anything other than negotiated to the satisfaction of the parties involved.

[31] The appellants submit that the transaction proposed by the resolution is not a sale within the meaning of s. 40 of the **Act** and, therefore, is not a transaction which may be authorized under that section.

[32] On this aspect of the case, the chambers judge decided as follows:

[36] The word "sale" in Section 40 does not mean only a sale at arms' length in the ordinary course of *bona fide* management of the Corporation. The individual unit owners urged that "sale" is limited to sales necessitated by heavy capital expenditures, for example, for remedial work required by environmental factors or for extensive repairs to the building's HVAC or other system, or to offers to purchase by a person at arm's length to the Corporation. That would require extensive "reading in" of additional wording to the legislation. There being a complete absence of any indication in the Act that "sale" was intended to bear such a restricted meaning, I am not prepared to do so.

[37] The individual unit owners submitted that there was no "sale" authorized because Resolution A provided only the purchase price and the identity of the purchaser, and left the closing date and adjustments to be concluded by the Board. Section 40 provides for authorization for sale of the condominium property. The process contemplated commences with authorization for sale. The Section does not refer to approval of a particular, detailed offer to purchase. Resolution A clearly proposed such authorization and set out the two critical details of the price and the purchaser.

[38] The Act deals with title to property held by multiple owners. In the case of Granbury Place where 2375813 Nova Scotia Limited and related corporations or persons own over eighty per cent of the units, there may be some forty or fifty owners. In other condominium corporations, there will be many more. I do not discourage the fullest presentation of a proposal but merely note that consideration of a heavily detailed proposal by multiple owners could be complicated. By making authorization of sale the initial step in the process, Section 40 ensures that the unit owners focus on that issue. Should any authorization be obtained, the less essential details of sale can then be negotiated. While it might have been desirable for some of the unit owners that particulars other than price and purchaser have been immediately available, for example that the closing date be not earlier than a date certain, such particulars are not essential to constitute a "sale" for the purposes of Section 40.

[33] The appellants submit that the term “sale”, which is not defined in the **Act**, should be given a meaning consistent with the purposes of the **Act** and the equities of the particular situation. They say that a sale has certain fundamental characteristics: a sale is a consensual arrangement pursuant to a contract which results in the transfer of property from one to another for valuable consideration. It is argued that the proposed transaction cannot be a sale because it is not consensual and does not result in a transfer of property from one to another.

[34] I cannot accept these submissions. As the respondents point out, the **Act** recognizes (and specifically permits) the authorization of sales to which not all of the unit holders may agree: see s. 40(5) and 40(6). It is apparent, therefore, that whatever else the term “sale” in s. 40 includes, it must include a transaction that is not consensual from the point of view of the dissenting unit holders. As for the argument that there is no transfer contemplated here, the facts show otherwise. All units will be transferred to the purchaser; it is not simply a transfer from the numbered company to itself.

[35] I conclude therefore that the proposed transaction is a sale within the meaning of s. 40 and would uphold the decision of the chambers judge in that regard.

2. Alleged Conflict of Interest:

[36] The appellants argue that the Directors contravened the provisions of s. 15F(7) of the **Act** by voting at a Directors' meeting when in a conflict of interest. The appellants submit that the members of the Board of Directors Charles Henman, Pamela Robertson, Betty Sinnis and Robert Thomson were in conflict of interest when the Directors voted in December of 1999 to convene a meeting of the members to consider the resolutions proposed by the numbered company. (Two additional facts should be noted. Ms Robertson was apparently not in attendance at the meeting and that the issue of her position was adjourned without hearing before the chambers judge because of Robertson's failure to appear for examination for discovery. Mr. Brett disclosed his interest in the proposed transaction on December 29, 1999, as contemplated by s. 15F of the **Act**.)

[37] Under Article V of the Condominium Corporation's By-Law No. 1, the Board has a non-discretionary duty to convene a general meeting upon receiving a petition in writing signed by owners entitled to vote with respect to twenty-five percent of the units. As noted earlier, the numbered company petitioned the Board for the meeting. The Board agreed to call the meeting and determined the material that would be sent to the owners with the notice of the meeting. As noted, the chamber's judge gave effect to the appellants' arguments concerning the inadequacy of this material. I will address here only the submission in relation to conflict of interest in relation to calling the meeting. I will address the issues concerning the adequacy of material provided to the owners later in my analysis.

[38] The chambers judge found there was no conflict within the meaning of the **Act** insofar as the decision to convene the meeting of members is concerned. She stated:

> [46] In December of 1999, the Board consisted of these four Directors and Mr. Brett. According to the evidence, Mr. Thomson is the General Manager of the condominium, and had been told by Mr. Brett that his position would continue. Mr. Henman had acted as a paid litigation agent for 2475813 Nova Scotia Limited and as a paid commission agent for sales he arranged by unit owners to that corporation. Ms. Sinnis had entered into an Agreement of Purchase and Sale of her unit with 2475813 Nova Scotia Limited or Mr. Brett, which Agreement has an "open" closing date.

> [47] None of these persons was in a conflict of interest as set out in Section 15F(7). The employment contracts of Mr. Henman and Mr. Thomson and the Agreement of Purchase and Sale by Ms. Sinnis are not contacts or proposed contracts to which the Corporation is or will be a party which were being voted upon at that meeting of the Board. Further, the fourth Director named as a Respondent, Ms. Robertson, was not present at the meeting.

[39] I respectfully agree with these conclusions and the reasons stated for them.

3. Adequacy of Information:

[40] Both the appellants and the respondents, by way of their cross appeal, challenge the judge's conclusions relating to the adequacy of the information placed before the meeting of unit holders. As noted, the chambers judge held that resolution authorizing the sale was null and void "... on the grounds that ...[it]... was moved and voted upon without sufficient information presented to the meeting to enable unit owners to make an informed decision on the issue."

[41] At their meeting of December 29, 1999, the Directors determined that the following information would accompany the Notice of Meeting to be called for January 12, 2000: an agenda, copies of the proposed resolutions and the notice of

interest of Bruce R. Brett dated December 29, 1999, to which I have referred earlier. It follows that the owners were given notice of the identity of the intended purchaser and the total proposed purchase price. At the meeting, they were informed that the price was based on an appraisal.

[42] On this issue, the judge gave the following reasons:

> [48] In support of their submission that insufficient information was provided to the unit owners, the individual unit owners argued that a condominium corporation was analogous to a corporation and referred to these excerpts from J.N. Wainberg, Company Meetings (3rd edition) at p. 14-15:
>
> > 36. Business in Full
> >
> > All the motions (resolutions) ... intended to be presented to the meeting must be set out in the notice either in full or in sufficient detail to give the full effect thereof clearly and accurately. ...
> >
> > 37. Full disclosure
> >
> > In addition to setting out in full the motions (resolutions) intended to be presented to the meeting, the notice must (unless the motions are self-explanatory) give the background and other data necessary for the shareholder to be able to determine whether or not he should attend or whether or not he should appoint a proxy holder.
>
> [49] However, those excepts deal with the sufficiency of the notice of meeting rather than of any information at the meeting itself. Here, the entire text of Resolution A accompanied the notice of meeting. That Resolution also included particulars of the arbitration procedure available to any dissenting unit owner. If the analogy to a corporation for this purpose is accepted, the requirements set out in Wainberg were entirely satisfied.

[50] I turn now to the meeting and the extent of the information available to the unit owners at the meeting. The individual unit owners suggested that the meeting was "oppressive". In response, 2475813 Nova Scotia Limited pointed out that nothing in the discovery examinations of Mr. Crosby, Mr. Halyk, Mr. Smith, or Ms. Lyttle suggested that they had found the meeting oppressive. Its counsel is correct in that that term did not appear in affidavit evidence or in the discovery excerpts.

[51] However, it is apparent from the transcript of the January 12, 2000 meeting attached as an exhibit to the Supplemental Affidavit of Ernest Crosby that scant information was available for the unit owners prior to the vote. Resolution A disclosed the purchase price and the identity of the purchaser. At the meeting, counsel for 2475813 Nova Scotia Limited referred to the "extension of the offer of good faith negotiations" and "a suggestion that there may be an option" for residential leases for up to a year with appropriate rents charged according to pages 72 and 73 of the transcript. It was apparent from the responses of at least two unit owners described at pages 78 and 80 of that transcript that not all owners knew of such negotiations or relocation particulars. The Board had not arranged for any appraisal or any legal opinion respecting the legality, effect or potential liabilities of the sale. It made no recommendation respecting the proposed sale.

[52] The information pertaining to Resolution B was even less. Its Clause 2 resolved that the Board be authorized to enter into arrangements with 2475813 Nova Scotia Limited whereby that corporation would be granted permission to commence "construction of an addition to the present building", without more. For example, there were no details given as to the size or location of that addition, despite requests by the unit owners at the meeting. Again the Board had not arranged for any legal opinion with respect to the legality, effect of potential liabilities of that Resolution.

[53] The President of the Corporation chose not to attend the January 12, 2000 meeting. At discovery, she stated her concern that the meeting might be unpleasant. She was right to be concerned. The meeting was difficult, with many interruptions on points of order, objections, and requests for adjournment or for information.

[54] The individual unit owners submitted that there had been a failure of the Board in providing any response in the assessment of the proposed resolutions as

to the best interests of all unit owners. 2475813 Nova Scotia Limited responded that it would have been wrong for the Board to make any recommendation. It suggested the situation had become polarized and urged that whether a unit owner decided to sell for the price offered was entirely up to him or her.

[55] What is troubling is not so much the lack of any recommendation, but rather the lack of information obtained by the Board for the unit owners. 2475813 Nova Scotia Limited took the position that not only must every unit owner assess the offer for himself or herself, but that he or she is individually responsible for obtaining any necessary information to do so. In short, it said the Board has no obligation in this regard.

[56] A unit owner knows the assessed value of his or her unit. Using the percentage of his or her common elements, an owner could calculate his or her share of any offer for the property of the Corporation. However, in general, an owner would not know the value of the property of the Corporation or be able to obtain such information easily or quickly.

[57] Let us assume that a party at arm's length to a condominium corporation makes an unsolicited offer to purchase the property of that corporation. The decision is one to be made by the unit owners. However, by Section 15 of the Act, a Board is to manage the affairs of the Corporation, and by Section 15D, Directors are to meet a statutory standard of care, diligence and skill. The submission of 2475813 Nova Scotia Limited would allow a Board to convene a meeting of unit owners to authorize such a hypothetical sale under Section 40 without arranging for some type of appraisal or for other pertinent information which may be triggered by the terms of the particular offer, for review by the owners at that meeting.

[58] Would or should a Board, as this Board did here, do nothing at all in response to such an unsolicited offer? In my view that would be unlikely and it would not be proper. Why then would any obligation on the Board to have appropriate information available when a proposed purchaser is at arm's length be different or less when the proposed purchaser is a current unit owner or one who owns a substantial number of units? I can see no reason.

> [59] The Board arranged a meeting of the unit owners after Mr. Brett petitioned for one. By Article V(5) of By-Law Number 1, it had to convene a meeting of the unit owners within fifteen days after receipt of a petition by an owner of 25% of the units. It held its own meeting the day after it received the petition and set the meeting of the unit owners for the earliest possible date. Indeed, the Board subsequently discovered the notice was insufficient by one day and the meeting had to be rescheduled for a later date. Nothing in the Minutes of its meeting shows any consideration given to the obtaining of any information or advice. Without this, the unit owners were voting blind on Resolution A at the January 12, 2000 meeting. The same could be said of Resolution B.
>
> [60] I have not forgotten the safeguard of the arbitration provisions in the Act. It could be argued that their availability eliminates any need for the Board to arrange information. A unit owner who dissents could always receive fair market value under those provisions. That, I suggest, is an extreme view. Section 40(5) and 40(6) are only available when the stipulated percentage of unit owners authorize sale. My concern is not merely the price but rather the ability of unit owners to make reasoned decisions and the role of the Board in that regard.
>
> [61] Having in mind the particular history of this condominium corporation, I acknowledge that it may have been unrealistic to expect or require a recommendation from the Board, and particularly any as to the best interests of the Corporation, when there were strongly divergent views in that regard. However, this did not preclude the Board from obtaining information so Resolution A could be properly considered.
>
> [62] Appropriate and sufficient information to enable the unit owners to make informed decisions not having been provided at the January 12, 2000 meeting, the purported vote on Resolution A was a nullity.

[43] The appellants, while supporting this decision as far as it goes, say the judge did not go far enough. The appellants submit that the Directors failed to met their obligations to the unit holders. It is submitted that these breaches of duty include

the failure to obtain "...an independent legal opinion as to the validity and effect and potential liabilities to the condominium of the actions of ... Brett", failure to present an "... analysis and a recommendation", failure to insure that an impartial person chaired the meeting, and permitting improper use of a proxy.

[44] The respondents, on their cross-appeal, attack the judge's conclusions, arguing that, in all of the circumstances, adequate information was provided.

[45] I am in respectful agreement with the conclusions and the reasons for them as stated by the chambers judge on this issue.

[46] In light of this conclusion, it is unnecessary for me to address the question of the effective date of the resolution.

4. Consent of Encumbrancers:

[47] On the cross-appeal, the respondents submit that "... the learned chambers judge erred in her interpretation that the owners were entitled to instruct registered encumbrancers to unreasonably withhold consent to the sale."

[48] The chambers judge refused to grant the declaration sought by the respondent to the effect that individual unit owners shall not direct a registered encumbrancer to unreasonably withhold consent to the sale of the property. She stated first, that the statute does not contain a stipulation that the encumbrancers cannot withhold their consent unreasonably; and, second, that in deciding whether to consent or not, an encumbrancer can consider "whatsoever it chooses, including any views of the unit owner."

[49] I agree with the second of these reasons. Provided the conduct is otherwise lawful, an owner is entitled to express his or her opinion about a proposed sale to an encumbrancer and the encumbrancer is entitled to consider whatever information it chooses. I also agree with the decision of the judge not to grant the declaration sought. Encumbrancers were not before the court and the declaration sought was premised on a hypothetical situation. Whether a duty not to withhold consent unreasonably should be read into the statute or otherwise be found to exist

and to whom such a duty is owed are questions which, in my opinion, are better resolved in a concrete factual setting and in the presence of all affected parties. I would, for those reasons, uphold the decision of the judge to refuse this part of the declaratory relief sought by the respondents.

5. Fiduciary Duty:

[50] The appellants sought a declaration that:

> Section 40 of the Condominium Act does not apply to authorize or permit a non-arms' length acquisition of the condominium property, including the units, by a unit owner owning a majority of interest in the common elements and particularly by a unit owner who is deemed to be the declarant legally or beneficially owning an interest [of] 80% or more of the common elements.

[51] In support of this position, they allege that the power conferred upon the Brett interests as holder of 80% control is subject to fiduciary duties owed to all the unit holders. The chambers judge held that there was nothing in the **Act**, the Declaration or the circumstances which prohibit any person from owning more than one unit or exercising the voting rights attached to the ownership of more than one unit.

[52] As I have said, I agree with the judge's interpretation of the statute and the Declaration and with her rejection of the appellants' arguments based on statutory interpretation. However, to my mind, that is not the end of the matter. It does not follow automatically, in my view, that this transaction is one that may be authorized under s. 40 if there is some legal constraint on the exercise by the majority interest of its authority to approve the transaction. The key question is whether, in the circumstances of this case, the majority power may lawfully be used to approve this transaction.

[53] For reasons which I develop, I have concluded that Mr. Brett owes fiduciary duties to act in the interests of the unit owners and the corporation. These duties arise from the particular circumstances and relationships present in this case in light of the power conferred by s. 40 of the **Act**. The fundamental duty of a fiduciary is loyalty to those to whom the duty is owed. It follows that Mr. Brett, having regard to his fiduciary position, cannot exercise his voting control in a situation such as this where his interest and duty conflict and where he stands to benefit personally from the exercise of the authority. However, a transaction which

would otherwise be contrary to the fiduciary's duty may be undertaken if all unit holders give their informed consent or if the transaction receives court approval.

[54] I will now set out in detail my reasons for this conclusion.

(a) Overview of Fiduciary Principles:

[55] The parties have been helpful in referring us to some of the authorities, both in Canada and the United States, which deal with particular fiduciary duties that may arise in relation to condominiums. I have found it helpful, however, to place these authorities in the context of the general development of fiduciary principles.

[56] Fiduciary principles have roots in equity extending to the early eighteenth century: see, for example, **Hodgkinson v. Simms**, [1994] 3 S.C.R. 377 at 407. As LaForest, J. put it in **Hodgkinson**, the fiduciary duty is one of a "... species of a more generalized duty by which the law seeks to protect vulnerable people in transactions with others.": at 405. While many judicial decisions, including a series of cases in the Supreme Court of Canada, have given the law of fiduciary

duties a well-defined analytical structure, one of their key elements is flexibility. Consistent with their equitable origins, fiduciary principles may be moulded to meet the needs of justice in a wide variety of circumstances. As LaForest, J. said in **Canson Enterprises v. Boughton**, [1991] 3 S.C.R. 534 at 585 - 6, "... the maxims of equity can be flexibly adapted to serve the ends of justice as perceived in our days. They are not rules that must be rigorously applied but malleable principles intended to serve the ends of fairness and justice." Or, as Laskin, J. said in **Canadian Aero Services v. O'Malley**, [1974] S.C.R. 592 at 609 "... new fact situations may require a reformulation of existing principle to maintain its vigour in the new setting."

[57] In keeping with this thinking, the Supreme Court of Canada has emphasized that the categories of fiduciary should not be considered closed: see **Guerin v. The Queen**, [1984] 3 S.C.R. 335 at 384 and **Hodgkinson, supra**, at 408. Fiduciary obligations do not only arise in certain categories of relationships, such as principal and agent. A fiduciary duty may arise from the nature of a relationship in specific circumstances even though, in general, a fiduciary duty would not otherwise exist. The question in such cases is whether fiduciary obligations "... arise as a matter of

fact out of the specific circumstances of that particular relationship.”: **Hodgkinson**, at 408.

[58] In considering whether a fiduciary relationship exists, the fundamental purposes of this equitable concept must be kept in mind. These purposes, which have been expressed in both scholarly and judicial writing, are to protect and foster the integrity of important social relationships and institutions where one party is given power to affect the important interests of another. The fiduciary principle helps to prevent, and may provide redress for abuse of such power, thereby ensuring that interdependence does not lead to subjugation. This point was made by Leonard I. Rotman, “*Fiduciary Obligations*”, in Mark Gillen and Faye Woodman (eds), *The Law of Trusts A Contextual Approach* (2000), 739 -806 at 742:

> Fiduciary law has its origins not only in equity but also in public policy. <u>The creation of fiduciary doctrine may be traced to the need to protect the continued existence of certain types of relationships within a given society</u>. ...
>
> <u>Fiduciary law exists to preserve the integrity of socially valuable or necessary relationships that arise as a result of human interdependency</u>. Maintaining the viability of an interdependent society requires that interdependency be closely monitored to avoid the potential for abuse existing within such relations.

> Protecting the integrity of socially valuable relationships requires that those who possess the ability to affect others' interests be prevented from abusing their powers for personal gain. ...
>
> (emphasis added)

[59] To similar effect, LaForest, J. said in **Hodgkinson, supra**, at 422:

> The desire to protect and reinforce the integrity of social institutions and enterprises is prevalent throughout fiduciary law. The reason for this desire is that the law has recognized the importance of instilling in our social institutions and enterprises some recognition that not all relationships are characterized by a dynamic of mutual autonomy, and that the marketplace cannot always set the rules. ...
>
> (emphasis added)

[60] An analytical framework for determining whether a fiduciary relationship exists was set out in the dissenting judgment of Wilson, J. in **Frame v. Smith**, [1987] 2 S.C.R. 99 and subsequent cases have recognized it as helpful in identifying new categories of fiduciary relationships: see **Hodgkinson** at 408. Factors such as a person's scope for the exercise of some discretion or power, the right to exercise that power unilaterally to affect another's legal or practical interests and peculiar vulnerability to the exercise of that discretion are *indicia* of a

fiduciary relationship: see **Hodgkinson** at 408. For present purposes, I find particularly helpful the statement of the characteristics of a fiduciary relationship as set out by McLachlin, J. (as she then was), in her reasons in **Canson** at 544, where, citing Cooter and Freedman, "The Fiduciary Relationship: Its Economic Character and Legal Consequence" (1991), 66 N.Y.U.L. Rev. 1045 she identified three characteristics, each of which is potentially relevant here. First, fiduciary relationships are often characterized by a separation between ownership and control. Here, the individual unit holders own their units, but in relation to a sale of the condominium development, control is conferred by the **Act** on those with 80 per cent of the votes. Second, fiduciary relationships are often characterized by the fiduciary having open-ended obligations in that specific conduct and definite results are not stipulated. Here, the authority granted by the **Act** to those controlling 80 per cent of the votes is conferred in broad terms with no direction or guidance concerning the purposes of or the circumstances justifying its use. Third, a fiduciary relationship is often characterized by what Cooter refers to as "asymmetry of information concerning acts and results". By this I take it he means that the fiduciary is better informed than those to whom the duty is owed about the actions to be taken and their results. On the facts of this case, the chambers judge found that the directors failed to provide adequate information concerning the proposed transaction to the unit holders at large and there can be no doubt that Mr. Brett was in a much better position to evaluate the proposed sale than the individual unit holders.

[61] Where, as here, it is alleged that the fiduciary obligation arises out of the specific circumstances of a particular relationship, the key consideration is whether, in all of the circumstances, one party could reasonably have expected that the other would act in the former's best interest with respect to the subject matter at issue: **Hodgkinson** at 409. This does not preclude the fiduciary from acting in the joint interests of him or herself and those to whom the duty is owed. LaForest, J in **Hodgkinson** at 407 specifically approved the statement of Professor P. D. Finn in "Contract and the Fiduciary Principle" (1989), 12 U.N.S.W.L.J. 76 at 88 that the key consideration is whether "... the one has the right to expect that the other will act in the former's interests (<u>or, in some instances, in their joint interest</u>) to the exclusion of his own several interests." (emphasis added)

[62] I emphasize that, in this case, the alleged fiduciary duty is one that arises, if at all, from the <u>specific</u> circumstances of a particular relationship. We are not here concerned with an attempt to establish a new category of fiduciary relationships or

even to establish some generalized fiduciary duty in relation to the exercise of the power conferred by s. 40 of the **Act** to authorize sales of the property. The analysis here concerns the specific circumstances and relationships in this particular transaction and nothing more.

(b) Fiduciary Duties and the Condominium

[63] I noted earlier that the fundamental purpose of the law relating to fiduciaries is to reinforce the integrity of social institutions and enterprises. It follows from this that fiduciary principles must be applied in the context of condominium law in a manner which will further strengthen the integrity of the socially valuable relationships upon which the condominium is based. In doing so, there are two potentially conflicting considerations. The first is that condominiums under the **Act** are created by a reasonably comprehensive statutory code and the courts should, therefore, be cautious about imposing rights and duties which are not expressly included: see, for example, **Eberts v. Carleton Condominium Corporation No. 396**, [2000] O.J. No. 3773 (C.A.) (Q.L.); **National Trust v. Grey Condominium Corporation No. 36**, [1995] O.J. No. 2079 (Gen. Div.) (Q.L.); **Ceolaro v. York Humber Ltd.** (1994), 37 R.P.R. (2d) 1 (Gen. Div.). The

other is that a residential condominium will often be the owner's home. Decisions of the corporation intimately affect their everyday lives as well as their financial security: see **Carleton Condominium Corp. No. 347 v. Trendsetter Developments Ltd. et al** (1992), 94 D.L.R. (4^{th}) 577 (Ont. C.A.) at 586.

[64] The stated legislative purpose of the **Act** reflects the need "to facilitate the division of land into parts that are to be owned individually, and parts that are to be owned in common", " to provide for the use and management of such properties" as well the need "to expedite the dealings therewith." see section 2. It is, therefore, important in determining whether fiduciary obligations arise in particular circumstances to reflect the necessary balance between business efficacy required for effective management of the collective interests and security of individual ownership. It also must be remembered that, while condominium ownership has many of the attributes of individual ownership of real property, it is not identical with it. The joint ownership of common areas and the joint management of the property, which are central features of the condominium, necessarily limit or modify rights normally associated with the ownership of real property: see Oosterhoff and Rayner, *Anger and Honsberger Law of Real Property* (1985), vol. II, at s. 3902.

[65] Effective joint ownership and management require that differences of opinion about what is in the best interests of the condominium be resolved and decisions taken in a timely fashion. The sale provisions in the **Act** and the provisions for termination of the government of the property in s.41 are parts of the statutory scheme which reflect this requirement. They establish mechanisms for taking actions which fundamentally alter the condominium relationship. The ownership interests of unit holders are provided with considerable protection while recognizing that such extreme measures as a sale or termination of the condominium are, in fact, appropriate and necessary in some circumstances.

