

PUBLICATION

Legal Fees in a Condominium Foreclosure

Stephanie D. Whyte
David S. Cumming

April 15, 2020

Why should owners who pay their monthly condo fees have to contribute towards the cost of legal fees to pursue owners who don't?

Of course Condominium Corporations want to collect all expenses, including legal fees incurred when dealing with owners who fall into arrears. Ideally, Corporations want to pass the legal fees onto the delinquent owner in the same way as condo fees. But a recent case in Alberta has cast doubt on the ability of Condominium Corporations to do just that.

Though this court decision raises some questions, it is important to note that the matter of cost recovery is not decided. The case *Tutt v The Owners: Condominium Plan No. 7822572*, 2020 ABQB 213, a decision out of Edmonton, involved a longstanding feud between the Board and an owner. The history between them involved a restraining order and defamation claim. The particular issue in this case was the owner's late payment of condo fees. In rather odd circumstances, the owner paid his condo fees, though late, and the Board didn't know the fees were paid before they commenced a lawsuit to collect. The court ruled that because no fees were outstanding when the lawsuit was filed the Corporation was not entitled to recover any of its legal fees.

Though not at-issue, the court commented on whether legal fees can be enforced against a unit in the same way condo fees can. The court addressed whether a caveat for legal fees holds the same "super-priority" as condo fees. Unlike most caveats, a caveat for condo fees survives the sale of the property. This means that the fees must be paid by the lender.

The court concluded that the legal fees do not have the same priority as condo fees. In coming to the decision, the court looked at the *Condominium Property Act* which states that a Corporation can assess a contribution to fund its operating account and reserve fund but does not specifically address legal or other fees. The court concluded that this prevents a Corporation from treating legal fees like condo fees.

The court took the position that a lender should not have to take a backseat to money spent on litigation, especially when the actual fight is about more than common expense collection. However, there is a compelling argument that the owners can agree, through the bylaws, that legal costs can be charged to the unit as a contribution. Why should the other owners pay extra because one owner doesn't pay?

The court decided that if the bylaws allow then the Corporation can file a separate caveat for legal fees, but this caveat is not entitled to “super-priority”. The consequence? If the mortgage is underwater the Corporation won’t be able to recover legal fees through sale of the property.

The courts in Edmonton and Calgary have a history of treating cost recovery differently. There are also other decisions that run contrary to this case. Master Prowse in *Condominium Plan No. 8210034 v. King* provided a very thorough and complex analysis on the circumstances of when and how a Condominium Corporation can recover its legal fees. Justice Lee in *Condominium Plan No 0526233 v Seehra* and Justice Dario in *Bank of Montreal v. Rajakaruna* both adopted and endorsed the analysis provided by Master Prowse in King.

The law remains somewhat unsettled on this point but in the meantime, there are a few practical lessons to take away from this case. One is the importance of good bylaws as, if the bylaws don’t permit it, the Corporation won’t be able to caveat for legal fees at all. The second is that Corporations should also move with reasonable haste to collect unpaid fees, and make sure the accounting is up to date before they do. If foreclosure is necessary, Corporations need to be very careful with how they navigate their way through the legal process to give them the best chance at recovering their expenses.

If you have questions about your condominium property, we can help. Call one of our lawyers in our [Condominium Law group](#) — we're here to assist you.