

## Not all condo fees are created equally

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Condominium fees are often comprised of more than just the regular monthly assessments or special assessments. Where there has been a default by the owner in payment, condominium corporations will usually charge the owner fees for NSF charges, writing a demand letter, as well as for the legal and other costs for taking collection steps or registering a caveat against the condominium title. Typically lenders presumed that the condominium corporation has priority over their registered mortgage for these expenses due to the provisions of the *Condominium Property Act*.<sup>1</sup> If the owner was not paying, lenders would often simply make payment of the amount requested by the condominium corporation and add the amount as a claimable expense under the registered mortgage. A recent decision issued from the Court of Queen's Bench has made it clear that not all fees or charges rendered by a condominium corporation will be secured against the title to the condominium nor will they take priority over a registered mortgage.

In *Condominium Plan No. 0210034 v. King*,<sup>2</sup> Master Prowse examined five cases in which the condominium corporation levied charges for items such as collection expenses, unpaid parking fees, and NSF fees, in addition to the regular monthly and special assessments and interest on those overdue assessments. Generally, there is nothing prohibiting a condominium

corporation from enacting bylaws that allow for it to charge these types of expenses and to have those expenses assessed against a particular defaulting owner or the owner's unit. After all, the condominium corporation is there to administer the common property and part of this administration is taking steps to collect on those unpaid expenses. However, whether those expenses have priority over a registered mortgage or whether the condominium corporation is even entitled to a security interest against the condominium unit is a whole other issue.

The *Condominium Property Act* clearly creates a statutory charge in favour of the condominium corporation for unpaid "assessments".<sup>3</sup> It also creates a statutory charge for interest on overdue "assessments", which has a priority over other registrations on title.<sup>4</sup> The key is to determine whether those other charges are included in the definition of an "assessment" or deemed to be an "assessment" under the condominium bylaws.

By way of example, below is a portion of two very similar bylaws that were considered by Master Prowse:

*Example 1:* "Any infraction or violation of or default under these By-laws on the part of an owner, his servants, agents, licensees, invitees or tenants that has not been corrected, remedied or cured within ten (10) days of having received written notification from the Corporation to do so, may be corrected, remedied or cured by the Corporation and any costs or expenses incurred or expended by the Corporation including costs as between a solicitor and his own client, in correcting, remedying or

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<sup>1</sup> R.S.A. 2000, c. 22.

<sup>2</sup> 2012 ABQB 127 (Alta. Master).

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<sup>3</sup> Supra note 1 at s. 39(8).

<sup>4</sup> Supra note 1 at s. 41.

curing such infraction, violation or default shall be charged to such owner and shall be added to and become part of the assessment of such owner for the month next following the date when such costs or expenses are expended or incurred (but not necessarily paid) by the Corporation and shall become due and payable on the date of payment of such monthly assessment and shall bear interest both before and after judgment at the Interest Rate until paid.”

*Example 2:* “The Corporation shall and does have a lien and charge upon and against the estate or interest of the Owner for any unpaid assessment, installment or payment (including interest on arrears) due to the Corporation in respect to his Unit, which lien shall be a first paramount lien against such estate or interest, subject only to the rights of any municipal or local authority in respect of unpaid realty taxes, assessments or levies of any kind against the Unit title or interest of such Owner, but subject also to the provisions of the Act and the *Land Titles Act* of Alberta...The lien or charge shall be deemed to be an equitable mortgage, payable on demand, and can be enforced either as a debt, or in the same manner as a legal mortgage registered against the Unit. The Corporation shall be entitled to be paid by the defaulting Owner the costs (including without limitation legal costs on a solicitor and his own client basis) incurred in preparing and registering the caveat and realizing upon and enforcing the charge caveated, recovering the arrears and in discharging the caveat; and shall not be obliged to discharge any caveat until all arrears of the Owner (including interest and all such costs) are fully paid.”

With respect to the first example, Master Prowse found that the collection

costs were included as an “assessment” and therefore took priority over the registered mortgage. In the second example, Master Prowse came to the opposite conclusion. The distinguishing factor is what we lawyers like to call “magic words”, namely “shall be added to and become part of the assessment of such owner”.

Expenses that don’t have the magic words attached to them in the bylaws, may still be subject to a contractual security interest agreed to in the bylaws. This security interest would entitle the condominium corporation to register a caveat against the condominium unit for those charges, but the condominium corporation would rank below any prior registrations against the title. Absent this security interest, the condominium corporation may still charge the expenses, but it will only be collectable against the owner as an unsecured debt.

The moral of the story is that in instances where the condominium corporation is claiming a charge for anything other than a regular monthly assessment, a special assessment, or interest, the bylaws should be carefully reviewed by lenders to ensure that they are not overpaying the condominium corporation. We suspect, however, that many condominium corporations will be reviewing their bylaws and amending them so that these other charges are included as an “assessment” and their super priority maintained.

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