[66] With respect to a sale of the property, the legislation requires a strong majority of unit holders (i.e., 80%) to approve, which, in most circumstances, will reflect a widely held view among the unit holders that the proposed sale is in their interest and the interest of the corporation. Aside from assuring that proper information is presented to them, as the chambers judge required in this case, there is no need, in most cases, for any other protection for unit owners. Their own, well- informed decision, by a strong majority, to authorize the sale vouches for the fact that it is in their interest and in the interest of the corporation. The fact that

unanimity is not required guards against unreasonable obstruction and promotes business efficacy that might be thwarted by a requirement for unanimity, but the requirement for 80% approval vouches for the fact that the transaction is, reasonably viewed, in the unit holders' collective interest.

[67] What, if any, aspects of the specific circumstances and relationship here would suggest that (to paraphrase LaForest, J. in **Hodgkinson** at 409) Mr. Brett would reasonably be expected by all unit holders to act in their collective best interests?

[68] First, I think it is relevant that Mr. Brett is not just a person who owns or controls the votes of 80% of the units. There is no dispute that Mr. Brett owned and controlled Brett Pontiac Buick GMC Limited. It was the declarant-owner of the property which became the condominium. There is also no dispute that he is the sole shareholder and an officer and director of the numbered company. At the relevant time, it owned 150 units and persons related to Mr. Brett owned 13 units. The numbered company was also the intended purchaser of the property.

[69] The respondents have not submitted that it is necessary for the purposes of this aspect of the case to pay attention to the various separate corporate entities. It is apparently acknowledged that Mr. Brett is the directing mind of all of them. This is clear as regards the numbered company from his letter to the unit owners dated December 3, 1998 in which Mr. Brett refers to the "... the interests which [he] owned or controlled" and to the fact that he "... commenced an extensive process of repurchasing units through 2475813 Nova Scotia Limited."

[70] Mr. Brett was also a director of the condominium corporation. While corporate law principles cannot simply be imported into condominium law without careful analysis, I note the strong line of authority that directors of corporations, including the directors of condominium corporations, owe fiduciary duties to the corporation to act in its best interests. As the Court put it in **Trendsetter**, **supra** at p. 590, directors "... owe a fiduciary duty to the corporation and not to any other individual or organization. If they fail in the exercise of that duty, they are subject to the full force of the law." To the same effect, in the context of business corporations, Laskin, J. said in relation to the fiduciary duties of directors in **O'Malley** at p. 610:

> What these decisions indicate is an updating of the equitable principle whose roots lie in the general standards that I have already mentioned, namely, loyalty, good faith and avoidance of a conflict of duty and self-interest. Strict application against directors and senior management officials is simply recognition of the degree of control which their positions give them in corporate operations, a control which rises above day-to-day accountability to owning shareholders...It is a necessary supplement, in the public interest, of statutory regulation and accountability which themselves are, at one and the same time, an acknowledgement of the importance of the corporation in the life of the community and of the need to compel obedience by it and by is promoters, directors and managers to norms of exemplary behaviour.
>
> (emphasis added)

[71] There is considerable authority for the view that the developer of a condominium owes certain fiduciary duties to those who purchase units in the property. While the existence and extent of these duties will depend on several considerations including the relevant legislation and the terms of the declaration and by-laws of the condominium, it has been widely accepted that the developer has certain fiduciary obligations to protect the interests of all unit owners, present and prospective, as well as the interests of the condominium corporation: see for example A. H. Oosterhoff and W.B. Rayner, Anger and Honsberger Law of Real Property (1985) vol II, s. 4008.1; **Condominium Plan No. 86-S-36901 v. Remai Construction (1981) Inc. et al.**(1991), 84 D.L.R. (4th) 6 (Sask C.A.) at 14 -19 and 22; **York Condominium Corp No 167 et al v. Newrey Holdings Ltd. et al.** (1981), 32 O.R. (2d) 458; 122 D.L.R. (3d) 280 (C.A.). It bears noting, however,

that this duty does not require the fiduciary to act in the interests of a few dissident unit holders but in the interests of all of the unit holders: see e.g. **Re Carleton Condominium Corp. No 347 and Trendsetter Developments Ltd. et al.**, **supra** at 585 - 6.

[72] In summary, Mr. Brett's involvement in the development and marketing of the condominium and his position as one of the directors of the condominium corporation tend, in my view, to support a reasonable expectation on the part of the corporation and all the unit holders that he would act in their collective best interest.

[73] The controlling position of the Brett interests is a highly relevant consideration: see **Trendsetter** at p. 586. Section 40 of the **Act** provides that, subject to the approval of the encumbrancers, votes representing 80% of the units may authorize a sale of the property. This power, conferred by the statute, places other unit owners in a position of special vulnerability as the facts of this case amply demonstrate. The Brett interests have the power under the **Act** to dispossess dissenting unit holders by forcing them to sell their homes. In my view, unit holders would reasonably expect that this power would not be exercised by a

director of the condominium corporation or the controlling mind of the developer other than in their collective best interest.

[74] Brooke, J.A., in **Frontenac Condominium Corp No.1 v. Joe Macciocchi & Sons Ltd**. (1975), 67 D.L.R. (3d) 199 (Ont.C.A.) spoke of what the "average person" understands about condominiums. I think his words are helpful on the issue of the reasonable expectations of unit holders in these circumstances. He said at (p. 202) that the average person would understand that "... no one, including the developer, would be in a position to put his economic interests against the interest of the group so far as joint ownership, management or enjoyment of the property was concerned, save through a mortgage or similar interest."

[75] Section 40 of the **Condominium Act** gives a broad authority to 80% of the unit holders to approve a sale of the property. The existence of such a power granted by statute does not in any way preclude the existence of a fiduciary duty on the part of one individual exercising it. It may, in fact, be a key consideration in finding that such a duty exists. This is well illustrated by **Guerin, supra**, where the Supreme Court of Canada found that the Crown had fiduciary duties to Indians in its exercise of certain powers under the **Indian Act**. In rejecting the Crown's

argument that the express statutory conferral on the Crown of a broad, discretionary power ousted the jurisdiction of the courts to intervene, Dickson, J., for the majority, said at 384:

> This discretion on the part of the Crown, far from ousting, as the Crown contends, the jurisdiction of the courts to regulate the relationship between the Crown and the Indians, has the effect of transforming the Crown's obligation into a fiduciary one. Professor Ernest Weinrib maintains in his article *The Fiduciary Obligation* (1975), 25 U.T.L.J. 1, at p. 7, that "the hallmark of a fiduciary relation is that the relative legal positions are such that one party is at the mercy of the other's discretion." Earlier, at p. 4, he puts the point in the following way:
>
>> [Where there is a fiduciary obligation] there is a relation in which the principal's interests can be affected by, and are therefore dependent on, the manner in which the fiduciary uses the discretion which has been delegated to him. The fiduciary obligation is the law's blunt tool for the control of this discretion.
>
> I make no comment upon whether this description is broad enough to embrace all fiduciary obligations. I do agree, however, that where by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary. Equity will then supervise the relationship by holding him to the fiduciary's strict standard of conduct.
>
> (emphasis added)

[76] As noted, the **Act**'s requirement that a sale be authorized by 80% of the unit owners will, in most circumstances, provide adequate assurance that the sale is in

the collective best interests of the unit owners and the condominium corporation. The situation is completely different in the circumstances of this case, however. Where, as here, Mr. Brett controls 80% of the votes and the sale is to himself, it is apparent that the authorization of the sale by that majority does not carry with it any assurance that the sale is in the best interests of the unit holders or of the corporation. If unconstrained by equitable principle, the sale provisions in the **Act** would permit the unit owner with the controlling interest to impose a sale in his or her own interest and dispossess the others. Expressed in the language of fiduciary obligations, the controlling unit holder, in effect, is (i) approving a sale to himself; (ii) has control over the property interests of others which is conferred by the **Act** in open-ended terms; and (iii) is much better informed than the individual unit holders about the wisdom and benefits of the proposed sale.

[77] In my view, there are several strong indicators of a fiduciary obligation on the part of Mr. Brett in the particular circumstances and relationships present in this case. Would the existence of such an obligation serve to enhance the integrity of the condominium and further the purposes of the **Condominium Act**?

[78] The **Act**, it is true, provides a measure of protection to the dissenting unit holders by providing, in subsections 40(5) and 40(6) that they may have the market value of the property determined by arbitration and recover any deficiency from the owners who voted for the sale. I do not think, however, that these statutory provisions oust all other protections for unit holders that arise from general legal principles. I agree with the chambers judge that such would be "... an extreme view." Moreover, these rights are premised on the assumption that the sale was indeed in the best interests of the unit holders as a group as assured by at least 80% approval of it. They do not provide an answer to the problem that, where a controlling owner is selling to himself, there is no such assurance.

[79] In my view, the imposition of a fiduciary relationship in these circumstances will further, rather than hinder, the implementation of the purposes of the **Act** to the extent that the existence of this duty requires some further assurance beyond the 80% approval that the proposed sale is, in fact, in the best interests of both the unit holders and the corporation.

[80] I return to what was identified by LaForest, J. in **Hodgkinson** as the key question. In all the surrounding circumstances, would the unit owners reasonably

have expected that Mr. Brett would exercise his voting control with respect to a sale of the property in the best interests of all unit owners? In my view they would. Mr. Brett was the controlling mind of the developer who sold units in this condominium. He was a director of the condominium corporation. His voting control gave him a broad, discretionary power to affect not just the property rights of the other owners, but to dispossess them of their homes. That power made the other unit holders vulnerable to its exercise in matters affecting their vital interests. He was the directing mind and owner of the purchaser in the transaction for which his voting control assured approval. In these circumstances, justice and the proper administration of a condominium require that Mr. Brett be subject to a fiduciary obligation which disentitles him from authorizing this sale without other objective assurances that it is in the best interests of the corporation and the unit holders as a whole.

[81] I conclude, therefore, that Mr. Brett was subject to two fiduciary duties. First, by virtue of being the owner and controlling mind of the developer and having effective voting control of the corporation, he owed a fiduciary duty to all of the unit holders not to use that voting control to authorize a sale of the property where, as here, their interests and his could conflict. Second, by virtue of Mr.

Brett's position as a director of the corporation, he owed a fiduciary duty to the corporation of a similar character.

[82] Having identified a fiduciary relationship, it is necessary to be specific about its nature and extent and its implications for a vote of unit owners authorizing a sale of the property pursuant to s. 40 of the **Act**. The term fiduciary refers to many different types of relationships and may give rise to a range of different duties. As was pointed out by Fletcher-Moulton, L.J. in **<u>In re Coomber</u>**, [1911] 1 Ch. 723 at 728 - 29:

> ... <u>Fiduciary relations are of many different types</u>; they extend from the relation of myself to an errand boy who is bound to bring me back my change up to the most intimate and confidential relations which can possibly exist between one party and another ... All these are cases of fiduciary relations, and the Courts have again and again, in cases where there has been a fiduciary relation, interfered and set aside acts which, between persons in a wholly independent position, would have been perfectly valid. ... <u>[I]n some minds there arises the idea that if there is any fiduciary relation whatever any of these types of interference is warranted... Of course that is absurd. The nature of the fiduciary relationship must be such that it justifies the interference</u>.
>
> (emphasis added)

[83] It is, therefore, necessary to define with precision the nature and extent of the duties attached to the particular fiduciary relationship. In this case, the only

issue is whether the fiduciary relationship gave rise to any restriction on the right of Mr. Brett to proceed with the sale to himself which was authorized by voting his 80% interest as a unit holder.

[84] I mention this to emphasize that, in this case, it is not necessary to determine the precise extent of the fiduciary duties, if any, that may arise in relation to other aspects of the condominium corporation's decision-making. We are dealing here only with the question of a resolution to sell the property in a situation in which the intended purchaser also has sufficient voting control to achieve the required authorization under the **Act** and where the person effectively exercising voting control is also the controlling mind of the developer and a director of the condominium corporation.

[85] We are not here concerned with an alleged breach of the duty to act in the best interests of the corporation or the unit holders. The fact that such a duty exists does not lead to the conclusion that the proposed transaction is not in the best interests of all of the unit holders or of the corporation itself. That issue is not before the Court in these proceedings. The duty to act in the best interests of the unit holders does not mean that only actions to which they all assent may be

considered in their best interests. The duty to act in the best interests of the corporation does not mean that only actions to which all unit holders agree may be taken. Moreover, there is nothing before the Court which would justify a conclusion that the proposed transaction is or is not in the best interests of the unit holders collectively or of the corporation.

[86] The existence of the fiduciary duties does, however, limit the ability of the fiduciary to impose the sale on dissenting unit holders where the transaction is such that the fiduciary's duty and interest conflict and where the fiduciary stands to benefit from the transaction. This conflict and potential for personal gain on the part of Mr. Brett coupled with his voting control take away the assurance normally provided by the favourable vote of a strong majority that the decision is, in fact, in the best interests of the unit holders and of the corporation.

[87] The fiduciary, in these circumstances, does not stand in the same position as a true trustee. The obligation is not to act selflessly, but to act in the best interests of all the unit holders and of the corporation. The duty does not preclude personal profit from the decision, but rather it precludes profit at the expense of others. Mr. Brett, through his company, has a large investment in the condominium. His right

to act as he sees fit to protect that investment must not be unduly restricted. He must not be disenfranchised and the condominium corporation must not be left in an irreconcilable deadlock. What the fiduciary principle requires in the context of s. 40 of the **Act** and the circumstances of this case is some substitute mechanism for assuring that the proposed sale is in the interests of the unit holders and the corporation, an assurance normally provided by the vote of a strong majority of the unit holders.

[88] In my view, that assurance may be provided here in each of two ways. First, the informed consent of all of the unit owners other than the Brett interests, in addition to the support of the Brett interests, would provide the assurance sought by the statute that the transaction is in the best interests of the unit holders as a group. Failing that, such assurance could be provided by approval of the transaction by an application to the Supreme Court of Nova Scotia on notice to all unit holders, the corporation and registered encumbrancers. The role of the Court on such an application would be to determine whether the proponents of the transaction have shown that, having regard to the circumstances of, and future prospects for, the condominium, there are sound reasons supporting the view that the proposed transaction is in the interests of unit holders and the corporation

collectively. Having regard to the fact that the sale will result in the termination of government of the property (s. 40(3)), a Court hearing such an application for approval may find it helpful to consider some or all of the matters relevant to Court ordered termination as set out in the authorities and s. 43(2) of the **Act**.

[89] For the reasons I have given, I would set aside paragraph 1 of the declaration made by the Chambers judge in file S.H. No. 162065 and in its place make the following declaration:

> 1. That, in the circumstances of the fiduciary duties owed by Mr. Brett to the unit holders and the to the corporation, a sale of the property of Halifax County Condominium Corporation No. 151 to a corporation under his control may be authorized pursuant to section 40 of the Condominium Act by unanimous approval of the other unit holders or by order of the Supreme Court of Nova Scotia.

[90] The order in S.H. No. 162174 should be amended accordingly. To that extent, I would allow the appeals. As noted earlier, I would dismiss the cross-appeals. As success on the appeals is divided, I would make no order as to costs with respect to them. I would order that the respondents pay to the appellants the costs of the cross-appeals which I would fix at $1500 plus disbursements relating to the cross-appeals.

Cromwell, J.A.

Concurred in:

Hallett, J.A.

Bateman, J.A.

Province of Alberta

CONDOMINIUM PROPERTY ACT

CONDOMINIUM PROPERTY REGULATION

Alberta Regulation 168/2000

With amendments up to and including Alberta Regulation 218/2022

Current as of November 16, 2022

Office Consolidation

Alberta King's Printer
Suite 700, Park Plaza
10611 - 98 Avenue
Edmonton, AB T5K 2P7
Phone: 780-427-4952

E-mail: kings-printer@gov.ab.ca
Shop on-line at kings-printer.alberta.ca

Designation of units

5(1) Subject to subsections (2) and (3), units are to be numbered consecutively commencing with unit one and terminating with a unit numbered to correspond to the total number of units comprised in the plan presented for registration as a condominium plan.

(2) In the case of a building or land that is to be developed in phases, the units in the phases, subject to section 38, are to be numbered consecutively commencing with unit one in the first phase and terminating with the last unit in the last phase.

(3) In the case of 2 or more adjacent parcels that are amalgamating,

(a) each condominium plan that is subject to the amalgamation is to be assigned a separate letter with one condominium plan being assigned the letter "A" and each of the other condominium plans being assigned respectively the next consecutive letters, and

(b) each unit contained in each condominium plan that is subject to the amalgamation is to retain the number assigned to that unit under that condominium plan but with the letter referred to in clause (a) that is assigned to that condominium plan following the number of the unit.

(4) Units that are delineated, illustrated and labelled as parking spaces under section 8(1)(l.1) of the Act must be identified on the condominium plan in a form and manner acceptable to the Registrar.

AR 168/2000 s5;154/2019

Unit factors

6 There is to be assigned to each unit a unit factor so that the total of the unit factors for all the units in the parcel is equal to 10 000.

Information to be contained in Schedule

7 For the purposes of section 8(1)(g), (h) and (j) of the Act, the Schedule to the plan is to be in the form set by the Registrar and is to set out the following:

(a) the unit number;

(b) the unit factor;

(c) the basis for determining the unit factor;

(d) the approximate floor area for each unit, in the case of a building;

2004 TCC 406, 2004 CCI 406
Tax Court of Canada [Informal Procedure]

Condominium Plan No. 9422336 v. R.

2004 CarswellNat 1768, 2004 CarswellNat 5720, 2004 TCC 406, 2004 CCI 406, [2004] G.S.T.C. 77, 2004 G.T.C. 351

The Owners: Condominium Plan No. 9422336, Appellant and Her Majesty the Queen, Respondent

McArthur T.C.J.

Heard: January 19, 2004
Judgment: June 10, 2004
Docket: 2003-2489(GST)I

Counsel: Gordon McIntosh (Agent), for Appellant
Dawn Taylor, for Respondent

Subject: Goods and Services Tax (GST); Corporate and Commercial; Contracts; Property; Torts

Related Abridgment Classifications

Commercial law
I Agency
I.3 Creation of agency
I.3.a General principles
Real property
XI Condominiums and strata
XI.6 Condominium and strata corporations
XI.6.g Miscellaneous
Tax
III Goods and Services Tax [GST] and Harmonized Sales Tax [HST]
III.3 Supply
III.3.g Taxable supply
III.3.g.i Commercial activity

Headnote

Taxation --- Goods and services tax — Special rules — Agents

Appellant corporation was constituted under Condominium Property Act (CPA) of Alberta — Corporation managed commercial condominium and collected condominium fees from 132 unit-owners — Minister assessed corporation for GST on basis that it was liable for GST, as it engaged in commercial activity — Corporation appealed — Appeal allowed — Assessment vacated — Corporation was agent for individual owners — As such, payment of condominium fees did not attract GST because owners remained beneficial owners of condominium fees — Essential qualities of agency relationship were considered, namely consent of both principal and agent, authority of agent to affect principal's legal position, and principal's control of agent's actions — Corporation was not independent entity and existed because of owners and on behalf of owners — Corporation did not carry on business of its own and was creature of owners who elected board of directors at pleasure and under control of owners — Corporation assumed no risks and could make owners liable to third parties — Portion of condominium fees was held by corporation in reserve or trust fund for owners — Pursuant to CPA, owners were obligated to operate through corporation which existed solely because of them and for them — Corporation carried on non-profit business and did not meet definition of "commercial activity" under s. 123(1) of Excise Tax Act, as it had no expectation of profit — Excise Tax Act, R.S.C. 1985, c. E-15, ss. 178, 221(1), V-I-13.

Commercial law --- Agency — Creation of agency — General principles

Appellant corporation was constituted under Condominium Property Act (CPA) of Alberta — Corporation managed commercial condominium and collected condominium fees from 132 unit-owners — Minister assessed corporation for GST on basis that it was liable for GST, as it engaged in commercial activity — Corporation appealed — Appeal allowed; assessment vacated — Corporation was agent for individual owners — As such, payment of condominium fees did not attract GST because owners remained beneficial owners of condominium fees — Essential qualities of agency relationship were considered, namely consent of both principal and agent, authority of agent to affect principal's legal position, and principal's control of agent's actions — Corporation was not independent entity and existed because of owners and on behalf of owners — Corporation did not carry on business of its own and was creature of owners who elected board of directors at pleasure and under control of owners — Corporation assumed no risks and could make owners liable to third parties — Portion of condominium fees was held by corporation in reserve or trust fund for owners — Pursuant to CPA, owners were obligated to operate through corporation which existed solely because of them and for them — Corporation carried on non-profit business and did not meet definition of "commercial activity" under s. 123(1) of Excise Tax Act, as it had no expectation of profit.

Sale of land --- Condominiums — Condominium corporation — General

Appellant corporation was constituted under Condominium Property Act (CPA) of Alberta — Corporation managed commercial condominium and collected condominium fees from 132 unit-owners — Minister assessed corporation for GST on basis that it was liable for GST, as it engaged in commercial activity — Corporation appealed — Appeal allowed; assessment vacated — Corporation was agent for individual owners — As such, payment of condominium fees did not attract GST because owners remained beneficial owners of condominium fees — Essential qualities of agency relationship were considered, namely consent of both principal and agent, authority of agent to affect principal's legal position, and principal's control of agent's actions — Corporation was not independent entity and existed because of owners and on behalf of owners — Corporation did not carry on business of its own and was creature of owners who elected board of directors at pleasure and under control of owners — Corporation assumed no risks and could make owners liable to third parties — Portion of condominiums fees was held by corporation in reserve or trust fund for owners — Pursuant to CPA, owners were obligated to operate through corporation which existed solely because of them and for them — Corporation carried on non-profit business and did not meet definition of "commercial activity" under s. 123(1) of Excise Tax Act, as it had no expectation of profit.

Table of Authorities

Cases considered by *McArthur J.*:

Glengarry Bingo Assn. v. R. (1999), 1999 CarswellNat 332, (sub nom. *Minister of National Revenue (Customs & Excise) v. Glengarry Bingo Assn.)* 237 N.R. 63, (sub nom. *Glengarry Bingo Assn. v. Canada)* [1999] G.S.T.C. 15, (sub nom. *R. v. Glengarry Bingo Assn.)* 99 G.T.C. 7101 (Fed. C.A.) — considered

Statutes considered:

Condominium Property Act, R.S.A. 2000, c. C-22

Generally — referred to

s. 6(1) — considered

s. 6(2) — considered

s. 25 — considered

s. 25(1) — considered

s. 25(2) — considered

s. 25(3) — considered

s. 25(3)(b) — considered

s. 28 — considered

s. 28(7) — considered

s. 32(1) — considered

s. 32(2) — considered

s. 37 — considered

s. 60 — referred to

s. 63 — considered

s. 65 — considered

s. 78 — considered

Excise Tax Act, R.S.C. 1985, c. E-15

Pt. IX [en. 1990, c. 45, s. 12(1)] — referred to

s. 123(1)"business" [en. 1990, c. 45, s. 12(1)] — considered

s. 123(1)"commercial activity" [en. 1990, c. 45, s. 12(1)] — considered

s. 123(1)"taxable supply" [en. 1990, c. 45, s. 12(1)] — considered

s. 165(1) [en. 1990, c. 45, s. 12(1)] — referred to

s. 169(4) [en. 1990, c. 45, s. 12(1)] — referred to

s. 221(1) [en. 1990, c. 45, s. 12(1)] — considered

APPEAL by condominium corporation from Minister's assessment of GST against corporation for condominium fees paid by owners for management of condominium.

***McArthur T.C.J.*:**

1 This is an appeal from an assessment of goods and services tax (GST) by the Minister of National Revenue (the Minister) under the *Excise Tax Act* (the *Act*) for $19,860 tax, $3,193 penalty and $2,478 interest for the period May 1, 1998 to April 1, 2000. The Appellant was represented by a unit owner, Mr. Gordon McIntosh, who was also a director of the condominium board.

2 The Appellant is a corporation constituted according to the *Condominium Property Act* (*CPA)* [1] of Alberta. It managed a commercial condominium in the Strathcona Business Park in Edmonton. It collected condominium fees from the 132 unit-owners including $136,058 for the one-year period ending April 30, 1999 and $147,666 for the period ending April 30, 2000, for a total of $283,724. Residential condominiums are specifically exempt [*] from GST under the *Act*, but commercial condominiums are not.

3 At the outset of trial, the Respondent requested that an adjournment be granted to permit the Respondent to review the Appellant's documentation with respect to an application for input tax credits (ITCs) pursuant to subsection 169(4) of the *Act*. The Appellant's agent was not interested in that approach and at his request the hearing proceeded. Further, the Respondent asked for an adjournment to permit the Appellant to notify the Attorney General of each province with respect to a possible constitutional challenge in that it appeared the Appellant is stating that the *CPA*, Alberta legislation (section 65), takes precedence over the *Excise Tax Act*. Again, I decided not to grant such adjournment before hearing the Appellant's argument.

4 The Appellant made taxable supplies of administrative and management services to the owners of the units in the condominium complex for consideration equal to at least the amount of the condominium fees it received of $136,058 for the reporting period ending April 30, 1999 and $147,666 for the reporting period ending April 30, 2000. The Appellant was

required to collect and report 7% of both amounts being $9,524 for the period ending April 30, 1999 and $10,336 for the period ending April 30, 2000 pursuant to subsection 165(1) and insufficient information was provided for ITCs in accordance with subsection 169(4).

5 The Appellant's primary position is that it is strictly an agent for the owners, its principals, and acted as such at all times and was never engaged in a "commercial activity". It adds that it provides administrative services as directed by the owners in helping with the *CPA* and its own by-laws. In this vein, the Appellant's principal (the owners) can by resolution, dissolve the Appellant (section 60 of the *CPA*) and can acquire or dispose of any of the Appellant's interest in real property. Upon terminating the Appellant condominium corporation, the owners can transfer ownership of the real property previously retained by the Appellant.

6 Mr. McIntosh presented secondary arguments including: (a) pursuant to section 65 of the *CPA*, the Appellant is not liable for GST; and (b) the Appellant did not provide "taxable supplies" as defined in the *Act* and does not meet the definition of "commercial activity" (section 123).

Analysis

7 The Appellant's agency argument is, by far, its strongest position and I will deal with it first. If the Appellant can establish that its relationship with the owners was one at law of principal and agent then the payment of condominium fees does not attract GST because the owners remained the beneficial owners of the condominium fees simply directing their agent (the Appellant) to pay for the maintenance of their units and their common elements.

8 Mr. James Thomas Clarke was the only witness and he represented himself together with all the other owners. Through him several documents were entered including the Appellant's by-laws, correspondence with Canada Customs and Revenue Agency (CCRA), the Appellant's financial statements for the years in question, and title documents. I allowed these documents over counsel for the Respondent's objections. As an owner and director of the Appellant, he had personal knowledge of all entries. Mr. Clarke testified that the Appellant managed the real property, keeping its own separate bank account, repairing and maintaining the real property and paying the maintenance bills. He admitted the Appellant could borrow funds, employ personnel, hire a management firm and generally take all the actions necessary to manage and maintain the common elements. For practical purposes, what the owners maintained exclusively was the interior of their unit from the paint inward.

9 Pursuant to subsection 6(2) of the *CPA* title to the common property is held by the owners. Subsections 6(1) and (2) provide:

> **6. (1)** The Registrar, in issuing a certificate of title for a unit, shall certify on it the owner's share in the common property.
>
> **(2)**<u>The common property comprised in a registered condominium plan is held by the owners of all the units as tenants in common in shares proportional to the unit factors for their respective units.</u>
>
> (emphasis added)

Subsections 25(1), (2) and (3) provide:

> **25. (1)** On the registration of a condominium plan, there is constituted a corporation under the name "Condominium Corporation No. ___________" and the number to be specified is the number given to the plan registration.
>
> **(2)** A corporation consists of all those persons
>
> > (a) who are owners of units in the parcel to which the condominium plan applies, or
> >
> > (b) who are entitled to the parcel when the condominium arrangement is terminated pursuant to section 60 or 61.
>
> **(3)** Without limiting the powers of the corporation under this or any other Act, a corporation may

(a) sue for and in respect of any damage or injury to the common property caused by any person, whether an owner or not, and

(b) be sued in respect of any matter connected with the parcel for which the owners are jointly liable.

(emphasis added)

Subsection 28 provides:

28. (1) A corporation shall have a board of directors that is to be constituted as provided by the bylaws of the corporation.

(2) Every member of a board shall exercise the powers and discharge the duties of the office of member of the board honestly and in good faith.

(3) Where a member of the board has a material interest in any agreement, arrangement or transaction to which the corporation is or is to become a party, that person

(a) shall declare to the board that person's interest in the agreement, arrangement or transaction,

(b) shall not vote in respect of any matter respecting that agreement, arrangement or transaction, and

(c) shall not be counted when determining whether a quorum exists when a vote or other action is taken in respect of the agreement, arrangement or transaction.

(4) Subsection (3) does not apply to an agreement, arrangement or transaction in which the member of the board has a material interest if that material interest exists only by virtue of that member of the board owning a unit.

(5) A corporation shall, within 30 days from the conclusion of the corporation's annual general meeting, file at the land titles office a notice in the prescribed form stating the names and addresses of the members of the board.

(6) Notwithstanding subsection (5), a corporation may at any time following a change in

(a) the membership of the board,

(b) e name of a member of the board, or

(c)the address of a member of the board,

file at the land titles office a notice in the prescribed form stating the change.

(7) The powers and duties of a corporation shall, subject to any restriction imposed or direction given in a resolution passed at a general meeting, be exercised and performed by the board of the corporation.

(8) A person who

(a) is a bona fide third party dealing at arm's length with the corporation, and

(b) does not have notice of a restriction or direction referred to in subsection (7),

is not liable for or otherwise affected or bound by any breach of or failure to follow that restriction or direction by the corporation.

(9) All acts done in good faith by a board are, notwithstanding that it is afterwards discovered that there was some defect in the election or appointment or continuance in office of any member of the board, as valid as if the member had been properly elected or appointed or had properly continued in office.

> **(10)** At least $^{2}/_{3}$ of the membership of the board of directors of the corporation shall be unit owners or mortgagees unless the bylaws provide otherwise.

Subsections 32(1) and (2) provide:

> **32. (1)** The bylaws shall regulate the corporation and provide for the control, management and administration of the units, the real and personal property of the corporation and the common property.
>
> **(2)** The owners of the units and anyone in possession of a unit are bound by the bylaws.

Subsections 37 and 65 provides:

> **37. (1)** A corporation is responsible for the enforcement of its bylaws and the control, management and administration of its real and personal property and the common property.
>
> **(2)** Without restricting the generality of subsection (1), the duties of a corporation include the following:
>
> > (a) to keep in a state of good and serviceable repair and properly maintain the real and personal property of the corporation and the common property;
> >
> > (b) to comply with notices or orders by any municipal authority or public authority requiring repairs to or work to be done in respect of the parcel.
>
> **(3)** A corporation may by a special resolution acquire or dispose of an interest in real property.
>
> **65.** The corporation is not liable in relation to a unit and the share in the common property assigned to the unit for any rate, charge or tax levied by the Crown, a local authority as defined in the *Municipal Government Act* or any other authority that has the power to assess and levy rates, charges or taxes on land or in respect of the ownership of land.

10 The Appellant had the onus of establishing, on a balance of probabilities, that it was an agent for the individual owners. CCRA, in the GST/HST Policy Statement, [3] sets out a range of tests to assist in determining whether an agency relationship exists. I find these helpful and in keeping with established case law. The essential qualities of an agency relationship include the following: (i) consent of both the principal and the agent; (ii) authority of the agent to affect the principal's legal position; and (iii) the principal's control of the agent's actions. I will apply some of these tests to the present situation starting with the first three "essential qualities".

Consent of both the principal and the agent.

11 The condominium corporation consists of all the unit owners (subsection 25(2) of *CPA*). They appoint or elect a Board of Directors that is answerable to all the owners. The directors operate the condominium corporation as the owners' representatives or agents. They report directly to the owners. They are not in business for themselves. I find nothing in the documentation that provides for compensation for their efforts other than being reimbursed for their out-of-pocket expenses. Paragraph 28(1)(7) of the *CPA* provides that the directors are subject to restrictions or directions imposed by the owners at an annual general meeting. I infer that the owners and the Appellant (which operates through the directors) consented to a principal and agent relationship. The first essential quality is answered in favour of the Appellant's position.

Authority of the agent to affect the principal's legal position

12 The by-laws of the Appellant provide for the control, management of all the property and the owners are bound by these by-laws (subsections 32(1) and (2) of the *CPA)*. The Appellant has consent and authority to legally bind the owners. Section 25 of the *CPA* states that the owners are jointly liable. This indicates that the owners are responsible for the acts of the Appellant and that the owners are exposed to potential risks. In addition, the Appellant can enter into contracts with third

parties on behalf of the owners. Counsel for the Respondent points out that the corporation can sue or be sued (subsection 25(3)) but the condominium corporation is made up of the owners. The corporation cannot be separated from the owners. It is not an independent legal entity. Paragraph 25(3)(b) states that the corporation can be sued with respect to the parcel of land and the owners are jointly liable. This second essential quality of an agency relationship exists.

The principal's control of the agent's actions

13 . The powers of the Appellant are vested in the board and subject to restrictions and directions imposed at general meetings of the owners. Further, several sections of the Bylaws and the *CPA* place requirements on the Appellant. For example, By-law 3.02(b) requires the owners' consent to borrow monies; subsection 37(3) requires a special resolution of the owners in order for the Appellant to acquire an interest or dispose of an interest in real property; section 63 of the *CPA* provides that the owners, by special resolution, can transfer the ownership of the Appellant's bare land units; and section 78 of the *CPA* states that contractors retained by the Appellant can register a lien against units in the complex.

15 The condominium corporation is not an independent entity. It exists because of the owners and on behalf of the owners. It does not carry on business on its own. It is a creature of the owner who, for conveniency and efficiency, elect a board of directors at the pleasure and under the control of the owners. The owners, by majority vote, have complete control over the corporation. The corporation assumes no risks, it can effect the liability of the owners in respect of strangers to the relationship by the making of contracts or the disposition of property. The following is the classic definition of agency found in *The Law of Agency*: [4]

> Agency is the relationship that exists between two persons when one, called the *agent*, is considered in law to represent the other, called the *principal*, in such a way as to be able affect the principal's legal position in respect of strangers to the relationship by the making of contracts or the disposition of property.
>
> The relationship between the Appellant and the unit owners easily fits within this definition. The corporation (agent) exists for the owners (principal) and the owners' legal position in the respect of strangers is affected by the Appellant entering into contracts.

17 The Federal Court of Appeal in *Glengarry Bingo Assn. v. R.* [5] held that risk is a significant factor in determining whether an agency relationship exists. The Court further sets out three essential qualities of agency:

> P-182 identified three essential qualities of agency. These are the consent of both the Principal and Agent, the authority of the Agent to Affect the Principal's Legal Position and the Principal's Control of the Agent's Action. Since I find that GBA did not have the capacity to affect the legal position of its Members, I find it unnecessary to address the other factors which Revenue Canada has indicated are required for a finding of agency.
>
> In contrast to this, I have no difficulty concluding that the present Appellant corporation had the capacity to affect the legal position of the unit owners. Another indication of an agency relationship is that a portion of the condominium fees is held by the Appellant in a reserve or trust fund for the owners. Clearly, the corporation was the unit owners' agent. The corporation is not a separate entity from the owners. Pursuant to the *CPA*, the owners are obligated to operate through a corporation which exists solely because of them and for them. The Appellant being an agent of the owners, no GST is payable unless the *Act* provides differently.

18 A brief review of the relevant sections follows. Subsection 221(1) of the *Act* provides that every person who makes a taxable supply shall collect GST. The definition of "taxable supply" in subsection 123(1) includes "... a supply that is made in the course of a commercial activity".

19 Subsection 123(1) of the *Act* defines "commercial activity" to include "a business carried on ... other than a business carried on without a reasonable expectation of profit ...". The corporation carried on a non-profit business and does not meet the definition of commercial activity because it had no expectation of profit. Counsel for the Respondent argues that the Minister gets over this hurdle by the definition of "business" in subsection 123(1), which is very broad and states:

> **"business"** includes ... undertaking of any kind whatever, whether the activity or undertaking is engaged in for profit, and any activity engaged in on a regular or continuous basis that involves the supply of property by way of lease, licence or similar arrangement, but does not include an office or employment;

20 The brief reference by both parties to ITCs is not sufficient to make a finding. Finally, it is not necessary to consider the Appellant's section 65 submission but I have no difficulty in agreeing with the Respondent's position and it was unnecessary to notify the Attorneys General of the provinces.

21 The appeal is allowed.

Appeal allowed.

Footnotes

1 R.S.A. 2000, c. C-22.

* The Court means to say that residential condominium *fees* are exempt under Schedule V, Part I, section 13 — ed.

3 P-182R issued on June 23, 1995 and revised July 2003, effective January 1, 1991.

4 G.H.L. Fridman, (7th ed.) (Toronto: Butterworths, 1996).

5 *Glengarry Bingo Assn. v. R.* (Fed. C.A.) at paragraph 32.

Court of Queen's Bench of Alberta

Citation: Tutt v The Owners: Condominium Plan No. 7822572, 2020 ABQB 213

Date: 20200330
Docket: 1803 01656
Registry: Edmonton

Between:

John Ernest Tutt and Terry Linda Tutt

Appellants

- and -

The Owners: Condominium Plan No. 7822572

Respondent

Reasons for Decision
of the
Honourable Mr. Justice Robert A. Graesser

Introduction

[1] This is an appeal from the decision of Master Schlosser dated August 19, 2019. The Master's decision was in response to a reference to him by the Assessment Officer. The Assessment Officer had previously been tasked with assessing costs in favour of The Owners Condominium Plan No 7822572 (the "Owners") against John Ernest Tutt ("Mr. Tutt") and Terry Linda Tutt (collectively, the "Tutts"). Solicitor and own client costs had been ordered in favour of the Owners in foreclosure proceedings taken by the Owners against the Tutts.

[2] The Assessment Officer asked the Master:

1. Was it reasonable for the Owners to begin pursuing legal remedies against the Tutts on December 5, 2017, having regard to the evidence that has been or will be provided by the parties and any facts that may be agreed to by them?
2. Was it reasonable for the Owners to commence its foreclosure action against the Tutts on January 23, 2018, having regard to the evidence that has been or will be provided by the parties?

[3] The Master answered "yes" to both of those questions. The Tutts appeal.

Background

[4] The Tutts are owners of a condominium unit (the "Unit") in a condominium development in Edmonton known as Castle Ridge. There are seventy-three units in the complex. The Owners are the condominium corporation established by the bylaws and pursuant to the *Condominium Property Act*, RSA 2000, c C-22 and its predecessors to manage the complex and enforce the rights and obligations of the unit owners.

[5] A board of directors, elected from amongst the unit owners, manage the condominium corporation themselves. They are unpaid volunteers. Condominium fees have traditionally been quite low, in the $150 per month range.

[6] The relationship between Mr. Tutt and the condominium corporation has been strained for many years. He has consistently refused to make his condominium fee payments by cheque or automatic bank deduction as required by the condominium bylaws and instead insists on paying in cash. The condominium fees are almost never paid on time, or monthly as required by the bylaws. Instead, Mr. Tutt will make a bulk payment after a number of months of non-payment and his account falling well into arrears.

[7] The Tutts do not live in the Unit and apparently rent it out. Mr. Tutt is vocally critical of the manner in which the complex has been run by the volunteer directors.

[8] In 2014, there were a number of complaints to the board of directors about the state of the Unit, as well as disagreements between him and some of his neighbours.

[9] Those disagreements led to the board of directors imposing a fine of $1,000 against the Tutts. The fine shows on the books of the Owners, but no steps appear to have been taken to enforce it before this action was commenced. There is no evidence of any demands for payment of the fine. This action makes no mention of the fine and it does not appear to have featured in the litigation.

[10] The difficult relationship between Mr. Tutt and the board of directors also led to litigation in the past. In 2015, the Owners filed a caveat against the Unit because condominium fees were in arrears. Mr. Tutt commenced a small claims action against the treasurer of the board of directors. The small claims action was eventually settled with Mr. Tutt paying the arrears and the Owners agreeing to allow him to directly deposit his condominium fees into the Owners' bank account.

[11] There were also proceedings commenced against Mr. Tutt by the treasurer, and a restraining order was obtained against him by the treasurer.

[12] After the 2015 settlement, the Tutts soon fell into arrears of paying their condominium fees. By October 2017, they were seven months in arrears. A demand letter was sent to the Tutts claiming $1,620.68 on October 8, 2017. That amount appears to include interest calculated at 18%. The demand letter said that if arrears were more than 6 months, a caveat would be filed against the Unit.

[13] The Tutts paid $900 on October 16, 2017, but that left arrears.

[14] The Owners filed a caveat dated October 8, 2017, sworn on October 16, 2017 and registered at the Land Titles Office on October 31, 2017.

[15] The Tutts did not make the November 1 condominium fee payment and made no payments in November.

[16] Mr. Tutt served a Notice to Take Proceedings on the caveat on November 23, 2017, under section 138 of the *Land Titles Act*, RSA 2000, c L-4.

[17] On December 1, 2017 Mr. Tutt deposited a payment of $900, which paid off all claimed arrears to date and actually left the account with a credit balance until the end of January 2018.

[18] In her affidavit of December 11, 2019, the secretary treasurer says that Mr. Tutt attended the annual general meeting on December 4, 2017 and was disruptive and argumentative. He claimed to have paid off all of the arrears and waved what he claimed to be receipts. The secretary treasurer says that because of the past history, she did not believe him.

[19] The board of directors consulted a lawyer on December 5, 2017 and shortly before the expiry of the notice period, the Owners filed and served a statement of claim. The statement of claim was filed on January 23, 2018. The Tutts filed a statement of defence and counterclaim. The counterclaim sought $50,000 from the Owners for harassment and defamation. The fight was on.

[20] After the counterclaim was filed, no further condominium fees were paid by the Tutts. An order for foreclosure was granted in April 2019. At that time, the arrears were set, solicitor and own client costs were ordered, and the actual amount of the solicitor and own client costs was directed to be determined by the Assessment Officer.

[21] During the litigation, the Owners' records and accounting were in issue, and it appears to have taken the Owners' lawyers to prepare a detailed (and accurate) statement of account. The rate of interest charged on arrears became an issue, as did the timing of payments made by Mr. Tutt. The actual knowledge of the board of directors as to the state of the Tutt's account for condominium fees became important to verify whether Mr. Tutt's claim to the annual general meeting on December 4, 2017 was in fact true.

[22] Also relevant is the extent to which claims by a condominium corporation can be caveated against an owner's unit, and what claims and financial obligations are personal obligations and not obligations *in rem*, which can be enforced against the lands by foreclosure, as opposed to through the provisions of the *Civil Enforcement Act*, RSA 2000, c C-15.

[23] By the time the Tutts redeemed their Unit, the Owners had spent $29,603.72 which they sought from the Assessment Officer. The dispute over the Tutts' liability for costs and the quantum of those costs has added another $24,000 to the claim of the Owners.

[24] The Tutts have been represented throughout by counsel, and it can be presumed that they have incurred significant costs in defending the Unit and themselves from the Owners' claims.

[25] The costs incurred by the Owners and claimed by them are wildly disproportionate to the amount in issue, as there have been no real steps on the counterclaim.

[26] A careful review of the records of all parties shows several important things:

1. When the Owners filed a caveat on the Unit in late October 2017, there had been a lengthy and continuous history of non-compliance by the Tutts in paying their condominium fees on time, and in the manner required by the bylaws;
2. When the caveat was filed, the Tutts were in arrears of payment for a number of months;
3. The Owners had previously accommodated the Tutts by allowing them to make direct deposits into the Owners' bank account, despite the requirement in the bylaws that condominium fees be paid either by cheque, money order, or through direct debit arrangements;
4. Despite the accommodation, the Tutts continued to fail to pay in a timely manner or regularly, and were generally in arrears of payment;
5. When Mr. Tutt served the notice to take proceedings on the caveat, the Tutts were still significantly in arrears, to the tune of approximately $1,600;
6. On October 16, 2017 Mr. Tutt made direct deposit into the Owners' bank account of $900. A further deposit of $900 was made by Mr. Tutt on December 1.
7. The December 1, 2017 payment put the Tutts into a credit balance according to a ledger prepared by the Owners in response to undertakings given at a cross-examination of the Owners' officer on January 10, 2020. The credit balance is either $298.22 or $353.74, depending on whether interest is charged at 18% or 12%.
8. The credit was eroded by $150 on January 1, 2018, and the after the February 1, 2018 condominium fee of $150 was charged, there was either a credit of $53.74 or a deficit of $1.80, depending on the interest rate;
9. These balances do not include the fine that had been levied against the Tutts some years earlier, nor any legal fees the Owners may have been entitled to charge to the Tutts under the provisions of the Owners' bylaws;
10. The fine was not part of the caveated amount, nor was it claimed in the statement of claim. There was no demand for legal fees at any time before the caveat was filed. They were raised for the first time in the statement of claim, and then only as part of the claim for costs.
11. The board of directors did not learn of the December 1, 2017 payment by Mr. Tutt until after the statement of claim had been issued on January 23,

2018, because that is when they received their bank statement showing the December 2017 transactions; and

12. Following the issuing of the statement of claim, the Tutts made no payments until they were ordered to do so in the foreclosure proceedings that ensued.

Issues

[27] Framing the issues is straightforward: was the Master correct in his answers to the questions posed by the Assessment Officer?

Standard of Review

[28] There is no issue on the standard of review. Since ***Bahcheli v Yorkton Securities Inc***, 2012 ABCA 166, there is no doubt that the standard of review on appeals from a master is correctness. No deference is given to the Master's decision.

Case law

[29] The parties have submitted a number of cases they believe to be relevant on this appeal. For the Appellants, the Tutts:

Condominium Corp No 042 5636 v Chevillard, 2012 ABQB 131;

Owners: Condominium Plan No 7721985 v Breakwell, 2019 ABQB 674;

Crystal Wealth Management System Ltd v JC Food Services Ltd, 2019 ABQB 59;

Discount Auto Sales v Cash Store Inc, 2005 ABQB 212;

Taylor v Alberta, [2005] AJ No 968 (ABQB);

Primrose Drilling Ventures Ltd v Carter, 2008 ABQB 605;

Gudzinski Estate v Allianz Global Risks US Insurance Co Limited, 2012 ABCA 5;

Bahcheli v Yorkton Securities Inc, 2012 ABCA 166 ;

Condominium Plan No 8222909 v Francis, 2003 ABCA 234;

Bank of Montreal v Bala, 2015 ABQB 166 ;

Bank of Montreal v Bala, 2017 ABQB 38 ;

Boardwalk REIT Property Holdings Ltd v Condominium Corp No 0822896, 2017 ABQB 315 ;

Condominium Corporation No 0425177 v Jessamine, 2011 ABQB 644 ;

Condominium Plan No 8722887 v Callaghan, 2011 ABQB 638 ;

Bank of Montreal v Rakaruna, 2014 ABQB 415 ;

Sager v Condominium Plan No 9523979, 2015 ABQB 549 ;

Condominium Plan No 7621302 v Stebbing, 2014 ABQB 487 ;

Condominium Plan No 7621302 v Stebbing, 2015 ABQB 219 ;

934859 Alberta Inc v Condominium Corporation No 0312180, 2007 ABQB 640 ;

Condominium Corp No 0729313 (cob Trails of Mill Creek) v Schultz, 2016 ABQB 338 ;

Canada (Minister of Citizenship and Immigration) v Vavilov, 2019 SCC 65;

Condominium Corp No 0312235 v Scott, 2015 ABQB 171 ; and

Almani v York Condominium Corporation No 473, 2020 ONSC 194.

And for the Respondent Owners:

369413 Alberta Ltd v Peter H Pocklington and 350151 Alberta Ltd, 1998 ABQB 603;

Bank of Montreal v Kundi, 2019 ABQB 216;

Alberta Treasury Branches v 1041057 Alberta Ltd (Katch 22), 2103 ABQB 748;

Orkin on the Law of Costs, (2nd Ed), online, (Toronto: Carswell, 2019), Chapter 1, paragraph 103;

Condominium Corporation No 311443 v Goertz, 2016 ABCA 362; and

Condominium Plan No 0526233 v Seehra, 2014 ABQB 588.

Analysis

[30] This is an unfortunate example of what happens when a dispute gets out of hand and the parties resort to the courts. Civil litigation is wickedly expensive but remains the default forum for dispute resolution where the parties are otherwise unable to agree on another process (or another process is not mandated by contract or legislation). The problem is compounded when the parties must litigate in the Court of Queen's Bench instead of Provincial Court Civil Division where, as here, proceedings relate to the *Land Titles Act* and the dispute involves remedies the Provincial Court is unable to give such as a declaration as to the validity of a caveat.

[31] The irony of this litigation is that when the statement of claim to enforce the Owners' rights under the caveat was filed, nothing was owed to the Owners that was covered by the caveat.

[32] Fundamentally, remedies to enforce an interest in real property such as a condominium unit must be charged against the condominium unit by contract or by legislation. This case involves a combination of both types of charges.

[33] The parties here largely argue over the extent to which the Owners have a statutory charge against an owner's unit. This has been a central area of dispute between them.

Priority of condominium fees secured

[34] Condominium corporations essentially have a taxation power over the unit holders. The power to raise money to pay for the ongoing costs of the corporation is set out in section 39 of the *Condominium Property Act*:

39(1) A board may by resolution

(a) determine from time to time the amounts to be raised for the purposes of the operating account and the reserve fund and may raise those amounts by levying contributions on the owners at regular intervals

(i) in proportion to the unit factors of the owners' respective units, or

(ii) subject to the regulations, and if provided for in the bylaws, on a basis other than in proportion to the unit factors of the owners' respective units;

(b) determine from time to time amounts to be raised by special levy and raise those amounts in accordance with section 39.1.

(2) A contribution shall not include any amount for the purpose of collecting from an individual owner

(a) a monetary sanction under a bylaw made under section 35(1),

(b) costs incurred by the corporation as a result of damages caused by an act or omission of an owner, tenant or occupant, or

(c) any other amount set out in the regulations.

[35] Enforcement or collection of any required contributions may be taken by way of civil action, and the corporation is entitled to secure a unit owner's contribution obligations by way of filing a caveat against the unit under section 39.2:

39.2 (6) A corporation may file a caveat against the certificate of title to an owner's unit for the amount of a contribution levied on the owner and interest payable but unpaid by the owner.

(7) On the filing of the caveat under subsection (6), the corporation has a charge against the unit equal to the unpaid contributions and any interest owing.

(8) On and from the date of filing of the caveat, a charge under subsection (7) has the same priority as a mortgage under the Land Titles Act and may be enforced in the same manner as a mortgage.

…

(11) Notwithstanding subsection (8), if

(a) a corporation has filed a caveat under this section,

(b) subsequent to the caveat's being filed another person gains title to the unit pursuant to

(i) a foreclosure action,

(ii) an action for specific performance, or

(iii) a tax recovery proceeding under the Municipal Government Act,

and

(c) an amount remains owing to the corporation with respect to the contribution and interest for which the caveat was filed, the caveat remains registered against the certificate of title of the unit until the amount owing is paid to the corporation.

[36] Interest on required contributions is dealt with in section 39.2:

39.2(1) A contribution levied as provided in section 39(1)(a) is due and payable on the passing of a resolution by the board to that effect and in accordance with the terms of the resolution, and a contribution levied under section 39(1)(b) is due and payable in accordance with a resolution of the board passed under section 39(1).

(2) A contribution referred to in subsection (1), and any interest charged under section 40, may be recovered by an action for debt by the corporation

[37] The *Condominium Property Act Regulations* limit interest to a maximum of 18%, which is what the Owners charge on unpaid fees (as opposed to unpaid special assessments).

[38] Cost recovery for enforcement proceedings is dealt with in section 42:

42 Where a corporation takes any steps to collect any amount owing under section 39, the corporation may

(a) recover from the person against whom the steps were taken all reasonable costs, including legal expenses and interest, incurred by the corporation in collecting the amount owing, and

(b) if a caveat is registered against the title to the unit, recover from the owner all reasonable prescribed expenses incurred by the corporation with respect to the preparation, registration, enforcement and discharge of the caveat.

[39] The power of an unpaid condominium corporation to file a caveat against the unit would not appear to depend on ownership of the unit. If someone purchases a condominium unit against which there are arrears, the condominium corporation is not barred by a title change from filing a caveat to enforce its claim against the unit itself. This right is a type of exception to indefeasibility, and is the underlying reason purchasers and mortgagees require estoppel certificates from condominium corporations to ensure there are no arrears. It is also a reason for prudent purchasers and mortgage lenders to review the condominium corporation's records to look for contributions that have been levied by the board and unpaid, or even approved by but not yet payable.

[40] A mortgagee or purchaser may find a caveat filed for any past contributions regardless of the transfer of title or advance of mortgage funds. While the contribution does not expressly take priority over the mortgage itself, or any other prior registered encumbrance, it has that practical effect as the caveat cannot be removed unless the amount owed is paid.

[41] Hence the power under section 39.2(3) for a mortgagee to pay any contributions itself and add them to the amount owed under the mortgage.

[42] Some cases consider this so-called "super-priority" of a condominium corporation's charges secured by a caveat against a unit. In ***Condominium Plan No 8722887 v Callaghan***, 2011 ABQB 638, Master Schlosser noted:

> [7] In recognition of the super priority, a practice has developed whereby foreclosing mortgagees pay the outstanding contributions together with legal expenses. Section 42(a) permits the recovery of costs and expenses incurred by the corporation but it does not give legal expenses any special status, or priority. Payment of outstanding condominium fees is referred to in paragraph 4(b) of the template Order Confirming Sale and Vesting Title. It is silent about legal expenses.

[43] He concludes that legal expenses incurred by the corporation in enforcing the caveat against an individual owner are not "contributions" under section 39. He held at paragraph 9:

> [9] In this case, the costs and related legal expenses are said to arise from the breach of a bylaw by an individual owner. They have been treated by the Plaintiff as an individual obligation rather than a common, or collective obligation. As such, this is a section 39(1)(d) scenario and falls within Bylaws 12.01 and 12.03. Section 39(1)(d) applies 'in respect of the unit or common property that is leased to that owner'. The obligation is individual. The Defendant was the only one assessed. The duties are personal and the Act allows recovery of the claim as a debt. Accordingly, this claim will not sustain a Caveat.

[44] Master Schlosser drew the distinction "between obligations that are fundamentally common, or 'collective', and those that are individual." He concluded that it is the "collective obligations" that have the "in rem quality" (paragraph 5).

[45] Feehan J (as he then was) took a somewhat different approach in ***Bank of Montreal v Bala***, 2017 ABQB 38, where he held that section 42 creates no statutory charge or priority for the costs and expenses described in that section. At paragraph 75, he stated:

> The Applicant's full indemnity costs are not recoverable by it as a contribution, nor do they constitute a statutory charge against the Unit, nor attract a statutory priority under the CPA, but they are recoverable in personam against the Plaintiff.

[46] Feehan J's decision looks carefully at the *Condominium Property Act* and the condominium corporation's bylaws. The underlying claim against the owner there was in relation to an insurance deductible and repair costs for the specific unit. The Bank of Montreal foreclosed, and during the foreclosure proceedings, the condominium corporation filed a caveat against the corporation unit for the insurance deductible and repair costs.

[47] Feehan J concluded that the condominium corporation was entitled to statutory priority over the Bank of Montreal's mortgage for the amounts in the caveat, but disallowed priority for the legal costs of enforcing the owner's payment obligation. The decision turned on his interpretation of section 42 and what "contributions" can be the subject of the condominium corporation's priority claims under section 39.

[48] ***Bala*** is at odds with the decision in ***Condominium Plan 052 6233 v Seehra***, 2014 ABQB 588. There, Lee J dealt with a breach of bylaw claim against an owner. He awarded solicitor and client costs against the Owner, following the condominium corporation's bylaws. The condominium corporation filed a caveat against the Owner's unit. Lee J concluded that the caveat was valid and gave priority for those costs over the Royal Bank's mortgage on a final foreclosure order. Lee J approved Master Prowse's decision in ***Condominium Plan No 8210034 v King***, 2012 ABQB 127. Master Prowse came to a different conclusion from Master Schlosser

in ***Callaghan*** and Master Smart in ***Condominium Corporation No 0425177 v Jessamine***, 2011 ABQB 644 on the issue of legal costs.

[49] In ***Bala***, Feehan J expressly disagreed with ***Seehra*** and ***King*** in a decision that allowed for disproportionate contributions to be assessed against unit owners in cases provided for in a condominium corporation's bylaws. He applied ***Condominium Plan No 8222909 v Francis***, 2003 ABCA 234, which holds that a condominium corporation has only those powers given to it by the *Condominium Property Act*. He noted that the super-priority position created by section 39.2(12) (now subsection 11) protected valid "contributions" but not legal costs.

[50] I agree with Feehan J's analysis and conclusions. Legal costs, whether on a Schedule C basis, a full indemnity basis, or any other basis, do not become a charge against the unit under the provisions of section 39 of the *Condominium Property Act*. All that is recoverable against the unit under section 39 is the amount of any unpaid contributions together with interest at the rate set in the bylaws. Feehan J added the costs of filing the caveat, but excluded legal costs. He ruled that the filing costs fell under section 42. Legal costs may only be enforced against the owner and not directly against the unit by filing a caveat under section 39.

[51] I note Master Prowse's careful analysis of foreclosure practices and the expectations of mortgagees. Mortgagees are undoubtedly aware that their priority to the unit is behind claims of the condominium corporation for unpaid condominium fees and unpaid assessments (collectively "contributions"). A mortgagee can protect itself regarding fees and interest by paying any arrears itself and adding these costs to the mortgage, as contemplated in section 39.2(3). Mortgagees can also protect themselves against claims such as those in ***Bala*** by insisting that the mortgagor have appropriate insurance covering deductible amounts and negligence claims. But a mortgagee cannot protect itself against a mortgagor who runs up a $50,000 legal bill for the condominium corporation over $1,600 in unpaid condominium fees. Fines may be levied but in maximum amounts as set out in the *Condominium Regulations* ($500 for the first "offence" and $1,000 thereafter). Those are foreseeable amounts for a mortgagee.

[52] I doubt, however, that mortgagees would expect to lose priority to a $50,000 assessment made against an individual unit owner for the condominium corporation's legal costs in pursuing $1,600 in arrears on its mortgagor's unit. Legal fees pursuing claims for the benefit of the condominium corporation or defending claims against the condominium corporation are controllable as they are spread over all of the unit holders through their regular contributions. The board is accountable to the owners (at least politically) if the owners are unhappy with board decisions to pursue claims or defend claims.

[53] But following ***Bala***, condominium corporations can no longer expect to recover costs awarded in its their favour against an owner using the super priority caveat. That does not mean that costs are not recoverable. They are fully recoverable against the owner to the extent that the owner has non-exempt assets to satisfy the claims. I recognize Master Prowse's concerns about an owner having exemptions if the condominium corporation is required to enforce its decision through the mechanisms in the *Civil Enforcement Act*, but I do not think there is a sound policy reason to prefer condominium corporation claims for things like fines and legal fees over the valid claims of other creditors.

[54] I would add to the analysis that once the amounts properly secured by a caveat have been paid off, the caveat ceases to have any validity because there is nothing to secure against the lands. It is clear from section 39.2(10) that a caveat filed to better secure unpaid contributions and interest must be discharged by the condominium corporation once those unpaid contributions and interest have been paid. It is just like a mortgage that has been fully paid off. While registration may continue because the parties have not taken formal steps to discharge it from title, the mortgage secures nothing because there is nothing owed.

[55] That does not end the matter. Subject to limitation periods and the provisions of the specific condominium corporation's bylaws, cost obligations may constitute a charge against the owner's interest in the unit and could be separately caveated. That type of charge would not take priority over previously registered encumbrances, and would not be caveatable after a title change.

[56] This recovery is dependent on the provisions of the condominium corporation's bylaws. Here, the Owners' bylaw 86(a) creates a "lien on and a charge against the estate or interest of any Owner for any unpaid contribution, assessment, sanction, installment or payment due to the Corporation including any costs relating thereto (on a full indemnity basis)."

[57] There is nothing to prevent parties from agreeing that debts and other obligations may be secured against someone's interest in land. Borrowers routinely sign charging agreements securing debts unrelated to the acquisition, maintenance and improvement of the land itself. Such agreements are capable of supporting caveats, as the charging agreement (if validly made) creates an interest in the lands charged.

[58] The bylaws bind all owners as if they had entered into the bylaws as a contract with the condominium corporation. In this case, the Owner's bylaws allow for costs to be recovered against a defaulting owner on a full indemnity basis, and that such costs constitute a charge against the owner's interest in the unit. No priority for costs is recoverable under the *Condominium Property Act* or the caveat contemplated in section 39. However, where claims are stated in the bylaws to be a charge against the owner's unit, those claims are at law caveatable as they constitute an interest in land.

[59] That may have the unfortunate result of requiring two caveats: one under the *Condominium Property Act* provisions and the other under the bylaws. If a condominium corporation filed one caveat securing both claims, it would be required under section 39.2(10) to discharge the caveat if the contribution portion of the total has been paid, even if the remaining claims had not.

Applying this analysis to the facts

[60] As at of the date the demand letter went to the Tutts, October 8, 2017, they owed the Owners $1,620.68 for unpaid contributions and interest at 18% since February 1, 2017. That is not disputed. That amount was still owed when the caveat was filed against the Unit on October 31, 2017.

[61] The caveat was validly filed, and secured the unpaid contributions and interest. The Tutts made two payments, one on October 8 and the other on December 1, each in the amount of $900. The December 1 payment put the Tutts in a small credit balance relating to contributions and interest due until January 31, 2018. After December 1, 2017, with the payments made, the Tutts

were entitled to have the caveat discharged and the Owners were obliged under section 39.2(10) of the *Condominium Property Act* to do so. That duty on the Owners' part continued until January 31, 2018, after which there were unpaid contributions again.

[62] Mr. Tutt had served a notice to take proceedings on the caveat on November 23, 2017. At that time, the caveat was valid, and secured the remaining arrears following the partial payment on October 16. I would characterize this as a knee-jerk reaction by Mr. Tutt to the Owners' valid collection claim. He was not then entitled to have the caveat removed because he had not fully paid the arrears. His intention to do so in the future (six weeks later) had no effect on the validity of the caveat.

[63] Mr. Tutt correctly advised the Owners at the annual general meeting on December 4 that he had paid off all arrears. The board did not believe him, but they did nothing to check their bank records to see if funds had been paid. It is not the Tutts' fault that the board did not have electronic banking so they could view their account transactions remotely and in real time. While the board may not be faulted for doubting Mr. Tutt's claim because of the unhappy history between them, that did not relieve them from the obligation of checking to make sure, before they instructed their solicitors to commence action on the caveat.

[64] So, when the Owners commenced action on its caveat against the Tutts on January 23, 2018, they did so at a time when there were no monies owed to the Owners that were secured by the caveat. The action should not have been commenced and it was not reasonable for the Owners to do so. The Tutts' payments were current, even after applying the 18% interest rate the Owners had calculated on the arrears.

[65] Put another way, why should the Tutts be liable for costs on an action that had no merit at the time it was commenced?

[66] The Owners sought to justify commencing the action by saying that while the contributions and interest had been paid in full by the time the action was commenced, the Tutts had not paid anything towards the legal costs that the Owners had incurred. The problem with that is that by the time the Owners' sought legal advice, the Tutts had fully paid off the arrears and were in a credit balance. The Tutts were entitled to require that the caveat be discharged. Additionally, there is nothing to suggest that the Owners had demanded payment of any legal fees or other expenses from the Tutts between the time they filed the caveat and the time the statement of claim was issued.

[67] The old $1,000 fine that had been levied by the board against the Tutts was also raised, but I treat that as a red herring. It was not mentioned in the statement of claim, there is no evidence that it was ever demanded from the Tutts, and it was by January 2018 very likely statute barred.

[68] In these circumstances, it was not reasonable for the Owners to seek legal advice, at least if they expected the Tutts to pay for those expenses other than as their part of a regular contribution assessed against all unit owners. Before going to the trouble and expense of hiring lawyers, the board should have checked with the bank. That may add insult to injury to the board, as they had accommodated the Tutts by allowing them to make direct deposits into the Owners' bank account. But in doing so the board placed themselves at risk for the consequences of not checking to see if any direct deposits had been made. I do not doubt that the December statement showing the December 1 payment by Mr. Tutt did not come to the board's attention

until they looked at the written statement the bank sent out. But before consulting lawyers, and before taking any legal proceedings against the Tutts, the board had an obligation to ensure that they were acting on correct and current information. That might have been an inconvenience, but calling the bank or going in to the branch to do a balance check would be the only way they would know if a payment had been made or not. That does not seem particularly onerous a task.

[69] There is an expression "no good deed goes unpunished", and the good deed of allowing the Tutts to make payments in this unusual may well be seen as being punished by imposing an extra burden on the board.

[70] In any event, the two questions put to Master Schlosser should be answered as follows:

1. **Was it reasonable for the Owners to begin pursuing legal remedies against the Defendants on December 5, 2017?**

[71] My answer is no. As at that date, there was nothing owed by the Tutts to the Owners under the caveat. They should have been aware of the $900 payment in October, and before consulting with lawyers they should have checked to make sure no additional payments had been made. No legal fees had been incurred, and the Tutts were in a credit balance. They might have consulted a lawyer in a general way as to what to do about an owner who is constantly in arrears, but when they actually consulted a lawyer, the Owners were obliged by the *Condominium Property Act* to discharge the caveat and not sue on it.

2. **Was it reasonable for the Plaintiff to commence its foreclosure action on January 23, 2018?**

[72] Again, my answer is no. The action commenced was an action on the caveat. It claimed the amount stated in the caveat. That amount had been fully paid off. The caveat should have been discharged, instead of the statement of claim being issued. On January 23, 2018 there was nothing left to sue on but for the legal fees that had been unreasonably incurred after the caveated amount had been paid. The evidence of the Owners is that they only learned of the December 1 payment after the statement of claim had been issued, when they received the December bank statement. The Master noted the history of the matter, and the fact that the Tutts went into arrears again only a few days after the statement of claim had been filed. I do not think an action lies for anticipatory breach of a payment that has not yet become due. In some matters, timing is everything. Here, the Owners' timing was out, and they cannot rely on a subsequent default to cure their premature filing.

Comments

[73] I will go further than simply answering the questions put to the Master, even though my comments that follow may be *obiter*. It is not clear if the Tutts appealed the Master's order awarding the Owners solicitor and own client costs. As such, this matter may have to return to the Assessment Officer with his questions answered and he will have to determine the quantum of costs the Tutts must pay.

[74] Nothing in this decision should be interpreted as condoning Mr. Tutt's actions. Communal living such as in apartments and condominiums, requires cooperation and goodwill towards neighbours. Mr. Tutt has shown none of that. Owners who do not pay their assessments on a timely basis and who ignore other responsibilities under the bylaws create an unfair burden on those owners and residents who comply. Mr. Tutt abused the goodwill of the board by not

providing them with confirmation of payment made by him. It would have been simple for him to send them a copy of any deposit receipt, so they would know (as opposed to having to find out for themselves) if he had made his required payments. Having regard to his payment history, it was not unreasonable for the board to assume that he had not made any required payments, as his account was almost always in arrears. But they had a responsibility to check.

[75] I recognize that I have the benefit of hindsight. Hindsight, rather than the record-keeping of the board, shows that the Tutts were in a credit balance until the end of January, 2018. But starting and maintaining this action was disproportionate to the remedy being sought.

[76] It would have made more sense to have such a small amount sued for in Provincial Court Civil Division which is a self-represented litigant friendly court, than in Queen's Bench with record production and questioning and mandatory alternative dispute resolution before trial. That may have compromised the caveat, but for $1,600, is full blown litigation appropriate?

[77] This is a classic case of litigation going out of control, where a dispute over $1,600 has morphed into a dispute over $50,000 in legal costs trying to enforce the $1,600 debt and collect costs. Neither party is without blame here. Mr. Tutt did not need to counterclaim for $50,000 for a claim that appears to have absolutely no merit. The parties did not need to treat this dispute as one worthy of multiple appearances in master's chambers, a contested assessment, and an appeal to Queen's Bench, with 28 and 31 page briefs.

[78] In hindsight, Mr. Tutt would have been much further ahead to have accepted the Owners' offer to settle sent to him on May 16, 2018. By that time, their offer to settle was $1,500, less than the $3,842.62 they had by then incurred in legal fees. But these were legal fees that were incurred in an action that should never have been commenced. It was a law suit over fees that were incurred to collect a debt that had been paid before any of the fees were incurred. It is hard to think that any fees would be recoverable by a plaintiff in such a situation, regardless of the contractual relationship.

[79] The Owners blame Mr. Tutt for causing all of the legal costs by serving notice to take proceedings on the caveat. Had he not done that, there would have been no need for the Owners to start the action. The caveat could have sat indefinitely, without anyone incurring legal costs. There was no evidence that the presence of the caveat caused the Tutts any harm or difficulty. That is true, but the Owners could have ignored the caveat and let it lapse. They would have incurred no cost in doing so. That is what they should have done. If they wanted to pursue costs against the Tutts, that could have been done in a separate action. To do so, however, in my view they first needed to quantify them and make a demand for payment, to give the Tutts a choice of paying what was demanded, rather than be sued for something they were unaware of.

[80] This is a case where in considering costs, the Court is faced with deciding which of the parties was more unreasonable than the other. This is a lawsuit that should never have been brought but was provoked by constant breaches of the Owners' bylaws. It was defended with a counterclaim that had no merit. Mr. Tutt should have provided the Owners with proof of payment of the two payments he made after receiving the demand letter to let them know he was trying to pay the debt off. The Owners should have checked with the bank to make sure no payments had been made before they contacted lawyers and they should have checked before they filed the statement of claim.

[81] In these circumstances, I conclude that neither party has met the burden of proof against the other. I would declare a tie. Neither party should be entitled to any costs in this action from the other.

[82] The irony here is that even if the Tutts do not have to directly pay the Owners' costs, they will have to pay their own legal fees plus their proportionate share of the Owners' legal fees, as those will undoubtedly form part of an assessment against all owners for common expenses.

Heard on the 13th day of February, 2020.
Dated at the City of Edmonton, Alberta this 30th day of March, 2020.

Robert A. Graesser
J.C.Q.B.A.

Appearances:

Ed Picard
Alberta Counsel
for the Appellants

Scott A. Matheson
Field LLP
for the Respondent

Province of Alberta

MUNICIPAL GOVERNMENT ACT

Revised Statutes of Alberta 2000
Chapter M-26

Current as of December 15, 2022

Office Consolidation

Alberta King's Printer
Suite 700, Park Plaza
10611 - 98 Avenue
Edmonton, AB T5K 2P7
Phone: 780-427-4952

E-mail: kings-printer@gov.ab.ca
Shop on-line at kings-printer.alberta.ca

Right to a clear title

423(1) A person who purchases a parcel of land at a public auction acquires the land free of all encumbrances, except

(a) encumbrances arising from claims of the Crown in right of Canada,

(b) irrigation or drainage debentures,

(c) caveats referred to in section 39.2(11) of the *Condominium Property Act*,

(d) registered easements and instruments registered pursuant to section 69 of the *Land Titles Act*,

(e) right of entry orders as defined in the *Surface Rights Act* registered under the *Land Titles Act*,

(e.1) a caveat that, pursuant to section 3.1(6)(f)(iv) of the *New Home Buyer Protection Act*, remains registered against the certificate of title to the land,

(f) a notice of lien filed pursuant to section 38 of the *Rural Utilities Act*,

(g) a notice of lien filed pursuant to section 20 of the *Rural Electrification Loan Act*, and

(h) liens registered pursuant to section 21 of the *Rural Electrification Long-term Financing Act*.

(2) A parcel of land is sold at a public auction when the person who is acting as the auctioneer declares the parcel sold.

(3) There is no right under section 415 to pay the tax arrears in respect of a parcel after it is declared sold.

RSA 2000 cM-26 s423;2014 c10 s59;2015 c8 s53

Transfer of parcel to municipality

424(1) The municipality at whose request a tax recovery notification was endorsed on the certificate of title for a parcel of land may become the owner of the parcel after the public auction, if the parcel is not sold at the public auction.

(2) If the municipality wishes to become the owner of the parcel of land, it must request the Registrar to cancel the existing certificate of title for the parcel of land and issue a certificate of title in the name of the municipality.

2011 ABQB 638
Alberta Court of Queen's Bench

Condominium Plan No. 8722887 v. Callaghan

2011 CarswellAlta 2011, 2011 ABQB 638, [2012] A.W.L.D. 2879, [2012] A.W.L.D. 2880

The Owners: Condominium Plan No. 872287, Plaintiff and Patrick Shawn Munroe Callaghan, Defendant

Master W.S. Schlosser

Heard: September 13, 2011
Judgment: October 19, 2011
Docket: Edmonton 0903-12390

Counsel: Dusten Stewart, for Servis
Stewart Brownlee, for Plaintiff
Harvey Hait, for Defendant

Subject: Contracts; Property; Civil Practice and Procedure
Related Abridgment Classifications
Real property
II Registration of real property
II.2 Registration of land
II.2.b Land titles
II.2.b.vi Caveats
II.2.b.vi.E Discharge
Real property
XI Condominiums and strata
XI.12 Remedies
XI.12.d Miscellaneous
Headnote
Real property --- Condominiums — Remedies
Plaintiff condominium corporation dealt with bedbug infestation which it said originated in defendant's unit and spread to adjacent unit — Plaintiff charged defendant with clean-up and extermination costs of $8,420.64, plus legal fees and interest of $27,091.10 — Defendant denied that he caused problem — Plaintiff's application for summary judgment was dismissed as there was no real evidence that defendant was source of infestation — Plaintiff filed caveat — Defendant applied to have caveat removed — Application allowed — Condominium Property Act supports distinction between obligations that are fundamentally common or "collective," and those that are individual — Unpaid common contributions, called "obligations," will support caveat — In this case, costs and related legal expenses were said to arise from breach of by-law by individual owner — They were treated by plaintiff as individual rather than as collective obligation — As such, this fell under s. 39(1)(d) of Act, which applies in respect of unit or common property leased to owner — Obligation was individual — Defendant was only one assessed — Accordingly, claim would not sustain caveat — Plaintiff was directed to remove its caveat with respect to clean-up and extermination costs, and related legal costs.
Real property --- Registration of real property — Registration of land — Land titles — Caveats — Discharge
Plaintiff condominium corporation dealt with bedbug infestation which it said originated in defendant's unit and spread to adjacent unit — Plaintiff charged defendant with clean-up and extermination costs of $8,420.64, plus legal fees and interest of $27,091.10 — Defendant denied that he caused problem — Plaintiff's application for summary judgment was dismissed as there was no real evidence that defendant was source of infestation — Plaintiff filed caveat — Defendant applied to have caveat

removed — Application allowed — Condominium Property Act supports distinction between obligations that are fundamentally common or "collective," and those that are individual — Unpaid common contributions, called "obligations," will support caveat — In this case, costs and related legal expenses were said to arise from breach of by-law by individual owner — They were treated by plaintiff as individual rather than as collective obligation — As such, this fell under s. 39(1)(d) of Act, which applies in respect of unit or common property leased to owner — Obligation was individual — Defendant was only one assessed — Accordingly, claim would not sustain caveat — Plaintiff was directed to remove its caveat with respect to clean-up and extermination costs, and related legal costs.

Table of Authorities

Cases considered by *Master W.S. Schlosser*:

Alder, Furman & Associates Ltd. v. Condominium Plan CDE 13442 (1985), 1985 CarswellAlta 73, 37 Alta. L.R. (2d) 341, 1985 ABCA 1 (Alta. C.A.) — referred to

Bare Land Condominium Plan 8820814 v. Birchwood Village Greens Ltd. (1998), 1998 CarswellAlta 1310, 1998 ABQB 458, (sub nom. *Owners - Condominium Plan No. 8820814 v. Birchwood Village Greens Ltd.)* 226 A.R. 227 (Alta. Q.B.) — referred to

Central & Eastern Trust Co. v. Borland (1981), 14 Alta. L.R. (2d) 376, 36 A.R. 260, 1981 CarswellAlta 6 (Alta. Master) — referred to

Statutes considered:

Condominium Property Act, R.S.A. 2000, c. C-22

Generally — referred to

s. 39(1)(a)-39(1)(c) — referred to

s. 39(1)(d) — considered

s. 39(2) — referred to

s. 39(7) — referred to

s. 39(8) — referred to

s. 40(1) — referred to

s. 42(a) — considered

s. 42(b) — referred to

Words and phrases considered

contributions

The *Condominium Property Act*, RSA 2000 c. C-22 supports a distinction between obligations that are fundamentally common, or 'collective', and those that are individual.

Obligations of the first type are called contributions in the Act.

APPLICATION by condominium unit owner from removal of caveat filed by condominium corporation.

***Master W.S. Schlosser*:**

1 This case raises the question of how bedbugs fit into condominium law. The answer depends on whether the problem is individual or collective; whether one person has them, or whether everyone does.

2 The Plaintiff 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, plus legal fees and interest of $27,091.10. The Defendant denied that he caused the problem.

3 The Condominium Corporation applied for Summary Judgment and an Order Nisi. Summary Judgment could not be given as there was no real evidence that the Defendant was the source of the infestation; at least no evidence that would permit summary disposition of this case.

4 The Condominium Corporation filed a Caveat. The owner wants it off.

5 The *Condominium Property Act*, RSA 2000 c. C-22 supports a distinction between obligations that are fundamentally common, or 'collective', and those that are individual. The collective obligations achieve an *in rem* quality and are sometimes thought to have a 'super-priority': *Bare Land Condominium Plan 8820814 v. Birchwood Village Greens Ltd.*, 1998 ABQB 458 (Alta. Q.B.), per Nation J., *Alder, Furman & Associates Ltd. v. Condominium Plan CDE 13442*, 1985 ABCA 1 (Alta. C.A.). *Central & Eastern Trust Co. v. Borland* (1981), 14 Alta. L.R. (2d) 376, 36 A.R. 260 (Alta. Master) per Funduk, M. Individual duties remain *in personam* and are enforced with the usual range of personal remedies.

6 Obligations of the first type are called contributions in the Act. They are described in sections 39(1)(a) - (c) and 39(2). Interest may be included in this category (s. 40)(1)). The Bylaws in this case use the term "common expense".

7 In recognition of the super priority, a practice has developed whereby foreclosing mortgagees pay the outstanding contributions together with legal expenses. Section 42(a) permits the recovery of costs and expenses incurred by the corporation but it does not give legal expenses any special status, or priority. Payment of outstanding condominium fees is referred to in paragraph 4(b) of the template Order Confirming Sale and Vesting Title. It is silent about legal expenses.

8 Unpaid *contributions* will support a Caveat (s. 39(7), (8)). Section 42(b) permits the recovery of reasonable expenses arising from the preparation, registration, enforcement and discharge of the Caveat but the subsection does not otherwise include legal fees.

9 In this case, the costs and related legal expenses are said to arise from the breach of a bylaw by an individual owner. They have been treated by the Plaintiff as an individual obligation rather than a common, or collective obligation. As such, this is a section 39(1)(d) scenario and falls within Bylaws 12.01 and 12.03. Section 39(1)(d) applies 'in respect of the unit or common property that is leased to that owner'. The obligation is individual. The Defendant was the only one assessed. The duties are personal and the Act allows recovery of the claim as a debt. Accordingly, this claim will not sustain a Caveat.

10 The Condominium Corporation is directed to remove its Caveat with respect to the clean-up and extermination costs, and related legal costs.

Application allowed.

Court of King's Bench of Alberta

Citation: Condominium Plan No.7822583 v Asiedu, 2022 ABKB 745

Date: 20221109
Docket: 1703 17712
Registry: Edmonton

Between:

The Owners: Condominium Plan No.7822583 0/A Cedarwoods

Respondents
(Plaintiffs)

- and -

Yaw Asiedu

Appellant
(Defendant)

Memorandum of Decision
of the
Honourable Justice Donald Lee

Introduction

[1] This is an appeal by Mr.Yaw Asiedu ["the Appellant"] from a decision of the Applications Judge (Master) granting the Condominium Corporation Summary Judgment and a Redemption Order. This appeal was heard by me in morning chambers at the insistence of both the Condominium Corporation counsel and the Appellant, even though counsel certainly was aware that these appeals are not heard normally in morning chambers. Both counsel and Mr. Asiedu believe that the issue was straight forward and could be dealt without another significant delay involving scheduling a Special chambers hearing and filing briefs. The primary

issue turned out to have two very different perspectives, and the facts covered events that occurred over several years.

[2] After hearing both parties' oral arguments in morning chambers, however, I decided that I would deal with this matter based on letter submissions from both parties in order to avoid the additional costs of going to a Special chambers hearing which would also cause further delay in a matter which started with the May 2016 Fort McMurray wildfires.

[3] The Appellant owned a unit in a condominium complex that was destroyed in the Fort McMurray May 2016 wildfires, along with several other units in the condominium complex. After the Appellant's condominium unit was destroyed in the wildfires, he essentially stopped making all his monthly condominium payments for the years it took for the unit to be repaired and inhabitable again. He believed that as the units that were destroyed were being rebuilt by the condo board under the Condominium's Master Insurance policy, and that same Condominium Master Insurance Policy contained coverage that indemnified the Condominium Corporation and him from loss arising out of common expenses, that is condominium fees, if he could not occupy his property as a result of fire.

[4] The Condominium Corporation initially seemingly had no concerns with the Appellant's position, but it eventually insisted he continue to make his monthly condominium fee payments, after the Condominium Corporation discussed the matter with representatives of the insurers pursuant to the Condominium's Master Insurance Policy. The Appellant disagreed with this conclusion and position and took the matter up with the insurance adjusters himself and the Insurance Ombudsperson. The insurance adjuster continued to refuse to acknowledge the Appellant's claims in this matter, although the Insurance Ombudsperson seemingly supported the Appellant.

[5] After the Appellant continued in his refusal to pay condominium fees, the Condominium Corporation proceeded before the Master and recently obtained Summary Judgment and the Redemption Order, both of which are the subject of the current appeal by Mr. Asiedu, even though he resumed making his condo payments after the unit could again be habitable.

Issue

1. Does the Condominium Corporation's Insurance policy insure the owner's condominium's contributions, that is, monthly condominium fees?
2. Are there any defences available to the Appellant for what he submits was the Condominium Corporation's unfair and unreasonable behaviour towards him, and its ineptitude in purchasing insurance with unit holder's monies that no unit holder could ever benefit from?

Analysis

[6] The Condominium Corporation's position is that Mr. Asiedu must pay condominium contributions and that his obligation as a condominium unit owner is absolute, as it is prescribed by the *Condominium Property Act*, RSA 2000, c C-22, as well as by the Condominium Bylaws. The fact that the Appellant's unit was uninhabitable for any reason including because it was destroyed in the wildfires does not excuse him from his obligation to pay his monthly condominium contributions.

[7] The Appellant takes the position that he was not required to pay condominium contributions to the corporation during the period between 2016 and 2019 when his unit was rendered uninhabitable due to no fault of his because of the wildfires. He bases his position in

part on the following provision of the Condominium Corporation's policy of insurance in force at the time of the 2016 wildfires, specifically s. 7(d) of the policy which reads as follows:

> 7. EXTENSIONS OF COVERAGE
>
> The following extensions of coverage shall not increase the amounts of insurance applying under this form and are subject to all conditions of this form:
>
> ...
>
> (d) Common Expense: The Insurer agrees to indemnify the "Condominium Corporation" for the loss of such obligatory contribution toward common expense as may be assessed from time to time by the "Condominium Corporation" against all "unit" owners. The Insurer shall be liable under this extension for not more than the pro-rata share of such expense during the time the "unit(s)" remain unoccupied and untenantable following a loss caused by an insured peril.

[8] The insurer's position with this clause was that there was no loss suffered because the Condominium Corporation has the absolute obligation to assess fees to unit holders in accordance with the *Condominium Property Act*, and the Condominium Corporation's Bylaws. Since there is no provision in the Bylaws, or in the *Act*, to assess on other than on the basis of unit factors, the Corporation has the ability under the *Act* and the Bylaws to secure payment through a caveat against title to the Appellant's unit which they could obtain judgment for, and for which it had a super priority in the *Act* which would allow it to obtain title. As such, the insurers took the position that the Condo Corp could not and did not any loss. Accordingly, there was no loss that would be covered.

[9] The Appellant argues that even if his monthly Condominium Corporation contributions are obligatory, when the Condominium Corporation gave up its right to claim compensation under the insurance, the Condominium Corporation could not then turn to the unit holder(s) to make the Condominium Corporation whole. This is a legal principle the Appellant says that has been codified in the *Civil Code of Quebec*, s 1074.1.

[10] Furthermore, the Appellant argues that even if the insurer and the Condominium Corporation are correct in their position, the Condominium Corporation is guilty of a lack of due diligence on its part in buying insurance coverage which the unit holders were obligated to pay for, which insurance neither the owners nor the corporation could ever derive any coverage or benefit. According to the Appellant, the Insurance premiums represented a significant portion of every unit holder's monthly condominium fees.

[11] Also, the Condominium Corporation can be held accountable if it is negligent or unreasonable in its actions, which the Appellant says is the case here.

[12] The Appellant also argues that the *Act* did allow for the reallocation of unit factors at the time of the fire, and even permitted the assessment of contributions on the basis other then unit factors. As such, the Appellant argues that the Condominium Corporation could have reallocated unit factors to reflect the true status of the destroyed units as bare land.

Conclusion

[13] The informal non-binding opinion of the Insurance Bureau Ombudsperson supporting the Appellant's position is not a binding one, and in my conclusion, is incorrect. The Condominium's Master Insurance Policy provisions contained in specifically s 7(d) regarding indemnification of the Condominium Corporation with the loss of obligatory contributions towards common expenses does not protect the Appellant. This is because under the

Condominium Property Act, and the Condominium Corporation's Bylaws, the Condo Corp can only assess monthly condominium contributions on the basis only of "unit" factors, and not on the basis of the other factors raised by the Appellant such as fairness and equitable legal remedies.

[14] There is also no ability in the *Act* or in the Bylaws that allows the Condominium Corporation to reallocate unit factors to reflect the true status of the destroyed units as bare land, without a special resolution amending the unit factors: See ***1597130 Alberta Ltd v Condominium Corporation No. 1023241***, 2016 ABQB 195 for the process. Either the Condominium Corporation or the Appellant could have initiated this process under s. 32(3) of the *Act*, but the fact that neither did does not make the Condominium Corporation liable to the Appellant since this was not an obligation it had. Since the majority of the units were not destroyed, it may have been difficult for any 75% approved special resolution to be passed by unit holders, because most were not directly affected by the fire yet they would have had to pay the destroyed unit holders monthly fees.

[15] I do agree that the Appellant will never receive any benefit from the Condominium Corporation insurance because given the *Act* and the Bylaws, no loss will ever be suffered by the Condominium Corporation because it has not only the obligation, but the right to assess fees to unit holders in accordance with the unit factors. The Condo Corporation can proceed to secure payment through a caveat against title to the individual condominium units, and it can obtain judgment in priority to most other charges against the property, such as in this case, the Scotia Bank mortgage that the Appellant had taken out. Accordingly, the Condominium Corporation could never suffer a loss as it could as in this case seek to sell the property, in priority to all over caveats and interests.

[16] It does not follow however that (as the Appellant argued), the Condominium Corporation Insurance Policy that was purchased according to the Appellant for a significant amount of money was worthless as it relates to all claims under Clause 7(d). For example, the CRA's priority to the Condominium Corporation under s. 227 of the *Income Tax Act* could trigger coverage under the clause.

[17] Furthermore, the Condominium Corporation was clearly paying for other aspects of the Condominium Corporation's Master Insurance Policy that did benefit all owners. The Condominium Corporation is not the Appellant's insurer in any event, and whether or not the Condominium Corporation's actions in this matter constituted negligence or just bad condominium governance are not issues presently before me. The only issues presently before me are whether the Condominium Corporation's Insurance Policy insures the owner's condominium contributions, which I have decided it does not, and whether the Appellant has any other defences available to him to resist or appeal the Summary Judgment and Redemption Order granted by the Master below.

[18] Whatever provisions exist in the Quebec *Civil Code* alluded to by the Appellant, or whatever other equitable principles in common law that exist, simply do not assist the Appellant given the specific provisions of the *Condominium Property Act,* the Condominium Bylaws, and the super-priority that is awarded to Condominium Corporations generally in Alberta.

[19] While the Appellant's situation is unique based on the Fort McMurray wildfires, these principles extend to all condominium fees plus special assessments fines, penalties, and interest charges. All condominium owners in Alberta can have their property taken away from them by the Condominium Corporation because of their non-payment of monthly condominium fees, special assessments fines and interest charges irrespective of the existence of the Condominium

Corporation's Master Insurance Policy and irrespective of questionable or unfair Condominium Corporation governance issues.

[20] Condominium Corporations in Alberta simply do not have the ability to help out condominium property owners and relieve hardship from condominium fees and special assessments even if they wanted to because Condominium Corporations can only assess on the basis of unit factors, not on the basis of what is fair and equitable. Ultimately, Condominium Corporations pursuant to the *Act* and the Condominium Bylaws are largely insulated from complaints such as the ones brought forward by condo unit owners such as the Appellant in this matter.

[21] The other side of the argument is that Condominium Corporation unit owners, can be relatively certain of their specific obligation to pay condominium fees when they are assessed only on the basis of unit factors. Even significant groups of minority owners must continue to pay condominium fees so that the majority of owners are protected because ultimately any fees not paid by the dissenting or unhappy owners would have to be paid by the remaining owners on their behalf.

[22] I also understand that the Appellant rented his condominium unit to third parties and therefore did not have his own insurance. It is likely his own insurance might have covered this situation. Perhaps the tenant would have also needed to have been insured through a tenant's policy. Undoubtedly, it seems inefficient and prohibitively expensive for the Condominium Corporation, the owner of the unit, and for the tenant of the unit to all have had separate insurance policies, however that may have been the case in this matter and in other matters involving damage to individual units within a condominium.

Disposition

[23] I have determined that notwithstanding the many efforts that the Appellant has made in this matter, both with respect to the Condominium Corporation and with respect to its insurers to resolve the matter fairly and quickly, the Application Judge's granting of Summary Judgment and Redemption Order in favour of the Condominium Corporation is correct in law. Accordingly, I must with some regret, dismiss Mr. Asiedu's appeal, particularly since he may lose his unit and/or suffer significant court costs while only missing approximately three years of condo fee payments while his unit was destroyed by the Fort McMurray wildfires.

Heard on the 29th day of September, 2022.
Dated at the City of Edmonton, Alberta this 9th day of November, 2022.

Donald Lee
J.C.K.B.A.

Appearances:

Yaw Asiedu
Self Represented, Appellant

Hugh Willis, Willis Law
for The Owners: Condominium Plan No.7822583, Respondent

Court of Queen’s Bench of Alberta

Citation: Toronto-Dominion Bank v Bachand, 2021 ABQB 271

Date: 20210409
Docket: 1603 04373
Registry: Edmonton

Between:

The Toronto-Dominion Bank

Plaintiff/Applicant

- and -

Levi Bachand and Averyl Michaud

Defendants

Reasons for Decision
of
L.R. Birkett, Master in Chambers

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Introduction

[1] The plaintiff, The Toronto-Dominion Bank, brought an application for an order for sale to plaintiff in its foreclosure proceedings on an apartment style condominium in Edmonton, Alberta. As part of the application, the TD Bank sought a ruling on the outstanding condominium fees having priority over the plaintiff's mortgage. The Owners: Condominium Plan No. 8222909 (the Condominium Corporation) responded to the application.

[2] I heard lengthy argument from Counsel in morning Chambers with respect to the priority of the condominium charges over the TD mortgage, and in particular, the priority for the Condominium Corporation's solicitor and client costs. Counsel referred to caselaw which had not been provided, a recent Affidavit on which leave was sought to rely, and bylaws which were yet to be read.

[3] The matter was further complicated by the bankruptcy of the defendants. The Condominium Corporation had filed a proof of claim and received a dividend in each bankruptcy.

[4] I asked for written submissions. I ruled the matter would be decided as if heard on August 19, 2020, with interest capped as of that date.

[5] Counsel provided written Briefs. There was a further affidavit of Troy O'Donnell, filed on behalf of the Condominium Corporation on September 10, 2020.

[6] I will summarize the facts, set out the position of the parties and identify the issues. I will then look at each of those issues and provide an analysis and conclusion.

Summary of the facts

[7] Having reviewed the material filed electronically and the physical file, I have gleaned the following facts. More specific details will be provided in my analysis.

[8] The certified copy of title shows the TD mortgage as a first charge, registered in 2010 for the original amount of $233,222.00, followed by caveats registered by the Condominium Corporation in 2013 and 2014 for unpaid contributions. Subsequent to the caveats, are writs filed by the Condominium Corporation for a judgment obtained in Action No. 1403 18216 against each of the defendants, Bachand and Michaud.

[9] The judgment obtained by the Condominium Corporation is for special assessments, a sanction and interest. The judgment is set out in the Order of Justice R.A. Graesser dated March 19, 2015 for an *in personam* judgment against the defendants, jointly and severally, in the amount of $64,997.63 and costs on a solicitor and own client basis.

[10] The Order granted March 19, 2015 provided that the Condominium Corporation's rights were reserved to pursue any further *in personam* judgments should the defendants default in paying ongoing condominium contributions levied against them.

[11] The Order also provided for a one-day redemption period, failing which the condominium was to be offered for sale at a listing price of $235,000. The Condominium Corporation took no further steps to list or sell the property.

[12] The defendants each filed for bankruptcy on January 18, 2016. I was advised they were discharged from bankruptcy in February, 2019.

[13] On January 22, 2016, the Condominium Corporation filed a Proof of Claim Form 31 in each of the bankrupt's estate. Identified in Section 4(A) is an unsecured claim of $77,107.85, comprised of the judgment for $64,997.63, plus interest, costs and condominium arrears since the judgment.

[14] Identified in Section 4(C) in the Proof of Claim form filed by the Condominium Corporation is a secured claim of an unknown amount: "That in respect of this debt, the above-named creditor holds assets of the debtor valued at an unknown amount at this time due to the uncertainty as to what monies, if any, might be realized in a foreclosure of the subject condominium unit…". The security is listed as the caveat registered at the Land Titles Office on November 28, 2014.

[15] The Condominium Corporation received a dividend from the bankruptcy of the defendant Bachand and from the bankruptcy of the defendant Michaud.

[16] The TD Bank commenced this action by Statement of Claim filed March 9, 2016. The TD mortgage is a CMHC insured high-ratio mortgage granted under the terms of the *National Housing Act* with the defendants liable on the covenant to pay. The defendants were noted in default April 5, 2016. A Preservation Order was granted April 3, 2018.

[17] The TD Bank originally filed an application on June 21, 2017 for an order for sale to plaintiff. An Affidavit of Default sworn April 18, 2016 was filed in support of that application showing the amount owing under the TD mortgage to be $213,119.92.

[18] The condominium was appraised on behalf of the TD Bank at a fair market value of $220,000 in April 2016. In February, 2017, the appraiser reviewed recent sales and opined a value in the $210,000 to $215,000 range would not be unexpected. There is no further update on the value of the condominium.

[19] In response to the application for the sale to plaintiff, the Condominium Corporation filed two affidavits, on July 7, 2017 and July 24, 2017, from Troy O'Donnell, a member of the Board of Directors. The affidavits set out the amounts owing to the Condominium Corporation totaling a minimum of $106,430.87 for the outstanding judgment, monthly contribution arrears since the judgment, a monetary sanction, interest, and solicitor and client costs.

[20] The June 21, 2017 application by the TD Bank for a sale to plaintiff was adjourned *sine die*.

[21] Three years later, on July 24, 2020, the plaintiff filed this application for an order for sale to plaintiff. The Final Affidavit of Default filed in support, attached a Statement of Secured Indebtedness showing the TD Bank was now owed $254,643.54, inclusive of the outstanding principal, interest, property taxes paid, and property maintenance costs. The Statement lists outstanding condominium fees of $151,157.97. The affidavit states there is due to the plaintiff as of July 14, 2020 the sum of $405,801.51 plus costs.

[22] The sale to the plaintiff will result in a deficiency of approximately $40,000.00 plus costs, with the amount owing on the mortgage (about $255,000.00) set off against the fair market value of the condominium (about $215,000.00). The deficiency for the TD Bank will be significantly greater if it is required to pay any or all of amounts owing to the Condominium Corporation in priority to its mortgage.

[23] The parties to this application have set out their respective positions from which I have identified the issues to be resolved.

Position of the TD Bank and the Condominium Corporation

[24] The TD Bank seeks an Order for Sale to Plaintiff and a determination as to whether the caveat registered by the Condominium Corporation has priority over the mortgage and, if so, a determination as to the precise amount owing under the caveat.

[25] The TD Bank takes issue with the priority claimed by the Condominium Corporation. It is the position of the TD Bank that the Condominium Corporation abandoned its security under the *Condominium Property Act* and under the caveat registered against title. The Condominium

Corporation reduced its claim to an unsecured judgment, ceased efforts to enforce the security through sale of the property, and participated in the bankruptcy of the defendants. The Condominium Corporation filed a proof of claim as an unsecured creditor and received dividends in the bankruptcy proceedings. The TD Bank submits that the Condominium Corporation has lost its priority to be paid ahead of the mortgage.

[26] The Condominium Corporation seeks priority ahead of the TD mortgage for the contributions, special levies and interest provided by the *Condominium Property Act* and secured by its caveat. It is the position of the Condominium Corporation that the law submitted by the TD Bank regarding the bankruptcy of the defendants has no application to this case.

[27] The Condominium Corporation further seeks priority for all legal costs it has incurred, including those in connection with this action. The TD Bank submits the Condominium Corporation has no priority for its legal charges.

[28] These positions give rise to four broad issues.

The issues

[29] What is the nature of the priority claimed by the Condominium Corporation?

[30] Is the Condominium Corporation also entitled to priority for its legal charges?

[31] Has the Condominium Corporation lost its priority by reducing its claim to an unsecured judgment and receiving dividends in the bankruptcy proceedings of the defendants?

[32] What is the precise amount, if any, payable to the Condominium Corporation in priority to the TD Bank mortgage?

What is the nature of the priority claimed by the Condominium Corporation?

[33] To determine if the Condominium Corporation has lost its priority by reducing its claim to an unsecured judgment and receiving dividends in the bankruptcy proceedings and if it is entitled to priority for its legal charges, it is important to understand the nature of the priority given by the *Condominium Property Act*, RSA 2000, c C-22 [the *CPA*] in sections 39, 40 and 42.

[34] It is also important to understand what was charged by the Condominium Corporation to the owners and which charges formed the basis of the caveat, the judgment, and the unsecured claim advanced in the bankruptcy proceedings.

The *Condominium Property Act*

[35] What are the provisions of the *CPA* and what priority do they provide to the Condominium Corporation in collecting the charges levied against Bachand and Michaud as condominium unit owners and against the TD Bank as mortgagee?

The charges for contributions, special levies, and interest

[36] Section 39(1) of the *CPA* provides that a condominium board may by resolution (a) determine from time to time the amounts to be raised for the purposes of the operating account and the reserve fund and may raise those amounts by levying contributions on the owners at regular intervals and (b) determine from time to time amounts to be raised by special levy and raise those amounts in accordance with section 39.1.

[37] Section 39(1)(a) of the *CPA* allows the contributions to be levied (i) in proportion to the unit factors of the owners' respective units, or (ii) subject to the regulations, and if provided for in the bylaws, on a basis other than in proportion to the unit factors of the owners' respective units.

[38] Section 39(2) provides that a contribution shall not include any amount for the purpose of collecting from an individual owner (a) a monetary sanction under a bylaw made under section 35(1).

[39] Section 40(1) provides that a corporation may charge interest on any unpaid balance of a contribution owing to it by an owner. The rate of interest charged under subsection (1) is not to be greater than the rate of interest provided for by regulation.

[40] The Condominium Corporation charged monthly contributions, assessed special levies, imposed a sanction, and accrued interest on these charges against the owners, Bachand and Michaud. When payments were not forthcoming, the Condominium Corporation filed caveats and sued the owners. The details of the outstanding contributions, special levies, sanction and interest are found in the affidavits and supporting documents filed in the debt action and in the foreclosure action, as set out below.

The judgment

[41] Section 39.2 of the *CPA* provides for the payment and enforcement of contributions. Contributions and special levies are due and payable on the passing of the resolution by the board and in accordance with the terms of the resolution. A contribution and any interest charged under section 40, may be recovered by an action for debt by the corporation from a person who was an owner at the time when the resolution of the board was passed or at the time when the action was instituted, both jointly and severally. See s 39.2(2) *CPA*.

[42] The Condominium Corporation obtained a judgment for the special levies, a sanction and interest in the debt action, Action No. 1403 18216, against each of the owners, Bachand and Michaud. The judgment is set out in the March 19, 2015 Order of Justice Graesser.

[43] The affidavit of Colin MacDonald filed March 4, 2015 in the debt action sets out three special assessments levied in March, April and May of 2012 totaling $41,000.10 plus interest calculated at 18% per annum.

[44] The MacDonald affidavit also sets out a monetary sanction imposed in June of 2012 under the bylaws for $2,000.00, with interest calculated at 18% per annum.

[45] This affidavit evidence supports the judgment granted to the Condominium Corporation in the amount of $64,997.63, as being the special levies totaling $41,000.10, plus interest of $21,007.87 calculated at 18% per annum, and the monetary fine of $2,000.00, plus interest of $989.66 calculated at 18% per annum.

[46] Thereafter, the Condominium Corporation calculated post-judgment interest on the $64,997.63 as shown in Schedule A to the Proof of Claim Form filed in the bankruptcy proceedings.

[47] The Order of Justice Graesser dated March 19, 2015 granted "an *in personam* judgment against the defendants, jointly and severally, in the amount of $64,997.63 and costs on a solicitor and his own client basis, and with the exception of $2,989.66 [the sanction and interest], is a valid and enforceable charge against the [condominium] property".

[48] The Condominium Corporation registered writs on title for the full judgment obtained in Action No. 1403 18216 against each of the defendants, Bachand and Michaud. The writs are registered subsequent to the TD mortgage and, by operation of s 56 of the *Land Titles Act*, RSA 2000, c L-4, afford no priority to the Condominium Corporation.

[49] The March 19, 2015 Order also provided for a one-day redemption period. As a subsequent encumbrancer, if the Condominium Corporation was to proceed on its redemption order or to enforce the writs, it would be required to pay out the prior TD mortgage. The balance of sale proceeds, if any, would be applied to the debt to the Condominium Corporation.

[50] The Condominium Corporation did not proceed against the land, rather it asserted its claim for payment of unpaid contributions, interest and other charges against the TD Bank.

[51] By letter dated February 26, 2016, the Condominium Corporation advised the solicitor for the TD Bank of the amount owing for the judgment and subsequent arrears and sought the TD Bank's intentions with respect to paying the arrears and maintaining ongoing condominium contributions. Thereafter, the Condominium Corporation participated in the foreclosure proceedings commenced by the TD Bank on March 9, 2016.

[52] Foreclosing mortgagees will often pay the arrears and ongoing contributions and add the amounts paid to the outstanding mortgage balance, in recognition of the remedies afforded to a condominium corporation by the provisions of the *CPA*. The payments are made pursuant to s 39.2(3) of the *CPA* and are generally provided for in the terms of the mortgage. The remedies the condominium corporation can pursue against the mortgagee are twofold.

[53] Firstly, s 39.2 of the *CPA* provides that contributions and any interest charged may be recovered by an action for debt by the corporation from a person who was an owner at the time when the action was instituted. This means, subject to the two-year limitation period in the *Limitations Act*, RSA 2000, c L-12, the Condominium Corporation could recover unpaid contributions and interest by suing the TD Bank as the subsequent owner following the foreclosure.

[54] Secondly, the *CPA* allows a caveat registered by a condominium corporation to remain registered against the certificate of title of the unit following a foreclosure until the amount owing is paid. This creates a priority for the condominium corporation over the mortgagee within the foreclosure action itself. The Condominium Corporation may rely on the caveats for unpaid contributions it registered against the title to the condominium unit owned by Bachand and Michaud, even though the caveats are registered subsequent to the TD mortgage.

[55] The statutory priority given to a condominium corporation's caveat is set out in detail below.

The caveat

[56] In addition to recovery of contributions and interest by an action for debt, the Condominium Corporation is entitled to secure the owner's obligations by filing a caveat against the condominium unit. See ***Tutt v The Owners: Condominium Plan No. 7822572***, 2020 ABQB 213 [***Tutt***] at paragraph 35.

[57] Section 39.2(6) of the *CPA* provides that a corporation may file a caveat against the certificate of title to an owner's unit for the amount of a contribution levied on the owner and interest payable but unpaid by the owner.

[58] Section 39.2(7) provides that on the filing of the caveat under subsection (6), the corporation has a charge against the unit equal to the unpaid contributions and any interest owing.

[59] Section 39.2(8) provides that on and from the date of filing of the caveat, a charge under subsection (7) has the same priority as a mortgage under the *Land Titles Act* and may be enforced in the same manner as a mortgage.

[60] Section 39.2(10) provides that if a corporation has filed a caveat under this section, the corporation shall withdraw the caveat on the payment to it of the amount of the charge.

[61] Section 39.2(11) provides that notwithstanding subsection (8), if (a) a corporation has filed a caveat under this section, and (b) subsequent to the caveat's being filed another person gains title to the unit pursuant to (i) a foreclosure action ... and (c) an amount remains owing to the corporation with respect to the contribution and interest for which the caveat was filed, the caveat remains registered against the certificate of title of the unit until the amount owing is paid to the corporation.

[62] The effect of filing the caveat is to give the charge against the unit for the unpaid contributions and any interest owing the same priority and enforceability as a mortgage. Further, if the mortgagee or another person gains title to the unit pursuant to a foreclosure action, the caveat remains registered against the certificate of title of the unit until the amount owing is paid to the condominium corporation. This creates what has been referred to as a super-priority. See Master Schlosser's comments in ***Condominium Plan No. 8722887 v Callaghan*****,** 2011 ABQB 638 [***Callaghan***] at paragraph 5.

[63] The caveat registered at the Land Titles Office on November 28, 2014 as instrument number 142 403 322 claims an interest pursuant to section 39 of the *Condominium Property Act* for the unpaid contributions levied by the Condominium Corporation on the unit, currently in the amount of $59,601.79, plus interest pursuant to sections 40 of the *Act*, plus all reasonable costs and expenses pursuant to section 42 of the *Act*.

[64] The three special assessments totalling $40,000.10 plus interest appear to have formed the basis of this caveat. A demand letter attached as Exhibit F to the affidavit of Colin MacDonald filed March 4, 2015 in the debt action confirms the special assessments plus interest accrued from May 15, 2012 to December 1, 2014 to be $59,824.21, which is consistent with the additional per diem intertest that would have accrued on the caveated amount. In paragraph 12 of the affidavit, Colin MacDonald states the amount owing under the caveat at December 16, 2014 was $60,127.51 with a per diem thereafter of $20.22, also consistent with the per diem interest accruing on the $41,000.10 special assessments.

[65] The Condominium Corporation claims it has priority over the TD mortgage for unpaid contributions in addition to the special assessments of $41,000.10 and accrued interest. Colin MacDonald says in paragraph 10 of his affidavit that through the caveat, the Condominium Corporation claimed an interest pursuant to section 39 of the *CPA* for the unpaid amount of $59,601.79 "plus future contributions so levied". However, the caveat registered November 28, 2014, does not specify that it was registered for the unpaid amount "plus future contributions so levied."

[66] The later affidavits filed in the foreclosure action show there were unpaid monthly condominium fees and monthly special assessments accumulating in addition to the amount owing for the special assessment identified in the caveat.

[67] Troy O'Donnell, a member of the Board of Directors for the Condominium Corporation, deposed in an affidavit filed July 7, 2017 that no payments had been received on the judgment nor had any monthly contributions been made thereafter. In that affidavit, Troy O'Donnell calculates future arrears at $21,395.54 as the balance in the ledger of monthly condominium fees and monthly special assessments and other charges accumulated since the March 19, 2015 judgment, less the legal charges.

[68] The further affidavit of Troy O'Donnell, filed July 24, 2017, indicates the last monthly contribution was paid in the month of January 2016 and calculates the monthly contribution arrears from February 1, 2016 to be $12,122.89, inclusive of interest to July 18, 2017. This affidavit does not address the monthly special assessments accumulating in the ledger. These are described as "SA loan Pymt - Due to Reserve" in the amount of $312.38 each month.

[69] The affidavit of Troy O'Donnell filed August 14, 2020 provides evidence of a total amount of $96,561.47 owing for contributions and special levies, sanctions, charge-backs and legal charges. This is shown in the Ledger attached as Exhibit A to the affidavit. Troy O'Donnell states this total consists of $58,499.62 for contributions and special levies, $2,200.00 for sanctions and $1,365.26 for chargebacks. Legal charges are $34,496.59.

[70] A Calculation Sheet purporting to show the calculation of interest at the rate of 18% per annum on the principal amount of the condominium fees and special assessment arrears is attached as Exhibit B to the August 14, 2020 affidavit. The document shows a calculation of monthly condominium fees and monthly special assessments with a cumulative total of $60,177.65 before interest, and a total due to the corporation including interest of $61,095.11. The document does not show the total for the interest accrued on a cumulative basis.

[71] The August 14, 2020 Affidavit does not specifically mention the outstanding special assessments and interest contained in the *in personam* judgment or the caveat. Troy O'Donnell does say he relies on his previous affidavits and the affidavit of Colin MacDonald filed in the debt action.

[72] Counsel for the Condominium Corporation has excluded the sanctions and chargebacks from the priority claim set out in his Brief. This is in keeping with s 39(2) of the *CPA*.

[73] Counsel argues all other charges should be paid in priority to the TD mortgage pursuant to the caveat.

[74] The nature of the priority must be further examined to determine the extent of what can be claimed by the Condominium Corporation. Does the November 28, 2014 caveat provide a charge against the condominium unit for unpaid contributions levied by the Condominium Corporation in addition to the special assessments and interest notwithstanding the caveat does not specifically claim for future contributions?

[75] The answer lies in the interpretation of the provisions of the *CPA* as to the priority given to the Condominium Corporation on filing a caveat, and otherwise.

The priority

[76] The Alberta Court of Appeal in ***Condominium Plan No. 8222909 v Francis***, 2003 ABCA 234 [***Francis***] at paragraph 25 reiterated that individual sections of the *CPA* are to be read with other provisions of the *CPA* and the *CPA* as a whole. The Court stated that the words of the *CPA* are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the *CPA* and the intention of the legislature, referring to the principle of statutory interpretation set out in ***Re Rizzo & Rizzo Shoes Ltd***, [1998] 1 S.C.R. 27. See also ***Bank of Montreal v Bala***, 2017 ABQB 38 [***Bala***] at paragraphs 30 and 31.

[77] The Court of Appeal in ***Francis*** held that a condominium corporation does not enjoy the same powers of a natural person, as do most business corporations. Section 25(5) of the *CPA* states that the *Business Corporation Act* does not apply to a condominium corporation. As a condominium corporation is created by statute, it owes its existence to the *CPA* and can only undertake actions specifically authorized by the *CPA*. See ***Francis*** at paragraphs 26 and 27.

[78] The condominium corporation is authorized by section 39.2 of the *CPA* to file a caveat as a charge against the unit for the unpaid contributions and any interest owing and gives that caveat the same priority and enforceability as a mortgage. Where the unit is transferred to another person pursuant to foreclosure proceedings, the caveat remains registered against the certificate of title until the amount owing is paid to the condominium corporation, creating a super-priority. See ***Callaghan***. The caveat for unpaid contributions remains registered against title whether title is transferred pursuant to an order for foreclosure, an order for sale to the plaintiff, or an order confirming sale and vesting title to a purchaser.

[79] Counsel for the Condominium Corporation points out the super-priority over the mortgagee only comes into play if the TD Bank pursues its foreclosure action to bring about a change of title. In the interval, the Condominium Corporation has to simply ensure its security remains in place. With the caveat in place, Counsel submits that the Condominium Corporation can claim all unpaid amounts owing to it by the owners (except the sanctions and charge backs) from the TD Bank. This includes the legal charges and the future contributions, in addition to the special assessments and interest enumerated in the caveat.

[80] A copy of the caveat registered on title in 2013 was not provided. We do not know if that caveat set out a specific amount owing for the special assessments levied in 2012 or for further or other unpaid contributions, or if the caveat specifically claimed for future contributions.

[81] The copy of the caveat registered on November 28, 2014 was provided. We know the Condominium Corporation claimed an interest pursuant to s 39 of the *CPA* for the unpaid contributions levied as the special assessments in 2012 in a specific amount, plus interest pursuant to s 40 *CPA*, plus all reasonable costs and expenses pursuant to s 42 *CPA*. We know that caveat did not specifically claim for future contributions so levied.

[82] Does the specific wording of the caveat limit the amount the Condominium Corporation can claim against the TD Bank in the foreclosure proceedings?

[83] In ***Bala***, Feehan J (as he then was) applied the principles in ***Francis*** to interpret the section of the *CPA* which allows for determining a condominium unit's share of a levy on a basis other than unit factors and concluded at paragraph 32: "Section 39(1)(c)(ii) is clear when read in the entire context of the *CPA*, in its grammatical and ordinary sense, harmoniously with the scheme of the statute, its object, and the intention of the Legislature's amendments in 2000."

[84] Similarly, I apply the principles in ***Francis*** to interpret the sections of the *CPA* which allow for the registration of a caveat by the condominium corporation. I conclude that the subsections in s 39.2 of the *CPA* are clear when read in the entire context of the *CPA*, in their grammatical and ordinary sense, harmoniously with the scheme of the statute, its object, and the intention of the Legislature. Once registered, the caveat acts as security until any and all amounts claimed pursuant to s 39 of the *CPA* for unpaid contributions are paid. This would include the specific amount set out in the caveat at the time of registration and future contributions. The caveat also provides security for the interest accruing on those contributions, pursuant to s 40 *CPA*.

[85] Furthermore, the Court of Appeal has determined that caveats are not invalid if they do not refer to the exact amount of the indebtedness secured. See ***Condominium Corp No 311443 v Goertz*****,** 2016 ABCA 362 at paragraph 36:

> … Nothing in the *CPA* or the *Land Titles Act,* RSA 2000, c L-4 requires that a specific amount be identified in the caveat or that any such amount be accurate as of the date the caveat is filed. This is because the purpose of a caveat is not to create a right of recovery in a certain amount but rather it is to give third parties notice of a claim to some entitlement, the value of which is to be separately determined. Further, s 39(8) of the *CPA* does not say that any caveat filed must disclose the exact amount of arrears owed. Rather, the filing of a caveat creates a charge against the unit in question equal to the amount of arrears, whatever they may be.

[86] I find the caveat registered on title November 28, 2014 creates a charge against the condominium unit owned by Bachand and Michaud for the special assessments levied in 2012, originally in the amount of $40,000.10, plus accrued interest, and for the other unpaid contributions levied against the owners pursuant to s 39 of the *CPA*, plus interest accruing on those contributions.

[87] The Condominium Corporation is entitled to a super-priority for the charges against the unit created by the caveat. If the TD Bank pays the Condominium Corporation for the amount of the unpaid contributions and interest, the caveat will be withdrawn. If the TD Bank does not pay the amounts outstanding and pursues its order for a sale to plaintiff, the caveat remains registered against the certificate of title to the unit until the full amount of the charge is paid to the Condominium Corporation.

[88] It is important to note the Condominium Corporation is able to pursue both an action in debt against the owners and the registration of a caveat against the title to the condominium unit.

[89] Justice Manderscheid, when he was legal Counsel for the City of Edmonton, wrote 'Condominium Contributions: A Matter of Priority' for the *Alberta Law Review*, Volume 37(4) 1999. In his view, expressed at page 977, the remedies provided by what is now s 39 *CPA* are twofold and consist of the right to bring an action for debt and to create a legal charge against the unit title. He compared the operation of the *Municipal Government Act*, which contemplates an election of remedies, to the operation of *Condominium Property Act* [the *Act*] and concluded: "There are no election provisions in the *Act* that require the corporation to choose one remedy over that of another. Consequently, the corporation does not have to exhaust its rights under one remedy prior to the exercise of the other."

[90] Justice Graesser stated in ***Tutt*** at paragraph 35: "Enforcement or collection of any required contributions may be taken by way of civil action, and the corporation is entitled to secure a unit owner's contribution obligations by way of filing a caveat against the unit under section 39.2."

[91] Applying the principles in ***Francis*** and ***Rizzo***, it is clear there are two separate remedies available. Subsections 2, 6, 7, and 8 of s 39.2 *CPA* are to be read in the entire context of the *CPA*, and in their grammatical and ordinary sense, harmoniously with the scheme of the statute, its object, and the intention of the Legislature in providing for the charging, payment and enforcement of condominium contributions. The subsections of s 39.2 *CPA* do not require the corporation to elect either to proceed in debt or to proceed by way of caveat, nor do they require one remedy to be exhausted prior to commencing another. The action in debt and the enforcement of security under the caveat may coexist and be pursued independently of the other.

[92] This analysis addresses the first of the four issues, in part. The nature of the priority claimed by the Condominium Corporation has been described generally, and specifically with respect to the super-priority in a foreclosure proceeding for charges for unpaid contributions and interest.

[93] The other three issues remain, namely:

> Is the Condominium Corporation also entitled to priority for its legal charges?
>
> Has the Condominium Corporation lost its priority by reducing its claim to an unsecured judgment and receiving dividends in the bankruptcy proceedings of the defendants?
>
> What is the precise amount, if any, payable to the Condominium Corporation in priority to the TD Bank mortgage?

Is the Condominium Corporation also entitled to priority for its legal charges?

[94] The Condominium Corporation seeks priority for all legal costs it has incurred, including those in connection with the foreclosure action. Counsel for the TD Bank argues legal expenses with respect to enforcing the caveat or for collecting unpaid contributions are recoverable against the owner only and do not become a priority charge against the condominium unit for which the mortgagee would be responsible.

[95] The evidence put forward by the Condominium Corporation through the affidavit of Troy O'Donnell filed August 14, 2020 is that the legal charges are $34,496.59. As part of, or in addition to, those legal charges, is a Bill of Costs taxed on a solicitor and own client basis in the amount of $5,630.99 on April 10, 2015 and one taxed in the amount of $5,612.25 on February 16, 2016.

[96] To determine the priority claimed by the Condominium Corporation for legal charges, it is necessary to look at the legislation and caselaw and the effect of the condominium bylaws.

Section 42 of the *Condominium Property Act*

[97] Applying the principle in ***Francis***, the entitlement of the Condominium Corporation to priority for its legal charges must be specifically authorized by the *CPA*.

[98] Section 42 of the *CPA* provides that where a corporation takes any steps to collect any amount owing under section 39, the corporation may (a) recover from the person against whom the steps were taken all reasonable costs, including legal expenses and interest, incurred by the corporation in collecting the amount owing, and (b) if a caveat is registered against the title to the unit, recover from the owner all reasonable prescribed expenses incurred by the corporation with respect to the preparation, registration, enforcement and discharge of the caveat.

[99] Section 42(a) creates a statutory entitlement to recover reasonable legal charges incurred in collecting outstanding contributions and special levies from the person against whom the collection steps were taken. Where the condominium corporation has registered a caveat for outstanding contributions and special levies, s 42(b) creates a further statutory entitlement to recover reasonable prescribed expenses incurred with respect to the caveat from the owner.

[100] The entitlement of the Condominium Corporation to recover legal charges and expenses is specifically authorized by the *CPA*. The entitlement is to recover reasonable legal charges for steps taken in collecting outstanding contributions and to recover reasonable expenses with respect to the caveat. The *CPA* does not specifically provide for full indemnity or solicitor and own client costs. Section 42 is silent regarding an entitlement of the Condominium Corporation to a priority for its legal charges.

The caselaw on priority for legal charges

[101] It is the position of the Condominium Corporation that I am bound, as a Master of the Court of Queen's Bench, by the decision in ***Condominium Plan No. 052 6233 v Seehra***, 2014 ABQB 588 [***Seehra***] which held that a condominium corporation has priority over a mortgagee in regards to the costs incurred in enforcing a caveat. Justice Lee concludes, at paragraph 59, from his analysis of the cases and the bylaws: "In the result, subject to assessment of the solicitor-client costs by the assessment officer, the [condominium corporation's] expenses in the circumstances of this matter form part of the [owner of the] Unit's assessment for contributions under the *CPA*, s 39, and constitute caveatable interests in priority to RBC's registered mortgage."

[102] Counsel for the Condominium Corporation acknowledges there are conflicting cases which could be considered if the matter was being heard by a Justice, however, the comments in those cases that would go against a priority are *obiter dicta* and not binding.

[103] Counsel for the TD Bank states that while collective contributions are treated as *in rem*, legal expenses with respect to enforcing the caveat or collecting unpaid contributions are *in personam*. Counsel submits that Graesser J in ***Tutt*** effectively summarized the law. Starting at paragraph 50, Graesser J refers to the decision of Feehan J (as he then was) in ***Bala***:

> I agree with Feehan J's analysis and conclusions. Legal costs, whether on a Schedule C basis, a full indemnity basis, or any other basis, do not become a charge against the unit under the provisions of section 39 of the *Condominium Property Act*. All that is recoverable against the unit under section 39 is the amount of any unpaid contributions together with interest at the rate set in the bylaws. Feehan J added the costs of filing the caveat, but excluded legal costs. He ruled that the filing costs fell under section 42. Legal costs may only be enforced against the owner and not directly against the unit by filing a caveat under section 39.

[104] I also agree with Feehan J's analysis and conclusions in ***Bala***. I find the comments in ***Bala*** and ***Tutt*** are not *obiter dicta* but are binding on me.

[105] In ***Seehra***, the mortgagee participated in the litigation between the condominium corporation and the owner; in ***Bala***, the condominium corporation participated in the foreclosure action between the mortgagee and the owner. In ***Seehra***, Lee J determined legal charges provided for in the bylaws formed part of the contributions and were thereby afforded a priority pursuant to s 39 of the *CPA*; in ***Bala***, Feehan J determined legal charges, even where provided for in the bylaws, were afforded no such priority.

[106] Justice Feehan's decision is an appeal from Master Schulz' decision in ***Bank of Montreal v Bala***, 2015 ABQB 166. With respect to legal charges, Master Schulz followed Master Smart in ***Condominium Corporation No 0425117 v Jessamine***, 2011 ABQB 644 and Master Schlosser in ***Callaghan***, while disagreeing with Justice Lee in ***Seehra*** and Master Prowse in ***Condominium Plan No 8210034 v King***, 2012 ABQB 127. Justice Graesser, in ***Tutt***, also reviewed these decisions and agreed with Justice Feehan's conclusions in ***Bala***.

[107] The learned Justices and Masters have ably set out their respective review of the case law and conclusions drawn. I will not repeat them here. My own review has led me to prefer Justice Feehan's analysis of s 42 of the *CPA* and to determine I am bound by the decision in ***Bala***.

[108] Justice Feehan provides a brief summary of each of the relevant cases, however his analysis focuses on the principles of statutory interpretation set out in ***Rizzo*** and ***Francis***.

[109] The issue of whether solicitor/client or full indemnity costs attract a statutory priority over a foreclosing mortgagee is addressed in paragraphs 69 to 74 of ***Bala***.

[110] The condominium corporation applied to vary the amount of a redemption order to collect from the mortgagee the amount owing under s 39 of the *CPA*. Feehan J found 'on the plain wording of s 42(a) of the *CPA*', the condominium corporation is entitled to its reasonable costs, including legal expenses in collecting that amount:

> However, that provision does not make those reasonable costs and legal expenses themselves a "contribution" pursuant to s 39 of the *CPA*. As a result, although reasonable costs and legal expenses are recoverable as taxable costs in the proceedings before this Court and the Court below, they do not become a contribution and do not attract a statutory priority.…
>
> The proper interpretation of s 42(a) of the *CPA* is that those costs can be collected *in personam* against "the person against whom the steps were taken", in this case BMO.…
>
> Such costs are in fact recoverable from BMO, but they do not form part of the "contribution", do not constitute a statutory charge against the Unit, and do not attract a priority. They are recoverable *in personam*, much as other costs in an action.

[111] Justice Feehan then addressed the issue of whether the expenses related to the caveatable interest of the condominium corporation attract a statutory priority over a foreclosing mortgagee. He set out how those legal expenses were treated in each of ***King***, ***Callaghan***, ***Jessamine***, and ***Seehra***.

[112] Again, looking at "the entire context of the *CPA*, in its grammatical and ordinary sense, harmoniously with the scheme of the statute, its object, and the intention of the Legislature…", Feehan J provides his analysis and conclusion in ***Bala*** at paragraphs 79 through 82:

> The filing of a caveat is provided for in s 39(7) of the *CPA*. It is the filing of the caveat that secures and provides notice of a statutory charge against the Unit equal to the unpaid contribution pursuant to s 39(8), and if the corporation has filed the caveat and an amount remains outstanding, that amount enjoys a statutory priority pursuant to s 39(12) of the *CPA*.
>
> Section 42(b) provides that if a caveat is registered against title to the Unit, the condominium corporation may "recover from the owner" (as opposed to "from the person against whom the steps are taken" as in s 42(a)) all reasonable expenses incurred by the corporation with respect to the preparation, registration, enforcement and discharge of the caveat.
>
> However, unlike the addition of interest to the contribution in s 41, the *CPA* does not expressly provide that the cost of preparation, registration, enforcement and discharge of the caveat may be considered as a contribution under s 39.
>
> I recognize that the costs of preparation, registration, enforcement and discharge of the caveat are necessary components in order to achieve a statutory charge against the Unit and a priority over the mortgagee. Nevertheless, I find on a plain reading of s 42(b) that such costs are not amounts owing under s 39, nor are they equated to such amounts. Therefore, I find the Master erred in finding that those charges formed part of the caveatable interest. Those charges remain recoverable only *in personam* "from the owner".

[113] Justice Feehan then comments on the priorities available to a condominium corporation for *in personam* claims, including an action in debt. "Additionally, a claim against an owner is caveatable against a unit title, even though it is not a statutory charge nor does it obtain priority over a mortgagee." See ***Bala*** paragraph 83.

[114] Graesser J described it this way in ***Tutt*** at paragraph 55:

> Subject to limitation periods and the provisions of the specific condominium corporation's bylaws, cost obligations may constitute a charge against the owner's interest in the unit and could be separately caveated. That type of charge would not take priority over previously registered encumbrances, and would not be caveatable after a title change.

[115] In ***Bala***, Feehan J concluded the condominium corporation could collect its legal expenses as an *in personam* judgment, but not with *in rem* priority, against the mortgagee. The reasonable expenses incurred by the condominium corporation with respect to the preparation, registration, enforcement and discharge of the caveat against the unit do not constitute a statutory charge or achieve priority as being a "caveatable interest". These charges remain collectible *in personam* against the owner of the unit.

The effect of the condominium bylaws

[116] The condominium corporation in ***Bala*** advanced its position against the BMO as mortgagee based on the provision in its bylaws. The bylaws entitled the corporation to be paid by

the defaulting owner the costs incurred in preparing and registering the caveat, in enforcing or seeking to enforce the corporation's lien and in discharging the caveat, all on a solicitor and his own client full indemnity basis. The bylaw also provided that the corporation shall not be obliged to discharge any caveat until all arrears of the owner, including interest and all such costs, are fully paid.

[117] Master Schulz awarded these costs, in an amount to be assessed for reasonableness on a solicitor and own client full indemnity basis, to be collected as an *in personam* judgment. Feehan J found the Master did not err in her determination with respect to the costs and legal expenses claimed. However, that determination should be interpreted to properly reflect that the condominium corporation's full indemnity costs are not recoverable by it as a contribution, nor do they constitute a statutory charge against the unit, nor attract a statutory priority under the *CPA*, but they are recoverable *in personam* against the unit owner.

[118] Master Schulz found an additional collection remedy is given to the condominium corporation in s 42(b) for "all reasonable expenses incurred by the corporation with respect to the preparation, registration, enforcement and discharge of the caveat" and that these legal expenses, and only these legal expenses, could be collected from the owner as part of the caveatable interest protected by s 39 of the *CPA*. Notwithstanding the wording of the bylaw, Feehan J held on a plain reading of s 42(b) that such costs are not amounts owing under s 39, nor are they equated to such amounts. He found the Master erred in finding those charges formed part of the caveatable interest. Those charges remain recoverable only *in personam* "from the owner".

[119] In the case at hand, the Condominium Corporation advanced its position against the TD Bank as mortgagee based on the provision in section 8.1(c) of its bylaws entitling the Corporation to not only be paid its legal fees on a solicitor and client indemnification basis, but to have those fees charged to the owner as an assessment. Counsel submits that ***Seehra*** supports their position.

[120] I find this position to be without merit on both the facts and the law. Section 8.1(c) falls under the heading "Maintenance" in the bylaws and provides that costs or expenses expended or incurred by the Corporation in correcting, remedying or curing an infraction violation or default, including legal fees on a solicitor and client indemnification basis, shall be charged to the owner as an assessment. The amounts claimed by the Condominium Corporation against the TD Bank are for collecting outstanding monthly contributions and special levies, not for expenses incurred in remedying a default. This section of the bylaws does not apply. The law is set out in ***Bala***.

[121] The Condominium Corporation advances the further position that section 8.4(a) of its bylaws creates a lien and caveatable charge against the interest of the owner for any unpaid assessment, instalment or payment, including interest on arrears, due to the Corporation. Section 8.4(a) falls under the heading "Default in Payment of Assessments and Lien for Unpaid Assessments, Instalments and Payments". It provides that the Corporation shall be entitled to be paid by the defaulting owner all costs incurred, including administration and legal costs on a solicitor and client indemnification basis, in pursuing and collecting upon the arrears; the Corporation shall not be obliged to discharge any caveat until all the arrears of the owner, including interest, administrative, and legal costs on a solicitor and client indemnification basis, are fully paid.

[122] Counsel for the Condominium Corporation submits that bylaw 8.4(a) provides for the registering of a caveat, entitlement to interest at the rate of 18% per annum, and a priority for legal costs on a solicitor and client indemnification basis.

[123] Counsel also points out the March 19, 2015 Order of Justice Graesser in the debt action granted both an *in personam* and *in rem* judgment against the defendants. The exact wording is:

> IT IS FURTHER ORDERED that the Plaintiff [Condominium Corporation] is hereby granted an *in personam* judgment against the Defendants, jointly and severally, in the amount of $64,997.63 and costs on a solicitor and his own client basis, and with the exception of $2,989.66 [the sanction and interest], is a valid and enforceable charge against property legally described as follows: [the condominium unit]

[124] It is not perfectly clear on reading the Order whether the phrase 'and costs on a solicitor and his own client basis' means the costs are included as part of the *in rem* judgment or the costs are in addition to the judgment. Given section 8.4(a) of the bylaw, and the submission of Counsel, I expect the draft of the Order was intended to provide a charge against the property for the outstanding contributions and for solicitor and client costs.

[125] Considering Justice Graesser's recent endorsement of ***Bala*** in ***Tutt***, it is unlikely that his Order granted today would include the award of costs, whether on a solicitor and his own client basis or otherwise, in the same form of judgment as the outstanding contributions. Unlike the contributions and interest component of the judgment, legal costs do not become a charge against the unit under the provisions of s 39 of the *CPA*. All that is recoverable against the unit under s 39 is the amount of any unpaid contributions together with interest at the rate set out in the bylaws. See ***Tutt*** paragraph 50.

[126] If it was intended the costs would also become a valid and enforceable *in rem* charge against the property, a caveat registered to protect that interest would not have the same super-priority given to a caveat registered to protect s 39 contributions.

[127] It is not clear on reading section 8.4(a) that the bylaw was intended to permit the legal costs incurred on a solicitor and client indemnification basis in pursuing and collecting the contribution arrears to also be included in the caveatable charge against the unit. It provides that the caveat shall not be discharged until these costs are paid.

[128] Where condominium bylaws allow for costs to be recovered against a defaulting owner on a solicitor and client full indemnity basis, and also provide such costs constitute a charge against the owner's interest in the unit, there is an agreement charging land which may support a caveat. That caveat would not take priority over previously registered encumbrances or transfer to the new title following a foreclosure. See ***Tutt*** 55 through 59.

[129] As stated by Graesser J, "No priority for costs is recoverable under the *Condominium Property Act* or the caveat contemplated in section 39. However, where claims are stated in the bylaws to be a charge against the owner's unit, those claims are at law caveatable as they constitute an interest in land." Graesser J observes "That may have the unfortunate result of requiring two caveats: one under the *Condominium Property Act* provisions and the other under the bylaws."

[130] I conclude there are several problems with the Condominium Corporation's reliance on bylaw s 8.4(a) and the March 19, 2015 Order to support their priority claim against the TD Bank.

[131] Firstly, s 8.4(a) does not support a charge of interest on arrears for unpaid assessments at the rate of 18% per annum. The bylaws attached to the March 4, 2015 affidavit of Colin MacDonald do not amend the original provision in s 8.3(a) for the assessment of common expenses. The bylaw requires each owner to pay any and all assessments made pursuant to that provision and further to pay interest on all assessments or payments in arrears 'at the rate of fifteen (15) per centum per annum'.

[132] Secondly, the wording of s 8.4(a) does not support an agreement charging land and caveat for the legal costs incurred on a solicitor and client indemnification basis.

[133] Thirdly, to the extent s 8.4(a) purports to remove the obligation of the Corporation to discharge its caveat until all the arrears of the owner, including administrative, and legal costs on a solicitor and client indemnification basis, are fully paid, the bylaw is *ultra vires* s 42 of the *CPA*, as set out in ***Bala*** and ***Tutt***.

[134] Fourthly, the collection of assessment arrears falls under s 39 of the *CPA*. The recovery of costs where the Condominium Corporation takes any steps to collect any amount owing under section 39 is determined by s 42(a) and 42(b). The claim for legal costs on a solicitor and client indemnification basis, in pursuing and collecting upon the arrears and with respect to the caveat must be assessed for reasonableness.

[135] Fifthly, the costs determined by s 42 are recovered by the Condominium Corporation *in personam*, and not with *in rem* priority against the TD Bank. See ***Bala*** and ***Tutt***.

Conclusion on entitlement to priority for legal charges

[136] In determining the priority claimed by the Condominium Corporation for legal charges, I have looked at the legislation and caselaw and the effect of the condominium bylaws.

[137] I have concluded that the Condominium Corporation is not entitled to priority for its legal charges.

[138] The Condominium Corporation may recover from the person against whom the steps were taken, which may include the TD Bank, all reasonable costs, including legal expenses and interest, incurred in collecting the amount owing for its unpaid contributions and special levies.

[139] The Condominium Corporation may recover from the owner, but not the TD Bank, all reasonable prescribed expenses incurred by the Corporation with respect to the preparation, registration, enforcement and discharge of the caveat registered against title to the unit. If the caveat remains after the TD Bank takes ownership, then arguably, the TD Bank would bear the cost of discharge of the caveat.

[140] That leaves two further issues to be determined: the issue of the potential loss of the Condominium Corporation's priority claim for unpaid contributions and interest by participation in the defendants' bankruptcy proceedings, and the issue of the precise amount, if any, payable to the Condominium Corporation in priority to the TD Bank mortgage.

[141] Although the Condominium Corporation is not entitled to claim a priority for its legal charges, it does have a claim for reasonable legal expenses incurred for the steps taken against the TD Bank to collect unpaid contributions. Some of those steps were taken during the course of the defendants' bankruptcy proceedings.

[142] I will comment on the effect that the participation of the Condominium Corporation in the defendants' bankruptcy proceedings had on the outstanding legal charges, including those claimable against the TD Bank.

Has the Condominium Corporation lost its priority by reducing its claim to an unsecured judgment and receiving dividends in the bankruptcy proceedings of the defendants?

The Bankruptcy and Insolvency Act

The Bankrupts

[143] At the time they filed for bankruptcy on January 18, 2016, the defendants, Levi Bachand and Averyl Michaud were in significant arrears with the Condominium Corporation. They had not paid the March 19, 2015 *in personam* judgment against them for $64,997.63, plus interest and costs, and there was an outstanding balance of $20,597.07 in the Ledger of monthly charges and payments. They had fallen behind on their TD mortgage payments.

[144] The Condominium Corporation had filed writs against the jointly owned condominium unit and in the Personal Property Registry. It had issued garnishee summonses against accounts at the TD Bank and against the debtors' employers, resulting in a receipt of $829.77 on June 4, 2015.

[145] The bankruptcy documents are not in evidence but clearly the defendants were facing financial pressure. Section 2 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [*BIA*] defines a bankrupt as a person who has made an assignment or against whom a bankruptcy order has been made; it is the legal status of the person.

[146] A debtor becomes a bankrupt by committing an act of bankruptcy. The most common act of bankruptcy occurs where the debtor has ceased to meet his or her liabilities generally as they become due and makes an assignment of his or her property to a trustee for the general benefit of creditors. See s 42(1)(a) and (j) *BIA*.

[147] The claims provable in bankruptcy include all debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt. See s 121(1) *BIA*.

[148] On discharge from bankruptcy, the bankrupt is released from all claims provable in bankruptcy, with certain exceptions. See s 178(2) *BIA*.

[149] At the time they filed for bankruptcy on January 18, 2016, the defendants, Levi Bachand and Averyl Michaud were indebted to the Condominium Corporation for the *in personam* judgment, which included the special levies and interest and the monetary sanction and interest, and for significant legal charges. The defendants would have been released from these debts on their discharge from bankruptcy in February 2019.

[150] The Condominium Corporation would no longer be able to collect from the bankrupt owners any amounts for the monetary sanction and interest or for the legal charges incurred in pursuing them for payment and with respect to the caveats registered against title. As I have determined above, the Condominium Corporation is not able to claim these amounts against the TD Bank. The prior garnishee funds and the dividends received in the bankruptcy are all the Condominium Corporation is able to recover for the monetary sanctions and interest and these legal charges.

[151] The Condominium Corporation would no longer be able to collect from the bankrupt owners personally for the outstanding contributions, special levies and any interest accrued on these amounts. However, the caveats remained on title. The Condominium Corporation seeks to assert a priority claim and to collect these amounts from the TD Bank.

[152] As determined above, the Condominium Corporation may recover the costs for steps taken against the TD Bank in collecting the amount owing for its unpaid contributions and special levies, pursuant to s 42(a). Insofar as the legal costs were not incurred for steps taken in collecting against the bankrupts or with respect to the caveats, the legal charges recoverable from the TD Bank are unaffected by the bankruptcy.

[153] The issue then is narrowed to whether the Condominium Corporation has lost its s 39 *CPA* super-priority claim for the special levies, contributions and interest against the TD Bank by participating in the bankruptcy proceedings.

[154] The Condominium Corporation participated in the bankruptcy proceedings by filing a Proof of Claim Form 31 in each of the bankrupt's estate. The Proof of Claim identified an unsecured claim comprised of the judgment for $64,997.63, plus interest, costs and condominium arrears since the judgment. Dividends were paid to the Condominium Corporation from the bankruptcy of each of the defendants.

[155] The Condominium Corporation's claim as an unsecured creditor has been released on receipt of the dividends and on the discharge of the bankrupts.

[156] The Proof of Claim form also identified a secured claim of an unknown amount, secured by the caveat registered at the Land Titles Office on November 28, 2014.

[157] Has the Condominium Corporation's claim as a secured creditor also been released on receipt of the dividends and on the discharge of the bankrupts?

[158] To determine if the claim as a secured creditor and the super-priority claim against the TD Bank have been released by the Condominium Corporation's participation in the bankruptcy proceedings, it is necessary to examine the provisions and options for secured creditors set out in the *BIA*.

The Secured Creditors

[159] Section 2 of the *BIA* defines a secured creditor as a person holding a mortgage, charge or lien on or against the property of the debtor as security for a debt due or accruing due to the person from the debtor. The Condominium Corporation and the TD Bank are secured creditors for the purpose of the bankruptcy proceedings.

[160] A creditor, including a secured creditor, may apply to the court for a bankruptcy order and participate in the bankruptcy in the same manner as if they were an unsecured creditor pursuant to s 43 of the *BIA*. There was nothing before me to indicate the Condominium Corporation applied as a secured creditor for a bankruptcy order. The TD Bank did not participate in the bankruptcy at all, nor was it required to.

[161] From the date of bankruptcy on January 18, 2016 and until the bankruptcy trustee was discharged, there was a stay of proceedings for the recovery of a claim provable in bankruptcy provided for in s 69.3(1) *BIA*. Accordingly, there was a stay of enforcement against the bankrupts for the *in personam* judgment, including a stay of execution on the writs and garnishee summonses issued by the Condominium Corporation.

[162] Notwithstanding the stay, the TD Bank was able to commence its action on March 9, 2016 and continue the foreclosure proceedings. Section 69.3(2) provides that the bankruptcy of a debtor does not prevent a secured creditor from realizing or otherwise dealing with its security in the same manner as the secured creditor would have been entitled to realize or deal with it if this section had not been passed.

[163] Rule 4.34(1) of the *Alberta Rules of Court* also provides for a stay of proceedings on bankruptcy, as the assets of the debtor are transferred to the trustee. The action is stayed until an order to continue has been obtained.

[164] The court may lift the bankruptcy stay if it is satisfied the creditor is likely to be materially prejudiced by the continued operation of the stay or on other equitable grounds. See s 69.4 *BIA*.

[165] Typically, the court in foreclosure proceedings is asked to lift the stays pursuant to both s 69.4 *BIA* and r 4.34, and does so. Typically, the trustee in bankruptcy will release its interest in the secured property, subject to any excess equity which may be available for the bankrupt's estate.

[166] The TD Bank served the trustee in bankruptcy with notice of its applications for an Order - Sale to the Plaintiff. The trustee was not represented at the hearing on August 19, 2020. The TD Bank was able to proceed with its foreclosure action, essentially, outside of the bankruptcy proceedings.

[167] It appears the Condominium Corporation did not apply to lift the stay. The Condominium Corporation did not pursue its redemption order granted March 19, 2015 to proceed against the condominium unit but rather asserted its priority claim for payment of unpaid contributions, interest and other charges in TD Bank's foreclosure proceedings. By letter dated February 26, 2016, the Condominium Corporation advised the solicitor for the TD Bank of the amount owing for the judgment and subsequent arrears and sought the TD Bank's intentions with respect to paying the arrears and maintaining ongoing condominium contributions.

[168] This left the secured claim of the Condominium Corporation in limbo while the TD Bank advanced its foreclosure proceedings. However, The Condominium Corporation did not sit idle. It participated in the bankruptcy of each of the defendants by filing a Form 31 and receiving a dividend.

[169] The TD Bank submits that the Condominium Corporation lost its ability to assert its priority claim for payment of unpaid contributions, interest and other charges in the foreclosure proceedings by this participation in the bankruptcy.

The Condominium Corporation's participation in the bankruptcy

[170] To determine if the Condominium Corporation has lost its priority, or remains entitled to claim priority for the outstanding balance secured by its caveat, it is important to review the nature of the priority given by s 39 *CPA* and to understand the options for secured creditors given by sections 127 and 128 *BIA*.

[171] The subsections of s 39.2 *CPA* do not require the corporation to elect to proceed in debt or to proceed by way of caveat, nor do they require one remedy to be exhausted prior to commencing another. The action in debt and the enforcement of security under the caveat may coexist and be pursued independently of the other.

[172] The action in debt taken by the Condominium Corporation against the owners was stayed as a result of the bankruptcy. The bankrupts have been released from liability for the *in personam* judgment and the legal costs charged to them.

[173] The enforcement of security under the caveat may be pursued by the Condominium Corporation independently of the action in debt, according to the provisions of s 39 *CPA*. The bankruptcy does not prevent the Condominium Corporation, as a secured creditor, from realizing or otherwise dealing with its security in the same manner as it would have been entitled to if there was no stay of proceedings, according to the provisions of 69.3(2) *BIA*.

[174] The Condominium Corporation could have enforced the charge secured by the caveat in the same manner as a mortgage but chose not to act on its redemption order. The Condominium Corporation instead relies on the super-priority given to its caveat through the foreclosure proceedings taken by the TD Bank. The stay of proceedings does not prevent the Condominium Corporation from dealing with its security in this manner outside the bankruptcy proceedings.

[175] However, the TD Bank argues the Condominium Corporation has lost the ability to deal with its security outside the bankruptcy proceedings by reducing its claim to an unsecured judgment and receiving dividends in the bankruptcy proceedings of the defendants.

[176] The act of reducing the claim to an unsecured judgment against the defendants does not, in and of itself, prevent the Condominium Corporation from also pursuing its remedies under the caveat according to the *CPA*.

[177] Does advancing that claim as an unsecured judgment through participation in the bankruptcy proceedings by filing a Proof of Claim Form 31 and receiving dividends, prevent the Condominium Corporation from also pursuing its remedies under the caveat against the TD Bank?

[178] To determine if the Condominium Corporation has lost its priority, or if it remains entitled to enforce its security under the caveat against the TD Bank, it is necessary to consider the effect of filing a Proof of Claim Form 31 and receiving a dividend as a secured creditor.

Proof by Secured Creditors

[179] Every creditor is required to prove their claim to be entitled to share in any distribution of the bankrupt's estate. See s 124(1) *BIA*.

[180] Secured creditors have options under the *BIA*. The secured creditor may realize on its security and not prove the claim, as authorized by s 69.3(2). This is what the TD Bank has done.

[181] The secured creditor may realize on its security and prove the balance of the claim due after deducting the net amount realized, as provided for in s 127(1) *BIA*.

[182] The secured creditor may surrender its security to the trustee for the general benefit of creditors and prove the whole claim due, as provided for in s 127(2) *BIA*.

[183] The trustee may serve notice on a secured creditor to file a proof of security giving the details required by s 128(1) *BIA*, including the value at which the creditor assesses the security. If the proof of security is not filed in time, the trustee may, with leave of the court, dispose of the secured property free and clear of the security. The secured creditor is entitled to receive a dividend only of the balance due after deducting the assessed value of the security: s 128(2) *BIA*. The trustee may redeem the security on payment to the secured creditor of the debt or the value of the security as assessed by the secured creditor, pursuant to s 128(3) *BIA*.

[184] There is no evidence the trustee required the Condominium Corporation to file a proof of security. It appears the Condominium Corporation voluntarily submitted a proof of claim pursuant to s 127 *BIA*.

[185] What exactly did the Condominium Corporation submit in the bankruptcy proceedings?

[186] The affidavit of Troy O'Donnell filed September 10, 2020 attaches the Proof of Claim Form 31 [Proof of Claim] filed by the Condominium Corporation on January 22, 2016 in each of the bankrupt's estates. The Condominium Corporation, through its legal counsel, certified "That the debtor was, at the date of bankruptcy, namely the 18th day of January 2016, and still is, indebted to the creditor in the sum of $77,107.85, as specified in the statement of account attached and marked Schedule 'A'".

[187] Schedule A to the Proof of Claim shows the debt to be comprised of the March 19, 2015 judgment amount of $64,997.63 plus interest, the April 10, 2015 Bill of Costs, condominium arrears accumulated since March 19, 2015, further fees and disbursements, and a credit for $829.77 received on June 4, 2015. Supporting documentation was also provided.

[188] Under Section 4(A) of the Proof of Claim, headed "Unsecured claim of $77,107.85", the Condominium Corporation states: "That in respect of this debt, the above-named creditor does not hold any assets of the debtor as security other than indicated in section 4(C) below and regarding the amount of $77,107.85, the above-named creditor does not claim a right to a priority."

[189] Under Section 4(C) of the Proof of Claim, headed "Secured Claim of an Unknown Amount at This Time", the Condominium Corporation states: "That in respect of this debt, the above-named creditor holds assets of the debtor valued at an unknown amount at this time due to the uncertainty as to what monies, if any, might be realized in a foreclosure of the subject condominium unit, particulars of which are as follows: Caveat dated November 21, 2014

registered at the Land Titles Office on November 28, 2014 as instrument number 142 403 322". A copy of the caveat was attached.

[190] Troy O'Donnell deposes that from the bankruptcy of the defendant Levi Bachand, the Condominium Corporation received the amount of $2,770.48 and from the bankruptcy of the defendant Averyl Michaud, $231.34. I assume these amounts were paid by the trustee to the Condominium Corporation as a distribution of "dividends among the unsecured creditors entitled thereto." See: s 148(1) *BIA*.

[191] It is clear from the Proof of Claim Form 31 the Condominium Corporation intended to submit an unsecured claim in the bankruptcy of the defendants. It is not clear from the Proof of Claim whether the Condominium Corporation intended to realize on the caveat and prove the balance of the claim in the bankruptcy, or whether it intended to surrender that security and prove the whole claim due.

[192] The claim submitted as Schedule A to the Proof of Claim is the "whole claim due". It is essentially the same claim submitted by letter dated February 25, 2016 to the TD Bank for payment.

[193] The Condominium Corporation did not realize on its security and prove the balance of the claim in the bankruptcy, as provided for in s 127(1). There is no evidence of an assessment of the value of the security to allow the remaining balance of the claim to be quantified for the purpose of paying a dividend, pursuant to either s 127(1) or s 128 *BIA*.

[194] The TD Bank argues the Condominium Corporation has surrendered its security and proven the whole of its claim in the bankruptcy, pursuant to s 127(2) *BIA*. The Condominium Corporation argues that a proof of claim can be filed both as an unsecured creditor and as a secured creditor.

[195] It seems from the position taken by the Condominium Corporation, it did not expressly intend to surrender its security. However, a secured creditor may, by its conduct, make an implied surrender of security to the trustee. Counsel for the TD Bank submits that by proving its claim as an unsecured creditor and receiving dividends, the condominium Corporation has impliedly abandoned it security.

Implied surrender of security

[196] There are no provisions in the *BIA* for deemed or implied surrender of a secured creditor's security. Judicial interpretation of the operation of the s 127 and s 128 of the *BIA* is helpful in the analysis of the circumstances under which an implied surrender of security may be found.

[197] Counsel both refer to ***Cutting Edge Foods Inc (Re)*****,** 2008 ABQB 340 [***Cutting Edge***]. Justice Topolniski considered sections 127 and 128 *BIA* in determining whether or not the Superintendent's levy was payable on dividends received by a secured creditor.

[198] Counsel for the Condominium Corporation submits that Topolniski J acknowledged, at paragraph 142 of ***Cutting Edge***, a proof of claim could be filed for both as an unsecured and a secured creditor. The paragraph does say the secured creditors 'had filed proofs of claim as both secured and unsecured creditors in a proposal' but it but does not say what effect that might have

had on the decision in the case, or otherwise. That paragraph does not support the Condominium Corporation's position.

[199] Justice Topolniski observes at paragraph 103: "when secured creditors want a dividend from the estate, they must become involved in the bankruptcy and with the trustee by complying with ss 127 to 132."

[200] Referring to s 127 *BIA,* at paragraph 37, Topolniski J states: "Secured creditors may choose to participate in a bankruptcy by surrendering their security or proving the balance due them after realizing their security."

[201] At paragraph 97, Topolniski J talks about the filing of a Proof of Claim Form 31 as follows:

> Section 128 refers to "proof of security," not "proof of claim." A "proof of claim" is what a secured creditor delivers to the trustee under s. 127 where the secured creditor seeks to claim for any deficiency after realizing on the security or surrenders the security to the trustee for the general benefit of the creditors. The form prescribed by the Superintendent for both types of proof is the same - Form 31, entitled "Proof of Claim." Directive 10 uses the language of Form 31 rather than that of s. 128. The interchangeable use of the terms "proof of claim" and "proof of security," coupled with the dual use of Form 31, adds an unnecessary element of confusion to the mix.

[202] There is nothing in the material to suggest the trustee in bankruptcy requested a proof of security from the Condominium Corporation pursuant to s 128 of the *BIA*. Section 128(1) and not s 127 is listed under the title to the completed Proof of Claim Form 31. However, this same form is apparently used for both proof of security and proof of claim.

[203] Has the Condominium Corporation surrendered its security to the trustee, as contemplated by s 127(2) *BIA*, by its conduct in completing the Proof of Claim as both an unsecured and a secured creditor, advancing the whole claim due, and receiving dividends in the bankruptcy?

[204] The topic of implied surrender is discussed in Houlden & Morawetz, *Annotated Bankruptcy and Insolvency Act,* (4^{th}) at page 5-136:

> A secured creditor may by its conduct make an implied surrender of security to the trustee. The cases on this issue have not been entirely consistent. Some cases have held that acts such as filing a claim as an unsecured creditor, failing to value security, voting as an unsecured creditor, acting as an inspector, or receiving a dividend as an unsecured creditor may constitute an implied surrender…
>
> In ***Andrew v. FarmStart*** (1988), 71 C.B.R. (N.S.) 124, [1989] 2 W.W.R. 127, 54 D.L.R. (4^{th}) 406, 71 Sask. R. 146 (C.A.); leave to appeal to S.C.C. refused 73 C.B.R. (N.S.) xxvii (note), [1989] 4 W.W.R. 1xx (note), 57 D.L.R. (4^{th}) viii (note), 102 N.R. 158 (note) (S.C.C.), the Saskatchewan Court of Appeal summed up (correctly, it is submitted) the law on surrender by course of conduct as follows: Whether a secured creditor has made an election to surrender its security by course of conduct is a question of fact. To constitute a surrender, the actions must be irrevocable, unequivocal and unconditional. A proof of claim itself, without reference to a security or without valuation of it, is not *per se*, such a

> surrender, because it does not meet the criteria for surrender, although it is evidence which tends to show that the creditor has elected to surrender. When a court is called upon to decide whether or not there has been a surrender by course of conduct, it must consider all the relevant facts and circumstances, of particular importance will be whether the secured creditor acted deliberately or as a result of error and whether the action of the secured creditor misled or caused prejudice to the trustee or other creditors. The acceptance of a dividend as an unsecured creditor may indicate surrender, since it may prejudice other creditors; on the other hand, it may simply indicate a claim in excess of the value of the security. The question is: Does the conduct of the secured creditor show that the creditor has elected to share in the bankruptcy for its full claim and is abandoning his or her security to the trustee for the benefit of the creditors?

[205] In ***Zemlak (Bankruptcy of) (Re)***, 2003 ABQB 622, the trustee argued the actions of the secured creditor Jirah, the holder of a builders' lien, amounted to surrender of security. Registrar Laycock found they did not. He quoted the passage, as it then was, from Houlden & Morawetz and concluded at paragraph 9:

> The conduct of the secured creditor does not show an unequivocal surrender of security. The secured creditor has not taken a dividend from the bankruptcy nor has it ever filed as an unsecured creditor. The fact that the lien claimant has not taken steps to advance the lien claim is not evidence of a deliberate surrender of security. It is therefore my conclusion that the lien claimant neither expressly or by implication surrendered its security.

[206] The case is distinguished on its facts as the Condominium Corporation did file as an unsecured creditor and take a dividend from the bankruptcy of the defendants. Although the Condominium Corporation has not taken steps to advance its redemption order, it has advanced its secured claim in the TD Bank foreclosure proceedings.

[207] The Court in ***Bank of Montreal v King***, 2003 ABQB 491, considered s 127(2) *BIA* and found the Bank did not surrender its security by submitting a proof of claim as an unsecured creditor where the proof of claim did not say that and it could not be implied. The employee submitting the proof of claim was not aware the Bank was a secured creditor. On discovering this error, an amended proof of claim was submitted, which the trustee declined to act on. At paragraph 27, Master Funduk concluded: "Before a creditor can make a conscious decision to surrender its security it must know that it has security."

[208] The case is distinguished on its facts as the Condominium Corporation was well aware of its security in submitting a proof of claim as an unsecured creditor. The case is similar as the proof of claim did not say the Condominium Corporation was surrendering its security, nor can that be implied.

[209] The Court in ***Hollingshead (Re) (Trustee of),*** 1999 ABQB 355, considered s 127(2) *BIA* and found the Bank did not surrender it security by initially submitting a proof of claim as a secured creditor and then later amending it to unsecured after the trustee determined the security invalid. Master Laycock quoted from the *1999 Annotated Bankruptcy and Solvency Act* by Houlden and Morwitz and at paragraph 9, concluded there was no "irrevocable, unconditional and unequivocal act of surrender." There were not sufficient facts for the Court to conclude that the Bank knew anything about "the concept of surrender and the benefits that may flow to the

creditors as a result of making a surrender". The Court found: "The mere fact of refiling as an unsecured creditor is not a surrender."

[210] Similarly, there are not sufficient facts before this Court to conclude the Condominium Corporation considered the concept of surrender and the benefits which may flow to the creditors as a result of making a surrender.

[211] The Court in ***Morrison v Toronto Dominion Bank***, 1980 CanLII 1149 (AB QB), examined the reasons for holding in certain instances a secured creditor who proves in bankruptcy thereby abandons its security. At paragraphs 15 and 16, Justice MacDonald stated:

> The purpose of the rule was explained in *Re Hoare; Ex parte Ashworth* (1874), LR. 18 Eq. 705 at 711, thus:
>
> > "Now what is the meaning of the provisions that creditors holding security shall not prove without either producing their securities and having them valued, or giving them up, or forfeiting them? It means that the estate which is to be administered among the creditors shall not be diminished by some one creditor, who holds security, taking part of that estate and coming to take his dividend out of what then remains."
>
> From the above and other cases it seems clear that the purpose of the rule was to prevent the secured creditor from, at the same time, benefitting by holding his security and taking advantage of sharing in the bankruptcy except to the extent of a deficiency which had been determined or at least disclosed. Where it was clear that the creditor had elected to prove in bankruptcy for the whole debt, he was held to have abandoned his security.

[212] At paragraph 20, MacDonald J restated the law: "In brief, it is my opinion that the secured creditor loses his security when his conduct or his omission indicates that he has elected to share in the bankruptcy for his full claim and is therefore taken to have abandoned his security." He concluded, in the circumstances, no case had been made out for holding the bank had abandoned its security. The bank had disclosed its full position, was unable to put a reasonably accurate value on its security and did not take any dividend from the trustee.

[213] The case is similar as the Condominium Corporation disclosed its full position and was not able to accurately value it security. The case is distinguished on its facts as the Condominium Corporation did take dividends from the trustee.

[214] The Court in ***Re Pelyea and Canada Packers Employees Credit Union Ltd***, 1969 CanLII 378 (ON CA), found that a secured creditor was not precluded from enforcing its security merely by filing a claim in the bankruptcy and opposing the bankrupt's unconditional discharge where the creditor was never required to value it security and received no dividend from the bankrupt's estate.

[215] The Condominium Corporation was not required to value its security based on the information before the Court but it did receive dividends from the bankrupt's estates.

[216] Several of these cases identify the taking of a dividend in the bankruptcy by the secured creditor as a factor in determining whether there has been an implied surrender of security. A dividend was not in fact taken by the secured creditor in the above-noted cases, except in the case of ***FarmStart***. A closer look at that decision is warranted.

[217] The Saskatchewan Court of Appeal in ***Andrew v FarmStart*** 1988 CanLII 217 (SK CA) framed the issue on appeal as “whether, in a bankruptcy, a secured creditor will be deemed to have surrendered his security if he files a claim as a preferred creditor for the entire debt without valuing the security and accepts a dividend.” This is the same issue faced by the Condominium Corporation here.

[218] The bankrupt, Mr. Andrew, was the owner of a parcel of land which was subject to three mortgages. It was common ground that at all times, there was no value to the third mortgage in favour of FarmStart because the amount owing on the first and second mortgages exceeded the value of the land. FarmStart filed a proof of claim with the trustee in bankruptcy claiming preference as a Crown Corporation and received a dividend.

[219] During the administration of bankrupt’s estate, the trustee released its interest in the parcel of land. Subsequent to the bankrupt’s discharge, the first and second mortgagees were paid out and discharged their mortgages. The land was sold and the proceeds held in trust pending the application by the bankrupt to remove the FarmStart mortgage from title.

[220] The Court of Appeal reviewed the findings of the Chambers judge and the law on implied surrender and dismissed the appeal, concluding:

> In this case, the secured creditor did disclose his security. The Chambers judge found, as a matter of fact, that the secured creditor acted as it did because everyone concerned knew the value of the security at that time to be zero. The judge in effect found that the appellant had disclosed its security, valued it at zero, and was therefore entitled to claim for the full amount due to it as an unsecured creditor and entitled to take a dividend as an unsecured creditor. The controlling factors are that the secured creditor did not misrepresent the situation to anybody, and that the mortgage was disclosed both in the particulars of the appellant's claim and in the bankrupt's own statement of affairs. Since it was disclosed, and since there was no demand for valuation, there was no prejudice to other creditors or the bankrupt by the respondent in filing as an unsecured creditor and in taking a dividend. There was no irrevocable, unconditional and unequivocal act of surrender. Thus, on the facts as found by the Chambers judge, which are supported by the evidence, he was entitled to find no surrender of the security.

[221] The Condominium Corporation fully disclosed in the Proof of Claim the existence and nature of its security held by the caveat. Since the security was disclosed, and since there is no evidence of a demand for valuation by the trustee to proceed under s 128 *BIA* or evidence to the contrary, I conclude there was no prejudice to other creditors or the bankrupts by the Condominium Corporation filing as an unsecured creditor and taking the dividends.

[222] Where the actions of the Condominium Corporation do not mislead or cause prejudice to the trustee or other creditors, the acceptance of a dividend does not indicate surrender. The actions of the Condominium Corporation in these circumstances do not amount to an unequivocal, unconditional and irrevocable surrender of its security.

[223] The acceptance of a dividend as an unsecured creditor may, on the other hand, indicate a claim in excess of the value of the security. The question posed by Houlden & Morawetz is: Does the conduct of the secured creditor show that the creditor has elected to share in the bankruptcy for its full claim and is abandoning the security to the trustee for the benefit of the creditors?

[224] The Condominium Corporation filed its proof of claim form on January 22, 2016 identifying that it held assets of the debtor, secured by a caveat, valued at an unknown amount due to the uncertainty of what monies might be realized in a foreclosure of the condominium unit.

[225] Whether the Condominium Corporation was referring to the uncertainty of what monies might be realized in the "foreclosure" of the condominium unit through its own redemption order or the TD Bank foreclosure proceedings, the acceptance of the dividends could reasonably indicate a claim in excess of the value of the security.

[226] The March 19, 2015 redemption order provided for a list price of $235,000 with a TD mortgage secured as a first charge registered on title in the amount of $233,222. In April 2016, the information in the foreclosure proceedings indicated the TD Bank was owed approximately $213,000 against a fair market value of $220,000. The debt claimed by the Condominium Corporation in the bankruptcy was $77,108, a claim in excess of the value of the security on these figures.

[227] The TD foreclosure action was commenced after the bankruptcy proceedings. The Condominium Corporation asserted its full claim against the TD Bank by letter dated February 25, 2016, approximately a month after filing its proof of claim in the bankruptcy.

[228] I have determined the super-priority afforded by caveat under the *CPA* is limited to payment of outstanding contributions and interest. The Condominium Corporation is not entitled to claim priority for the monetary sanction and interest or for the legal charges incurred collecting from the owners; these cannot be collected from the TD Bank by operation of the *CPA* and can no longer be collected from the discharged bankrupts. The claim is in excess of the value of the security.

[229] It is more likely than not the Condominium Corporation intended to realize on its security and prove the balance of the claim due after deducting the amount realized, as provided for in s 127(1) *BIA*.

[230] Considering the relevant facts and circumstances, the acceptance of the dividends as an unsecured creditor indicates a claim in excess of the value of the security. The conduct of the Condominium Corporation does not show that it had elected to share in the bankruptcy for its full claim and had abandoned the security to the trustee for the benefit of the creditors. The Condominium Corporation has not expressly or impliedly surrendered its security.

[231] The Condominium Corporation has not lost its priority by reducing its claim to an unsecured judgment and receiving dividends in the bankruptcy proceedings of the defendants. The Condominium Corporation may realize on its security notwithstanding the discharge of the bankrupts. See ***FarmStart***.

[232] With the bankrupts' condominium unit in foreclosure proceedings, the Condominium Corporation must realize on its security by relying on the super-priority afforded by the caveat over the TD Bank mortgage.

[233] I have described the nature of the priority claimed by the Condominium Corporation, determined it is not entitled to priority for legal charges, and concluded the priority afforded by the caveat was not surrendered in the bankruptcy proceedings. The final issue to be addressed is the amount payable to the Condominium Corporation by the TD Bank.

What is the precise amount, if any, payable to the Condominium Corporation in priority to the TD Bank mortgage?

[234] I am not able to calculate the precise amount payable to the Condominium Corporation by the TD Bank to satisfy the priority claim. The affidavit and other evidence are set out below. The Condominium Corporation will need to review its records to make an accurate calculation of the unpaid special levies, monthly contributions and interest. Additionally, the claim for legal charges payable by the TD Bank pursuant to s 42 *CPA* will need to be quantified.

[235] I will recap my ruling on what is payable in priority to the TD mortgage and summarize the evidence and other information made available. In doing so I will identify the areas for clarification.

[236] I have found the caveat registered on title November 28, 2014 creates a charge against the condominium unit for the special assessments levied in 2012, originally in the amount of $40,000.10, plus accrued interest, and for the other unpaid contributions levied against the owners pursuant to s 39 of the *CPA*, plus interest accruing on those contributions. Once the precise amount is quantified, the TD Bank will pay the Condominium Corporation and the caveat will be withdrawn.

[237] I ruled this matter would be decided as if heard on August 19, 2020, with interest capped as of that date.

Special assessments and interest

[238] The special assessments in the amount of $40,000.10 plus interest to August 19, 2020 are to be paid in priority to the TD mortgage. Once the rate of interest is confirmed, the precise amount payable for these special assessments and accrued interest may be calculated.

Outstanding contributions and interest

[239] The outstanding contributions and interest, excluding the special assessments levied in 2012, will need to be quantified. Counsel for the Condominium Corporation has referred to these as "future arrears". There have been various methods to calculate those through the affidavits of Troy O'Donnell, letters from Counsel, the property management Ledger and spreadsheets.

[240] The Condominium Corporation advised the TD Bank by letter dated February 25, 2016 that the defendants owed condominium fees and penalties of $82,660.19, enclosing the March 19, 2015 Order and judgment, the two taxed Bills of Costs and the Verification Statement dated February 18, 2016 and a calculation of future arrears. Legal charges were identified in the amount of $25,930.29 at that time.

[241] Troy O'Donnell deposed in an affidavit filed July 7, 2017 that no payments had been received on the judgment nor had any monthly contributions been made thereafter. In that affidavit, Troy O'Donnell calculates future arrears at $21,395.54 as the balance in the ledger of monthly condominium fees and monthly special assessments and other charges accumulated since the March 19, 2015 judgment, less the legal charges.

[242] The further affidavit of Troy O'Donnell, filed July 24, 2017, indicates the last monthly contribution was paid in the month of January 2016 and calculates the monthly contribution arrears from February 1, 2016 to be $12,122.89, inclusive of interest to July 18, 2017. This affidavit does not address the monthly special assessments which are also accumulating in the Ledger. These are described as "SA loan Pymt - Due to Reserve" in the amount of $312.38 each month.

[243] The affidavit of Troy O'Donnell filed August 14, 2020 provides evidence of a total amount of $96,561.47 owing for contributions and special levies, sanctions, charge-backs and legal charges. This is shown in the Ledger attached as Exhibit A to the affidavit. Troy O'Donnell states this total consists of $58,499.62 for contributions and special levies, $2,200.00 for sanctions and $1,365.26 for chargebacks. Legal charges are $34,496.59.

[244] Counsel for the Condominium Corporation has acknowledged the $2,200.00 for sanctions and $1,365.26 for chargebacks are not collectible from the TD Bank.

[245] Attached as Exhibit B to the August 14, 2020 affidavit is a spreadsheet entitled "Calculation of Condominium Fee and Special Assessment Arrears". The monthly condominium fees and monthly special assessments are $60,177.65 before interest. The interest has not been totalled on a cumulative basis. There is no specific mention of the *in personam* judgment. Legal charges are $34,496.59.

[246] The spreadsheet reflects payments made, presumably by the TD Bank, in the amount of $633.33 per month for the months of September 2019 through August 2020.

[247] The "Monthly Special Assessment Charge" identified on the spreadsheet and in the Ledger as "SA loan Pymt - Due to Reserve" in the amount of $312.38 per month has not been paid. There is no explanation of what this charge is for. That will need to be clarified.

[248] With respect to the interest payable, more evidence may be needed. As noted above, Condominium bylaw s 8.4(a) does not support a charge of interest on arrears for unpaid assessments at the rate of 18% per annum. The original provision for the assessment of common expenses is set out in bylaw s 8.3(a) and requires each owner to pay any and all assessments made pursuant to that provision and further to pay interest on all assessments or payments in arrears 'at the rate of fifteen (15) per centum per annum'. The bylaws attached to the March 4, 2015 affidavit of Colin MacDonald do not amend these bylaws.

[249] Once the rate of interest is confirmed and the "future arrears" or monthly contributions and monthly special assessments are determined, the precise amount payable for outstanding contributions and accrued interest may be calculated.

Legal expenses and interest

[250] The Condominium Corporation has a statutory entitlement to recover all reasonable costs, including legal expenses and interest, incurred in collecting outstanding contributions and special levies from the person against whom the collection steps were taken, pursuant to s 42(a) *CPA*.

[251] The condominium owners were released from liability for any legal charges incurred by the Condominium Corporation in collecting against them on their discharge from bankruptcy. The Condominium Corporation has no recourse to the TD Bank to collect those amounts.

[252] The Condominium Corporation may recover reasonable legal charges incurred for the steps taken against the TD Bank in collecting the outstanding contributions and special levies prior to and in the foreclosure proceedings.

[253] Once the TD Bank obtains title to the condominium unit through the Sale to Plaintiff Order, it will be the owner. The Condominium Corporation has a further statutory entitlement to recover reasonable prescribed expenses incurred with respect to the caveat from the owner, pursuant to s 42(b) *CPA*. Accordingly, the Condominium Corporation would be entitled to recover the reasonable expenses incurred with respect to the discharge of the caveats from the TD Bank.

[254] These legal charges for collecting contributions and expenses for discharge of the caveat may be claimed against the TD Bank *in personam* only and not in priority to the mortgage or as a condition of discharging the caveat.

[255] The claim by the Condominium Corporation for legal costs on a solicitor and client indemnification basis, in pursuing and collecting upon the arrears and with respect to the caveat, must be assessed for reasonableness and may be taxed.

[256] The evidence put forward by the Condominium Corporation through the affidavit of Troy O'Donnell filed August 14, 2020 is that their legal charges are $34,496.59. The largest portion of those charges were incurred in collecting from the defendants and included expenses incurred with respect to registering and enforcing the caveat against the condominium owners. That portion is no longer recoverable because of the bankruptcy of the defendants.

[257] The legal charges identified by the Condominium Corporation at the time of bankruptcy were $25,930.29, as shown on the Ledger and set out in the February 26, 2016 letter to the TD Bank. I expect the portion of these legal charges that relate to collection from the TD Bank are minimal, if any.

[258] A further invoice for $6,064.38 was billed to the Condominium Corporation March 31, 2018 and an invoice for $1,672.15 was billed on May 9, 2019. The responsibility of the TD Bank for these legal charges will need to be confirmed.

[259] There was a Bill of Costs taxed on a solicitor and own client basis in the amount of $5,630.99 on April 10, 2015, following the March 19, 2015 Order which was included in the unsecured claim advanced by the Condominium Corporation in the bankruptcies. There was a second Bill of Costs taxed on a solicitor and own client basis in the amount of $5,612.25 on

February 16, 2016. The two Bill of Costs were included in the in the Verification Statement filed in the Personal Property Registry on February 18, 2016 for combined taxed costs of $11,243.24.

[260] These documents were provided to the TD Bank by the Condominium Corporation with the February 25, 2016 letter. Whether these costs are part of, or it or in addition to, the legal charges identified in the letter in the amount of $25,930.29 is immaterial. The two Bill of Costs were claimed against the defendants and extinguished on their discharge from bankruptcy. The Condominium Corporation is no longer able to collect these costs.

[261] Once the rate of interest is confirmed and the portion of legal charges attributable to the TD Bank is determined, the precise amount payable for legal expenses and interest may be calculated.

[262] In summary, the precise amount payable to the Condominium Corporation in priority to the TD Bank mortgage will be the total of amount payable for the special assessments and accrued interest and the amount payable for outstanding contributions and accrued interest.

[263] In addition, the TD Bank will be responsible for their portion of the legal charges for collecting contributions and interest and for the expense to discharge the caveats. These costs may be claimed against the TD Bank *in personam* only and not in priority to the mortgage or as a condition of discharging the caveat.

[264] The claim by the Condominium Corporation for legal costs on a solicitor and client indemnification basis, in pursuing and collecting the arrears and with respect to the caveat, must be assessed for reasonableness and may be taxed.

[265] The Condominium Corporation may retain the $829.77 received on June 4, 2015 through its garnishee efforts and the dividends of $2,770.48 and $231.34 from the bankruptcy of the defendants as contributions towards the monetary sanctions and interest and the legal charges incurred registering the caveats and pursuing collection from the owners. The balance will remain unpaid.

Conclusion

[266] The issues raised in this application for an Order for Sale to Plaintiff as between the TD Bank and the Condominium Corporation have been determined.

[267] The nature of the priority claimed by the Condominium Corporation is described in the analysis of s 39 of the CPA.

[268] The Condominium Corporation is not entitled to priority for its legal charges as concluded from the analysis of s 42 CPA, following the decision in ***Bala***.

[269] The Condominium Corporation has not lost its priority by reducing its claim to an unsecured judgment and receiving dividends in the bankruptcy proceedings of the defendants, as concluded from the analysis of s 127 *BIA* and applying the test for implied surrender in the ***FarmStart*** decision.

[270] The precise amount payable to the Condominium Corporation in priority to the TD Bank mortgage is yet to be determined. The amount payable for the special levies and contributions and interest are to be calculated and are payable to the Condominium Corporation in priority to

the TD mortgage. The reasonable legal charges and interest and expenses attributable to the TD Bank for collection of contributions and the discharge of the caveats are to be assessed or taxed.

[271] Costs of this application may be addressed through brief written submissions if counsel are unable to agree.

[272] The submissions and arguments of Counsel were appreciated in resolving this "morning special".

Heard on the 19th day of August, 2020.
Written Submissions received on the 8th day of October, 2020
Dated at the City of Edmonton, Alberta this 9th day of April, 2021.

L.R. Birkett, Q. C.
M.C.Q.B.A.

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